estrays, and the like may be granted out in the form of franchises in certain cases,"

and with reference to the grants of franchise the law is thus stated at p. 580 para 740:

"Certain franchises, whilst they remain in the hands of the Crown form part of the royal prerogative and do not exist as franchises until they have been granted out as such to the subject. Such are royal mines, waifs, wrecks, estrays, treasure troves, fines and forfeitures, royal fish and swans. These may be validly granted as franchises, notwithstanding the general rule which prevents the Crown from parting with its prerogatives;"

and again

"Other franchises again, may be granted not out of but by virtue of the prerogative; but until so granted they have no legal existence. Instances are markets and fairs, ferries, free fisheries, free chases, parks and warrens, pontage and murage, corporations, counties, palatine, counties, corporate and the cinque ports."

Blackstone defines "Franchise" as "royal privilege or branch of the King's prerogative subsisting in the hands of a subject". (Blackstone 2 com. p. 37). The conception of a franchise is, therefore, bound up with that of the prerogatives of the Crown of England as recognised by the common law and by its very nature it can have no place either in Republican America or in India. But as a survival of the pre-independent days when the Crown of England nad granted franchises in the American colonies the word "franchise" continued to live on in the legal world in America but with an altered complexion. In the — 'Charles River Bridge v. The Warren Bridge Et. Al', (1837) 9 Law Ed 773, the facts were that there was a legislative grant of the right to construct a bridge and collect tolls. Subsequently under a later legislation similar rights were conferred on a new company and the question arose whether this legislation was valid. The court held that the grant of exclusive rights to the first company was in the nature of a franchise and adopting rules of construction applicable to franchises, it held that the second legislation was valid.

Storey J. dissented from this view and observed as follows:

"An attempt has, however, been made to put the case of legislative grants upon the same footing as royal grants, as to their construction, upon some supposed analogy between royal grants and legislative grants. Under our Republican forms of Government such a claim in favour of Republican prerogative is new and no authority has been cited which supports it. Our legislatures neither have nor affect to have any royal prerogatives", & again "the policy of the common law, which gave the Crown so many exclusive privileges and extraordinary claims, different from those of the subject, was founded in a good measure if not altogether upon the divine right of Kings, or at least upon a sense of their exalted dignity and pre-eminence over all subjects and upon the notion that they are entitled to peculiar favour for the protection of their kingly rights and office. Parliamentary grants never enjoyed any such privileges."

But the view of the majority that monopoly rights conferred by statutes might be treated as in the nature of franchises came to be adopted as part of the American jurisprudence.

Thus in — 'New Orleans Gas Light Co. v. Louisiana Light and Heat Producing and Mfg. Co.', (1885) 29 Law Ed 516, it was observed as follows:

"The right to operate gas works and to illuminate a city, is not an ancient or usual occupation of citizens generally. No one has the right to dig up the streets and carry on the business of lighting the streets and the houses of the city of New Orleans without the special authority from the Sovereign. It is a franchise belonging to the State and in the exercise of police power the State could carry on the business itself or select one or several agents to do so."

Again in — 'New Orleans Water Works Co. v. Rivers', (1885) 29 Law Ed 525, the Court observed:

"The restriction imposed by the contract upon the use by others than plaintiff of the public streets and ways, for such purposes is not one of which the appellee can complain. He was not thereby restrained of any freedom of liberty he had before;"

In — 'California v. Central Pacific R. Co', (1888) 32 Law Ed 150 Bradley J. explains the connotation of the word "franchise" in the following terms:

"What is a franchise?.....Under the English law Blackstone defines it as 'a royal privilege, or branch of the King's prerogative subsisting in the hands of a subject'. Generalized, and divested of the special form which it assumes under a monarchial government based on feudal traditions, a franchise is a right, privilege or power, of public concern, which ought not to be exercised by private individuals at their mere will and pleasure but should be reserved for public control and administration either by the Government directly or by public agents acting under such conditions and regulations as the Government may impose as the public interest and for the public security. No private person can establish a public highway, or a public ferry or railroad, or charge tolls for the use of the same without authority from the Legislature direct or derived. These are franchises."

In — 'Frost v. Corporation Commission of the State of Oklahoma', (1929) 73 Law Ed 483, the question arose whether a corporation to which a monopolistic right to carry on business in a ginning factory was granted by a statute of Oklahama had a right to restrain others from carrying on the same business. In holding that it was a franchise and that the corporation had a right to exclude others, Sutherland J. observed as follows:

"It follows that the right to operate a gin and to collect tolls therefor, as provided by the Oklahama statute is not a mere license, but a franchise, granted by the State in consideration of the performance of a public service; and as such constitutes a property right within the protection of the 14th amendment."

After quoting the observations in — 'California v. Central Pacific R. Co.', (1888) 32 Law Ed 150, extracted above, he went on to observe:

"And these are but illustrations of a more comprehensive list, from which it is difficult, upon any conceivable ground to exclude a cotton gin declared by statute to be a public utility engaged in a public business the operation of which is precluded without a permit from a State Governmental agency,

and which is subject to the same authority as that exercised over transportation and transmission companies in respect of rates, charges and regulations. Under these conditions to engage in the business is not a matter of common right but a privilege, the exercise of which, except in virtue of a public grant, would be in derogation of the State's power. Such a privilege, by every legitimate test, is a franchise."

Brandies J. dissented from the decision but on the meaning of the word 'franchise' he expressed himself in similar terms. He stated:

"It must also be borne in mind that a franchise to operate a public utility is not, like the general right to engage in a lawful business, part of the liberty of the citizen; that it is a special privilege which does not belong to citizens generally; that the State may, in the exercise of its police power, make that a franchise or special privilege which as common law was a business open to all; that a special privilege is conferred by the State upon selected persons; that it is of the essence of a special privilege that the franchise may be granted or withheld at the pleasure of the State; that it may be granted to corporations only thus excluding all individuals; and that Federal Constitution imposes no limits upon the State's discretion in this respect."

(15) These authorities show that under the American law the State Legislatures possess the power to grant monopoly rights in respect of any business treating it as franchise; that while in England that power is limited by the prerogatives of the Crown as determined by the common law, it extends in America to whatever matter is declared by the Legislature to be proper subject of monopoly; that the right of a citizen to carry on trade is subject to the paramount authority of the Legislature to take it out of his hands and make it a monopoly and that he has no such fundamental rights in respect of business as can be set up in opposition to a franchise which may be granted by State legislation. In India there could be no franchise in the English sense. The American concept of a franchise is a development peculiar to that jurisprudence and that has not been adopted in the Indian Constitution. Article 19 (1) (g) does not make any distinction between common law trades which could be carried on by all persons and prerogative trades which could be carried on only under State grants. The right of a citizen to carry on any trade is subject only to the restrictions such as would fall within the scope of Art. 19(6). Even the legislatures have no power to curtail or abridge that right except to the extent provided in Art. 19(6). By the First Amendment to the Constitution it is provided that "nothing in Art. 19(1) (g) shall affect the operation of any existing law in so far as it relates to, or prevent the State from making any law relating to (ii) the carrying on by the State, or by a corporation owned or controlled by the State, of any trade, business, industry or service, whether to the exclusion, complete or partial, of citizens or otherwise." This is a recognition that except to the extent provided in this amendment the legislature has no power to create a monopoly or to take away the right of a citizen to carry on any trade. In this respect the law under the Constitution is fundamentally different from that laid down in the American decisions.

(16) Allied to this distinction between trades which could be carried on by all and businesses which could be carried on only under State authorisation, and often mixed up with it, is another distinction which has considerably affected the course of American law relating to business. Under that law businesses are classified as those which are "private" and those which are "affected with public interest." This distinction came to be made with reference to the power of the State to control business by legislation. It was held that while the Legislature had no power to control business which is private it had a paramount power to control business which was "affected with public interest." The reason for this distinction is that the power to control business is part of the police power of the State; such a power could be exercised only for reasons of public welfare and therefore it could be exercised only when the business is affected with public interest. In — 'Munn v. People of Illinois', (1877) 24 Law Ed 77, the State Legislature fixed the maximum rates which warehousemen could charge for storing grains. The validity of this Statute was attacked on the ground that the State had no right to interfere with the carrying on of business. It was held that the Legislature was competent to control any business which had become "affected with public interest". Waite C. J. observed as follows:

"This brings us to inquire as to the principles upon which this power of regulation rests in order that we may determine what is within & what without its operative effect. Looking then to the common law from whence came the right which the Constitution protects, we find that when private property is affected with a public interest, it ceases to be 'juris private only'. This was said by Lord Chief Justice Hale more than two hundred years ago in his treatise 'De Portibus Maris, Harg. L. T. R. 78 (sic), and has been accepted without objection as an essential element in the law of property ever since. Property does become clothed with a public consequence and affect the community at large. When, therefore, one devotes his property to a use in which the public has an interest, he in effect, grants to the public an interest in that use, and must submit to be controlled by the public for the common good, to the extent of the interest he has thus created. He may withdraw his grant by discontinuing the use; but, so long as he maintains the use, he must submit to the control."

(17) The correctness of the application of the observations of Lord Chief Justice Hale to business is open to question. Field J. in his dissenting judgment in that case pointed out that the passage in Lord Hale's treatise referred to property which was held in public ownership or which had been dedicated to the public and that business even regarded as property could in no sense be said to be dedicated to the public: vide his observations at pages 92 and 93. But the doctrine propounded in that case that business might, when affected with public interest, become a legitimate subject of legislative control imposed in exercise of police power became an accepted principle of American jurisprudence. After that decision whenever any dispute arose as to the validity of a law relating to business the ques-

tion came to be asked: "Is it one affected with public interest or is it a private business?" On a question of this kind there was naturally considerable room for difference of opinion and the law on the subject was in a vague and uncertain condition. Thus in — 'Lachener v. New York', (1905) 49 Law Ed 937, the business of bakery was held to be a private one. Banking business was held to be affected with public interest in — 'Noble State Bank v. Haskell', (1911) 55 Law Ed 112 and so was insurance business in — 'German Alliance Ins. Co. v. Lewes', (1914) 58 Law Ed 1011. Employment agency business was at one time held to be private: vide — 'Adams v. Tanner', (1917) 61 Law Ed 1336 and — 'Ribnik v. Mcbride', (1928) 72 Law Ed 913. But the contrary view was upheld in — 'Olson v. Nebraska', (1941) 85 Law Ed 1305. The business of selling theatre tickets was held to be private in — 'Tyson & Brothers v. Banton', (1927) 71 Law Ed 718 and so was the business of sale of gasoline in — 'Lawrence v. St. Loussan Rancis R. Co.', (1929) 73 Law Ed 282.

In — 'New State Ice Co. v. Liabmann', (1932) 76 Law Ed 747, the question arose with reference to the business of selling ice. The majority of the Court held that (1) "where the business was so charged with public use" as to justify the State control then "engagement in the business was a privilege to be exercised only in virtue of public grant and not a common law right to be exercised independently" and the permit granted by the Government "constituted a franchise" and that (2) where a business was not so affected with public interest any control thereof by the State legislation would be unconstitutional & a violation of liberty under the 14th Amendment. In — 'Wolf Packing Co. v. Court of Industrial Relations', (1923) 67 Law Ed 1103, Taft C. J. classified businesses affected with public interest into three categories— those which were carried on under the authority of public grant of privileges; such as rail roads, common carrier and public utility; certain occupations regarded as exceptional such as those of keepers of inn, cabs and grist mills; and businesses which though not public at their inception may be said to have become such by being devoted to public use. In — 'New State Ice Co. v. Leibmann', (1932) 76 Law Ed 747, Brandies J. remarked in his dissenting judgment that:

> "The notion of a distinct category of business affected with public interest employing property devoted to a public use rests upon historical error."

In — 'Nebbia v. New York', (1934) 78 Law Ed 940, the question arose whether a New York statute fixing the price at which milk should be sold was valid. It was contended that that trade could not be said to be affected with public interest on any of the accepted principles & that the legislation was, therefore, unconstitutional. In upholding the validity of the law the Court observed as follows:

> "It is clear that there is no closed class or category of businesses affected with public interest and the function of courts in the application of the 5th and 14th amendments is to determine in each case whether the circumstances vindicate the challenged regulation as a reasonable exertion of Governmental authority or condemn it as arbitrary or discriminatory. The phrase 'affected with public interest' can in the nature of things mean no more than that an industry for adequate reason is subject to control for the public good."

(18) The result of this decision was to abrogate the theory of a distinction between private trades and businesses affected with public interest which had dominated the field of American law from the days of — 'Munn v. People of Illinois', (1877) 24 Law Ed 77, and to subject all trades without difference to State control in the exercise of police powers. The law as laid down in — 'Nebbia v. New York', (1934) 78 Law Ed 940 is in agreement with that enunciated in Arts. 19(1) (g) and 19(6) of the Constitution. In applying the older decisions of the American Courts and the (sic) occurring therein it should not be forgotten that they represent different strata of thought which prevailed at different stages in the evolution of the law and that some of them would now be considered obsolete even under that law.

(19) Turning to the American decisions on the right of citizens to carry on transport business on public pathways, it will be observed that they present the same features which have been noticed in decisions relating to the right to carry on business generally. Thus they lay down that carrying on of transport business on public roads is a franchise and not a common law right which could be claimed by all citizens, and a distinction is also made between contract carriers or private taximen whose business is held to be private and over which the State has no power to legislate except to the extent of licensing; and common carriers whose business is affected with public interest and over whom, therefore, the State has large powers of control. In — 'Packard v. Banton', (1924) 68 Law Ed 596, the law in question provided that operators of motor vehicles for hire should take out insurance policies to meet claims arising out of accidents. This legislation was held to be valid and justified by the police power of the State. That would be so even under Art. 19(6) of the Constitution and therefore there is nothing in the decision itself which bears on the question now under consideration but there are certain observations in the judgment on which the respondents rely.

Sutherland J. observed at page 1608:

> "The streets belong to the public and are primarily for the use of the public in the ordinary way. Their use for purposes of gain is special and extraordinary and generally at least may be prohibited or conditioned as the legislature deems proper"

and again

> "moreover a distinction must be observed between the regulation of an activity which may be engaged in as a matter of right and one carried on by Government sufferance or permission. In the latter case the power to exclude altogether generally includes the lesser power to condition and may justify a degree of regulation not admissible in the former."

(20) These observations were approved by Holmes J. in — 'Frost v. Railroad Commission', (1926) 70 Law Ed 1101 at p. 1108. Again in — 'Stephenson v. Binford', (1932) 77 Law Ed 288 at p. 294, Sutherland J. observed:

> "It is well established law that the highways of the State are public property; that their primary and preferred use is for private purposes; and that their use for purposes of gain is special and extraordinary which gene-

rally at least the Legislature may prohibit or condition as it sees fit"

and again after quoting certain observations from — 'Atkin v. Cansas', (1903) 48 Law Ed 148, he continued:

"It may be said likewise that it belongs to the State as master in its own house to prescribe the terms upon which persons will be permitted to contract in respect of the use of the public highways for purposes of gain."

Apart from considerations arising from State ownership of public streets which will be adverted to presently the views expressed in — 'Packard v. Banton', (1924) 68 Law Ed 596 and — 'Stephenson v. Binford', (1932) 77 Law Ed 288 are based on the doctrine of franchise which for reasons already given must be held to be inconsistent with the provisions of the Constitution.

(21) The distinction between private business and business affected with public interest resulted in its application to this branch of law in a distinction being made between the business of contract carriers and that of common carriers. The business of taxi owners of carrying passengers or goods under particular contracts was held to be private and therefore, not subject to legislative control except to the extent of licensing regulation. Vide — 'Michigan Public Utilities Co. v. Duke', (1916) 60 Law Ed 445 (sic), — 'Frost v. Railroad Commission', (1926) 70 Law Ed 1101 and — 'Smith v. Cahoon', (1931) 75 Law Ed 1264. In contrast to contract carriers stood common carriers who were under an obligation to carry all passengers or goods and over whom the legislature had plenary powers of control. The question arose frequently in connection with laws which required that a certificate of public convenience and necessity should be obtained before vehicles could be put on public roads. Such requirements were held to be valid with reference to common carriers. Vide — 'Bradley v. Public Utilities Co.', (1933) 77 Law Ed 1053, and — Stanley v. Public Utilities Commission', (1935) 79 Law Ed 1311. But in respect of a contract carrier it was held in — 'Smith v. Cohoon', (1931) 75 Law Ed 1264, that such regulations were unconstitutional as amounting to a prohibition of a constitutionally protected right. Under the Constitution of India both the contract carriers and common carriers would stand in the same position; both of them will have a right to carry on the business under Art. 19(1)(g) and both of them are liable to be controlled by appropriate regulations under Art. 19(6).

(22) It is now necessary to examine the contentions of Mr. M. K. Nambiar that as the public pathways vest in the State and as the only rights of the citizens over them are to pass and re-pass, the State as their owner has a right to control their use in such manner as they decide and that no citizen can claim a right to carry on business there except to the extent that the Government might permit. He relied on the following passage in Halsbury's Laws of England, Vol. 16, page 238 and paragraph 288:

"The right of the public is a right 'to pass and re-pass along' a highway for the purpose of legitimate travel, 'not to be on it', except so far as their presence is attributable to a reasonable and proper user of the Highway as such. A person who is found using the highway for other purposes must be presumed to have gone there for such purposes and not with a legitimate object; and as against the owner of the soil he is to be treated as trespasser."

In England the rights of citizens to use public pathways have their origin in Feudal times when extensive estates were held in fee simple by Lords of the Manors. Highways connecting towns lay to a large extent through these estates and citizens had necessarily to pass through them in going from town to town. If a way lead to a market and were a way for all travellers and did communicate with a great road, etc., it is a "highway" — 'Austin's case', I Vest. 189.

"The common definition of a highway that is given in the text books of authority is that it is a way leading from one market town or inhabited place to another inhabited place which is common to all the Queen's subjects" (per Lord Coleridge L. J. in — 'Bailey v. Jemieson', (1876) 1 C . P. D. 329 at p. 332).

In such a case the law inferred a dedication of the pathway by the owners for user by the public but the extent of this user was limited to passing and re-passing on the road. "The property is in the owner of the soil subject to an easement for the benefit of the public" (per Heath J. in — 'Dovaston v. Payne', 2 H B L 527). Lord Cairns considered that the right of the public was not in the nature of an easement but that it was "a dedication to the public of the occupation of the surface of the land for all purposes of passing and re-passing". 'Rangeley v. Midland Rly. Co.', (1867) L. R. 3 Ch. 306 at p. 310. But whatever view be taken of the rights of the public they were limited to passing and re-passing and any excessive user was held to constitute trespass on the property rights of the person who owned the lands on either side of the road.

"If a man uses a land over which there is a right of way for any purpose lawful or unlawful other than that of passing and re-passing he is a trespasser."

So observed Crompton J. in — 'R. v. Pratt', (1855) 4 El & Bl 860.

In — 'Harrison v. Duke of Rutland', (1893) 1 Q B 142, Lopes L. J. observed:

"If a person uses the soil of the highway for any purposes other than that in respect of which the dedication was made and easement acquired, he is a trespasser. The easement acquired by the public is a right to pass and re-pass at their pleasure for purposes of legitimate travel and the use of the soil for any other purpose, whether lawful or unlawful is an infringement of the rights of the owner of the soil who has subject to this easement precisely the same state in the soil as he had previously to any easement being acquired by the public."

Vide also — 'Hickman v. Maisey', (1900) 1-Q.B. 752. Reliance was also placed on the decision in — 'Abingdon Rural Council v. City of Oxford Electric Tramways (1917) 2-K. B. 318 for the position that the user of the public streets by motor omnibuses on country roads was an extraordinary traffic.

(23) In answer to this contention, the learned advocates for the petitioners quoted the following passage from Halsbury's Laws of England, Vol. 16 p. 185 paragraph 214:

"A right of passage once acquired will extend to more modern forms of traffic reasonably

similar to those for which highways were originally dedicated, so long as they do not impose a substantially greater burden on the owner of the soil nor substantially inconvenience persons exercising the rignt of passage in the manner originally contemplated."

It is argued that as the public pathways were being used in this country for travel by jutkas and stage coaches from time out of mind it would be a legitimate user to travel by stage carriages over them. But there is an even more complete answer to this contention of the respondents. The law of England with reference to rights of the public to use highways is based on a theory which was never part of the law of this country. As already mentioned the highways in England lay to a large extent through private estates and a right by the public to use them was based on an inference that the owner had dedicated them to public user; the extent of the dedication was determined by the user & subject to such dedication the pathways continued to be the private property of the owner. This theory, therefore, has a feudalistic origin and has a historical background which is peculiar to England. In this country the Crown has always been the owner of all highways; which were referred to as 'Raja margas'. The common law of this country did not recognise the doctrine well established in Great Britain that

"the soil of public highways is presumed to be in the conterminous proprietors and that if a public highway is established by usage over the land of another the soil is still his with all his former rights subject to the public servitude which he has suffered to be established" per Lord Campbell in — 'Gelbraith v. Armour', 4 Bell's App. 374.

It was never the common law of India that a citizen owned any public highways in private ownership subject to a right in the public in the nature of easements or a right of occupation of surface. The pathways vested solely in the Crown and restrictions on the rights of the public to use them based on the theory of private ownership of the soil in the streets would be foreign to Indian jurisprudence. In — 'Municipal Commissioners of Madras v. Sarangapani Mudaliar', 19 Mad 154, a Bench of this Court observed as follows:

"The English maxim once a highway always a highway is based on the theory that the property in a highway is in the owner of the soil subject to an easement in favour of the public. In the case before us this legal fiction peculiar to English law cannot arise for there is no question of any easement whatever. The street itself and the soil thereof is vested in the municipality in trust for the public so that there is no question of dominant or servient heritage."

It is true that Bhashyam Aiyangar J. expressed a dissent from these observations: vide — 'Sundaram Ayyar v. Municipal Council, Madura', 25 Mad 635 at pages 645 and 648. But the question there was with reference to the rights of the Municipality over streets which had vested in it under the Madras District Municipalities Act and not with reference to the rights of the Government as against a citizen. Indeed the decision was that the vesting under the Act was only of certain rights over streets 'qua' streets and not of the soil which continued to be vested in the Government. In — 'Baswaswari Swami v. Bellary Municipal Council', (AIR 1916 Mad 613), Sadasiva Aiyar J. after referring to the differing views expressed in — 'Municipal Commissioners v. Sarangapani Mudaliar', 19 Mad 154 and — 'Sundaram Ayyar v. Municipal Council of Madura', 25 Mad 635, observed as follows:

"With greatest deference I might be permitted to express some regret that the complications known to English law were thus introduced into this presidency through this judgment of Bhashyam Aiyangar J. The result has been, as pointed out by that very learned Judge himself that there sprang up a sort of divided ownership between the municipal council and the Secretary of State."

There has been considerable discussion in the Indian Courts as to the extent of the rights which a Municipality has when the streets are vested in it under statutes like the District Municipalities Act but no doubt was ever expressed on the extent of the rights of the Government itself over the streets. Two decisions which at first sight might seem to strike a different note, may be noticed. In — 'Nihalchand v. Azmat Ali Khan', 7 All 362, a certain municipality took over lands in Zamindari for forming a road and subsequently abandoned a portion of it. The question arose whether the zamindars could lay claim to this portion. In holding they were entitled to it the Court observed:

"Land was either highway or waste land adjoining it & there is a presumption that such land belongs to the owners of the soil of the adjoining land."

Here the land out of which the road was formed was not property which had vested in the Crown but private property belonging to Zamindars. In — 'Narharsingji v. Secretary of State', ILR (1941) Bom 226: AIR 1941 Bom 161, the above observations in — 'Nihalchand v. Azmat Ali Khan', 7 All 362, were quoted and it was held that the road must be presumed to belong to the adjoining proprietors but that again was a case of an estate which had been settled on the representatives of a Royal House under a sannad. The entire estate belonged to the Sannadholder.

(24) The true position then is that all public streets and roads vest in the State but that the State holds them as trustee on behalf of the public. The members of the public are entitled as beneficiaries to use them as a matter of right and this right is limited only by the similar rights possessed by every other citizen to use the pathways. The State as trustees on behalf of the public is entitled to impose all such limitations on the character and extent of the user as may be requisite for protecting the rights of the public generally. Thus the nature of the road may be such that it may not be suitable for heavy traffic and it will be within the competence of the Legislature to limit the use of the streets to vehicles which do not exceed specified size or weight. Such regulations have been held to be valid as within the police power of the State in America. Vide — 'Morris v. Duby', (1927) 71 Law Ed. 966, — 'Sproles v. Binford', (1932) 76 Law Ed 1167, and — 'South Carolina State v. Barnwell Bros.', (1938) 82 Law Ed 734. For the same reason the State might even prohibit the running of transport buses and lorries on particular streets or roads if such running would interfere with the

rights of pedestrians to pass and re-pass as it might if the street is narrow or conjested but subject to such limitations the right of a citizen to carry on business in transport vehicles on public pathways cannot be denied to him on the ground that the State owns the highways.

(25) Mr. M. K. Nambiar also relied on the following observations of Horwill J. in — 'President District Board, Kistna v. Lakshmayya' 1938-1 Mad L J 391,

> "I doubt whether at any time motor vehicle has had an unrestricted common law right to use the highway. However, assuming that such a right did at one time exist or must be presumed to have existed from the mere fact that motor bus is a vehicle that runs along roads, it seems clear to me that that right was taken away by the Local Boards Act."

These observations do not negative the existence of the right to ply buses but suggest that it is liable to be controlled. The decision in — 'Abingdon Rural Council v. City of Oxford Electric Tramways Ltd.', (1917) 2 K B 318, was one on a special statute and does not lay down any principle of general application. In—'Ambaprasad v. Jugalkishore', AIR 1936 All 112, it was held that the right of the public to pass and re-pass along public highways included the right to ply lorries for hire. This decision is also an authority against the contention of the respondents that the citizen has no right to use public pathways for purposes of gain. There are observations in the American Courts in support of the view that citizens have no right to use public pathways for purpose of gain, but then contract carriers were also using public pathways for purposes of gain and it was held in — 'Atkin v. Cansas', (1931) 75 Law Ed 1264 (sic) that they were entitled to carry on trade without being compellable to take out a certificate of public convenience and necessity as a condition of carrying on the business.

In — 'Motilal v. Uttar Pradesh Government', AIR 1951 All 257 (FB), one of the questions discussed by the Full Bench was whether members of the public had a right to ply passenger buses on public roads. The opinion was expressed that such a right was within Art. 19 (1)(g) and subject to the limitations in Art. 19 (6), vide paras. 55, 56, 98, 177 and 367. In — 'Lokanatha Misra v. State of Orissa', A. I. R. 1952 Orissa 42, it was held by a Bench of the Orissa High Court that plying of motor vehicles for hire on public roads is a business within the meaning of Art. 19(1)(g), vide para. 8 of the judgment. An important decision bearing on this question is the one reported in—'Rashid Ahmed v. Municipal Board, Kairana', 1950 SCJ 324. There the Supreme Court held that the refusal by a Municipality to grant a licence to a citizen to carry on the business as a wholesale vegetable merchant in a market, a monopoly in that business having been already granted to another, was an infringement of his right to carry on trade under Art. 19(1)(g) and that it was not saved by Art. 19 (c). There the business by its very nature could be carried on only in a public place and it was to be carried on for gain, as indeed all businesses must be. The right of a citizen to carry on business in motor transport on public streets cannot in law be different from his right to sell vegetables in a public market and on the principle of the decision in — 'Rashid Ahmed v. Municipal Board of Kairana', 1950 SCJ 324, it must be held to be equally within the protection of Art. 19(1)(g).

(26) (2) The above conclusion leads on to a consideration of the second group of questions. If the petitioners have a right to carry on business in motor transport on public pathways and that is a right guaranteed under Art. 19 (1) (g) then the validity of the impugned sections of the Motor Vehicles Act must be determined with reference to the requirements of Art. 19 (6). They will be valid only if they are reasonable restrictions imposed in the interests of the public.

(27) Section 42 is attacked on the ground that it prohibits the carrying on of the business unless a permit is obtained. It is argued that the exercise of a fundamental right cannot be made to depend upon the discretion of an administrative authority; nor could previous restraint be imposed on it. Reliance is placed on — 'Lovell v. Griffin', (1938) 82 Law Ed 949 and — 'Hague v. Committee for Industrial Organisation', (1939) 83 Law Ed 1423 and — 'Schneider v. Irvington', (1933) 84 Law Ed 155 and — 'Largent v. Texas', (1943) 87 Law Ed 873. In — 'Ramakrishnaiah v. President, District Board, Nellore', 1952-1 Mad L J 38, this Court referring to the above decisions observed as follows:

> "It is well established that the exercise of any of the fundamental rights like the right of free speech, right of freedom of religion or right of freedom of association cannot be made subject to the discretionary control of an administrative or executive authority which can grant or withhold permission to exercise such right at its discretion. It is equally well established that there cannot be any restriction on the exercise of such a right which consists in a previous restraint on such exercise and which is in the nature of administrative censorship."

The question then is whether S. 42 is bad as offending the above principles? It is necessary in this connection to bear in mind the distinction between permit and licence. The law might confer on an administrative authority an absolute discretion to grant or withhold permits for carrying on business or it may empower it to issue licence to the applicants imposing appropriate conditions for the conduct of business. The word "permit" may appropriately be used for the former and the word "licence" for the latter. While it is well established that a permit system is unconstitutional in so far as it relates to the exercise of fundamental rights, it is equally well settled that a system of licensing which has for its object the regulation of trades is not repugnant to Art. 19 (1) (g). Such regulations have been sustained in America as a proper exercise of the police power and under the Constitution they will be upheld as falling within the scope of Art. 19(6).

(28) Bearing in mind these principles it is necessary to examine the relevant provisions of the Act for determining whether what is prescribed is a permit or is a licence. S. 47 enacts provisions by which the Regional Transport Authority has to be guided in the grant of permits. S. 59 provides that reasons are to be given in case of refusal. Under S. 60 there is an appeal against the decision of the Regional Transport Authority to the Central Road Traffic Board. Thus the proceedings are judicial in character. No arbitrary power is conferred on

the executive authority to grant or refuse permit at its own discretion. It is, therefore, in substance not a permit but a licence. Nor is there any force in the contention that S. 42 imposes previous restraint on the exercise of a Constitutional right and is, therefore, invalid. As observed in the decision in — 'Ananthakrishna v. State of Madras', 65 Mad. L. W. 114, the theory of previous restraint which was evolved with reference to freedom of person and freedom of speech cannot operate with the same force with reference to the freedom of trade or profession and that reasonable conditions forming part of licensing regulations cannot be held to be repugnant to Art. 19(1)(g). Vide pages 130 and 131. S. 42 must accordingly be held to be valid.

(29) Coming next to S. 43-A, it is argued that it confers on the provincial Governments wide and unlimited powers to issue all such orders and directions of a general character as it may consider necessary, that the transport authorities are bound under that section to give effect to such orders and directions; that there is nothing to prevent the Government from even issuing directions with reference to the judicial functions which those authorities have to discharge under the Act; that it could not be expected that such directions would be disregarded by those authorities & that in practice the provisions of S. 47 could be evaded. Reference is also made to the fact that this section was introduced for nullifying the effect of the decision in — 'Sri Rama Vilas Service Ltd. v. Road Traffic Board, Madras', 1948-1 Mad L J 85, where it was held that the transport authorities had failed in the discharge of their judicial function in meekly giving effect to an order of the Government which was opposed to the provisions of the Act. Section 43A appears to be intended to clothe the Government with authority to issue directions of an administrative character and in that view it would be valid. No specific order or direction of the Government is attacked in these proceedings as invalid and the discussion is largely academic. The section must itself be held to be valid though particular orders passed thereunder might be open to challenge as unconstitutional.

(30) Sections 47 (1) and 48 (a) and 48 (b): These sections are among the most important in the Motor Vehicles Act. They provide (1) that the Regional Transport Authority should, before granting or refusing a permit, have regard to the several matters mentioned in S. 47 (1), (2) that it should fix the number of vehicles to be put on the road (48) (a) and (3) grant the permit to a particular stage carriage (48) (b). Many of these provisions have come in for considerable criticism and before dealing with the sections clause by clause it will be convenient to consider on principle the questions in dispute. (1) Can the Transport authorities take into account the condition of the road in granting or refusing the permit for a stage carriage or limiting its number on a particular route? Conservation of roads is a matter of general public interest and they have to be well maintained not merely for purposes of motor traffic but also for other vehicular traffic and to enable pedestrians to pass and repass safely and comfortably and their maintenance involves considerable expenditure of public funds. A regulation of motor traffic with the object of conserving the roads must be upheld as protected by Art. 19 (6). The following observations of Holmes J. in — 'Frost v. Railroad Commission', (1926) 70 Law Ed 1101 at p. 1108 may in this connection be usefully quoted:

> "If a State speaking through its Legislature should think that in order to make its highways most useful. the business traffic upon them must be controlled. I suppose that none would doubt that it constitutionally could, as I presume most states or cities do exercise some such control. The only question is how far can it go. I see nothing to prevent its going to the point of requiring a licence and bringing the whole business under the control of railroad commission so far as to determine the number, character and conduct of transportation companies and so to prevent the streets from being made useless and dangerous by the number and lawlessness of those who seek to use them."

(2) Can the transport authorities take into account the nature of the locality before deciding whether the use of transport vehicles could be permitted there? It is in the interests of the public that where the streets are narrow or the locality is congested that there should be a restriction on the running of motor transport vehicles in that area. In — 'Bradley v. Public Utilities Co.', (1933) 77 Law Ed 1053, a certificate of public convenience and necessity was refused on the ground that the

> "proposed service would create and amount to an excessive hazard to the safety and security of the travelling public and the property upon such a highway."

In upholding the refusal as a proper exercise of police power Brandeis J. observed at page 1056: "The purpose of the denial was to promote safety and the test employed was congestion of the highway."

That would also be the position under Art. 19(6).

(31) (3) Can the transport authorities take into account the adequacy of the existing services? Can they say that there is no need for extending the existing services? In America the Statutes provide for a certificate of public necessity and convenience being obtained before permits are issued. But under Art. 19 (6) the only relevant consideration would be whether the grant is in the interests of the public. It will not be a proper ground to refuse a permit on the ground that there is no need for extension of service. Mr. K. V. Venkatasubramania Iyer the learned advocate for the petitioners cited a number of American authorities in which it was held that while transport authorities might properly refuse to grant permits on account of the condition of the roads they may not do so merely on the ground that existing service is adequate and competition would be uneconomic. In — 'Buck v. Kay Kendall', (1925) 69 Law Ed 623 at p. 627, a certificate of public necessity and convenience was refused on the ground that the locality was "already being adequately served by the holder of a certificate". In holding that the refusal to issue a certificate on this ground was unconstitutional, Brandies J. distinguished the cases in which it had been refused on the ground of conservation of roads and observed:

> "The provision here in question is of a different character. Its primary purpose is not a regulation with a view to safety or conser-

vation of highways but the prohibition of competition. It determines not the manner of the use but the persons by whom the highways may be used."

In — 'Bush and Sons v. Maloi', (1925) 69 Law Ed 627, it was held that the refusal of a certificate on the ground that the existing lines of transportation would be prejudiced was improper as its object was not the protection of highways but the protection of persons engaged in business. In — 'Frost v. Railroad Commission', (1926) 70 Law Ed 1101 this distinction was again emphasised, Sutherland J. observed as follows:

"It is very clear that the Act as thus applied is in no real sense a regulation of the use of the public highways. It is a regulation of the business of those who are engaged in using them. Its primary purpose evidently is to protect the business of those who are common carriers, in fact by controlling competitive conditions. Protection or conservation of the highways is not involved."

It may be said with reference to this class of cases that they are decisions on the commerce clause and that what was decided was that inter-state commerce as distinguished from regulation of highways was not within the legislative competence of the State but the principles enunciated therein are in accordance with the law as enacted in Art. 19 (6). Under that provision what has to be decided is whether the grant is for the benefit of the public and not whether it is injurious to the interests of the existing operators.

(32) (4) Can transport authorities take into consideration that the existing operators are running other services which are not remunerative and can they grant permits to them with a view to compensate them for those unremunerative services? This will be clearly opposed to Art. 19 (6) under which the restriction imposed must be in the interests of the public and not in the interests of particular individuals.

(33) (5) Is the power conferred by S. 48 (b) of the Motor Vehicles Act on the Regional Transport Authority to grant permit to a particular stage carriage or particular service of stage carriage valid? Can the transport authorities refuse to grant permit altogether to any applicant? It is argued that Art. 19 (6) is intended only to cover restrictions which are of a regulatory character but that a power to regulate does not carry with it the power to prohibit and that refusal to grant permits is not a reasonable restriction on the exercise of the right to carry on trade but an unconstitutional denial of it. Reliance was placed on the decision of the Supreme Court in — Chintaman Rao v. State of Madhya Pradesh', 1950 S C J 571, where a Statute prohibiting the use of labour for beedi business during agricultural seasons was held to be bad as not warranted by Art. 19 (6). It was further argued that the effect of S. 48 (a) and (b) was to enable the Government to confer monopoly rights on one or more persons to the exclusion of others and that such monopoly could not be sustained under Art. 19 (6). Reliance was placed on the decision in — 'Rashid Ahmed v. Municipal Board, Kairana', 1950 SCJ 324, where a grant of monopoly right for carrying on business as wholesale merchants was held to be an unreasonable restriction on the rights of other citizens to carry on business. Reference was also made to the authorities under the commerce clause of the Australian Constitution wherein it had been held that a power to regulate did not include the power to prohibit and that the right of "free" trade under S. 92 was violated by laws conferring monopoly rights.

In — 'Milk Board v. Metropolitan Cream Pty. Ltd.', 62 CLR 116, at p. 127, Latham C. J. observed as follows:

"One proposition which I regard as established is that simple legislative prohibition federal or state as distinct from regulation of inter-state trade and commerce is invalid... ..... Such a law does not regulate such trade. it merely prevents it."

Vide also — 'Gratwick v. Johnson', 70 C L R 1. In — 'Australian National Airways v. The Commonwealth', 71 C. L. R. 29, the learned Chief Justice further observed that the exclusion of competition is not a system of regulation and is a violation of S. 92. These observations were quoted with approval by the Judicial Committee in — 'Commonwealth of Australia v. Bank of New South Wales', (1950) AC 235. Vide also the observation of Lord Bavey in — 'Taranto Municipal Corporation v. Virgo', (1896) AC 88 at p. 93.

(34) The soundness of these contentions in general has not been disputed but it is argued that in judging of the reasonableness of restriction under Art. 19 (6) regard must be had to the nature of the business, and the conditions prevailing in that trade; that these factors must differ from trade to trade and no hard and fast rules capable of application to all trades can be laid down. It cannot be denied that the State has the power to prohibit trades which are illegal or immoral or injurious to the health and welfare of the public. Laws prohibiting trades in noxious or dangerous goods, or gambling or trafficking in women cannot be held to be illegal as enacting a prohibition and not a mere regulation. The nature of the business is, therefore, an important element in deciding on the reasonableness of the restrictions. It has been already mentioned that while a citizen has a right to carry on the business of motor transport on public pathways, the latter however are owned and held by the State as trustees on behalf of the public; that the rights of a citizen to use the streets are limited by similar rights possessed by the other citizens and that it would be within the power of the State as such trustees to limit the number of transports that could run on the road and to even totally prohibit its running.

Elimination and exclusion are inherent in the nature of this business and it would hardly be proper to apply to such a business principles applicable to trades which all could carry. Nor can the provisions of the Act be attacked on the ground that they create a monopoly. Properly speaking there can be a monopoly only when a trade which could be carried on by all persons is entrusted by law to one or more persons to the exclusion of the general public. Such, however, is not the case with the business of the motor transport. Even with reference to trades in which it could properly be said that there is a monopoly the following observations of Lord Porter in — 'Commonwealth of Australia v. Bank of New South Wales', (1950) A. C. 235, may be quoted:

"Yet about this as about every other proposition in this field a reservation must be made. For

their Lordships do not intend to lay it down that in no circumstances would exclusion of competition so as to create a monopoly either in a State or Commonwealth agency or in some other body be justified. Every case must be judged on its own facts and in its own setting of time and circumstances and it may be that in regard to economic activities and at some stage of social development it might be maintained that prohibition with a view to State monopoly was the only practical and reasonable manner of regulation and that inter-state trade, commerce and intercourse thus prohibited and thus monopolised remained absolutely free."

(35) A more difficult question is, when the number of vehicles is limited under S. 48(a) and there are several applicants for the permit, how is the choice to be made? The Act contains no provisions relating to this question. The provisions of S. 47(1) do not cover this aspect. It is argued that as no criteria are laid down in the Act for making a selection among the numerous applicants the power to grant permits becomes arbitrary and vague and is, therefore, void. Reliance is placed on the decision in — 'Yick v. Hopkins', (1886) 30 Law Ed 220, but as already mentioned under the Act the transport authorities are acting judicially and not administratively in granting or refusing to grant permits. Section 47(1) mentions the matters by which the transport authorities are to be guided in disposing of the applications; S. 57(7) provides that the authority must give reasons in case of refusal and under S. 64 his order is appealable. In — 'Sri Rama Vilas Service Ltd. v. Road Traffic Board, Madras', 1948-1-Mad L J 85, these proceedings were held to be judicial and therefore, the provisions of the Act are not open to the objection which was upheld in — 'Yick v. Hopkins', (1886) 30 Law Ed. 220. The only consequence that results from the absence of criteria in the Act itself is that the validity of every one of the orders will have to be determined on its own merits and on a consideration whether it satisfies the requirements of Art. 19(6); that is to say, whether it is reasonable and made in the interests of the public.

(36) It will be convenient at this stage to consider the objections of the petitioners based on Art. 14. Their contention is that as there are no criteria laid down in the Act for making a selection among the applicants, there is scope for arbitrary exercise of power and that it is, therefore, repugnant to the provisions of Art. 14 of the Constitution. A perusal of the several orders shows unmistakably that the transport authorities were often guided to the interests of the public and that even when the grounds assigned for the grant or refusal of a permit were not personal, there was no fixity in the principles adopted and no uniformity in their application. To take a question very much debated, is it a qualification for the grant of a permit that the applicant holds a number of permits already or is it a disqualification? One view is that persons who run a number of buses will have considerable experience and command convenience beyond the means of a single permit-holder such as owing a workshop for effecting repairs; that they will be in a position to send substituted buses in case there is a breakdown of the stage carriage on the way. It is, therefore, contended that from the point of view of the public good which should be the only guiding consideration, a fleet owner, as he has been called, should be preferred to stray operators. On the other hand, it is contended that to adopt this principle would be hard on the new entrants and will tend to create a monopoly which, it is argued, is not in the interests of the public. It is also argued that new entrants are likely to devote greater attention to the work while the fleet owners might develop an attitude of indifference to the public need. This is typical of several other questions over which conflicting views have been advanced, it being claimed by the adherent of each view that its adoption would be in the best interests of the public.

The position with reference to this class of contentions is that it is for the State to decide on questions of policy as to which among the several competing principles would serve best the interests of the public and when once a decision has been taken by the Government it is not the province of the Court to go into the question of the comparative soundness of one point of view rather than the other. That is a matter on which the State is entitled to come to its own conclusion and the jurisdiction of the court is limited to examining whether the view point adopted has relation to the purpose which it is intended to serve and if it has, then the court would be loath to interfere with the principles actually adopted on the ground that a different principle would be more advantageous. In — 'Railroad Commission v. Rowen an Nichols Oil Co.', (1940) 84 Law Ed 1368, dealing with the limits of the Court's jurisdiction to interfere with the rules adopted by the State Commission Frankfurter J. observed as follows:

> "A controversy like this always calls for a fresh reminder that the Courts must not substitute their notions of expediency and fairness for those which have guided the agencies to whom the formulation and execution of the policy have been entrusted."

The same principle was adopted in — 'Secretary of Agriculture v. Central Roig Refining Co.', (1950) 94 Law Ed 381, where the court declined to interfere with the decisions of special tribunals based on well defined principles.

(37) But whatever principles be adopted as criteria for making the selection among the applicants it is necessary that they should be applied uniformly and without differentiation as if they had been enacted as part of the statute. This does not, however, prevent the State from altering its rules from time to time when as a result of experience it discovers that they require to be altered in the interests of the public. But what is necessary is that at any given time there must be one set of rules and regulations governing the disposal of all the applications. In W. P. No. 615 of 1951, it is alleged in para 6(g) of the affidavit in support of the petition that while the rule against the fleet owners being granted permits was applied by the Central Road Traffic Board against the petitioner in its order dated 10-8-1951 the self-same body adopted a different rule in respect of permit granted on 7-8-1951 and a permit granted on 23-1-1951. This would be clearly illegal and opposed to Art. 14. There should not be two different and opposing principles both in operation at the same time, one being applied to one applicant and the other to the other.

(38) Rules should be observed not 'ad hoc' with reference to particular applicants but generally with reference to all applicants. There should be a Government of laws and not of men.

(39) In the light of these discussions the validity of the provisions of Ss. 47(1) and 48 (a) and (b) can now be considered. In S. 47(1) cls. (a), (b), (d) and (f) are valid, as being in the interests of the public; and cl. (e) is invalid as being not in the interests of the public but of the permit holder. With reference to S. 47 (1) (c) adequacy of extension of service can be taken into account only in so far as it is in the interests of the public. The factor to be considered is not whether the existing operators will suffer by competition but whether extension of service will be in the interests of the public. Therefore, S. 47(1)(c) will not be legal in so far as it provides that the effect of the service proposed upon the existing service should be taken into account.

(40) Section 48(a). One contention that has been advanced with reference to this provision is that it is erroneous in principle to fix beforehand the number of vehicles that can be put on a route. It is argued that the roads should in the first instance be laid open generally to bus traffic as an experimental measure; that all persons who would run stage carriages should be free to do so and that as a result of experience the requisite number should be determined. But, on the other hand, to fix the number beforehand on a consideration of the conditions of the road and the needs of the public is less likely to be open to attack on the ground of unfairness or discrimination, and moreover it is not in the interests of the public that there should be "lawlessness" on the roads even temporarily. Further the authorities have the power to revise at any time the number of vehicles that could be permitted to run on the roads and the procedure prescribed by S. 48(a) must, therefore, be held to be in the interests of the public. Section 48(b) must for the reasons already given be held to be valid.

(41) Section 64A. It is this section that has come in for the largest criticism. This provision came in by an amendment made by the local legislature. It confers revisional jurisdiction on the Provincial Government. The scope of the jurisdiction extends to its satisfying itself as to the "legality, regularity or propriety" of the proceedings or order in question, and it can pass such orders "as it thinks fit". The contention of the petitioners is that these provisions taken along with the power conferred under S. 43A set up, in the words of Mr. K. V. Venkatasubramania Aiyar, a "Government dictatorship" which is wholly out of keeping with the character of a fundamental right. He argued that the Government had unlimited powers under S. 43A to issue directions to its subordinate officers; that under S. 64A it could set aside any order on the ground that it is not proper; that "propriety" as distinct from legality or regularity is vague and undefined; that as the statute contains no criteria for making the selection among the applicants it was possible for the Government to control the entire machinery through executive fiats in disregard of constitutional rights and that the authority to pass such order "as it thinks fit" leaves to the Government to decide on its own subjective satisfaction and that the rights guaranteed under Art. 19(1)(g) would be rendered illusory.

(42) It must be conceded that there is considerable force in this contention & that the fears expressed by the petitioners are not as would appear from the cases which have come before the Courts wholly fanciful. But the question now before us is whether S. 64A is unconstitutional as clothing the Government with a "naked and arbitrary power." We are not now concerned with the validity of any particular orders passed thereunder. The language of S. 64A is undoubtedly wide. But it should not be forgotten that it is a judicial power to review the orders of subordinate officers passed in judicial proceedings. The extent of the powers of those officers is sufficiently defined in the Act and it would be reasonable to construe the powers of the Government under S. 64A as subject to the same limitations as those subordinate authorities. Moreover judicial power, however wide, are not arbitrary. Courts of equity are entrusted with wide discretion in deciding matters within their jurisdiction but such discretion "is not arbitrary" but sound and reasonable guided by judicial principles and capable of correction by a Court of appeal. Considerable argument was addressed to us on the significance of the word "propriety" used in S. 64A. It was contended that legality and regularity covered all possible judicial grounds for interference and the inclusion of a third category "propriety" is in its vagueness and indefiniteness, interference on any grounds not even judicial. If that is the true scope of the word the criticism is well founded but in the context the word can only mean reasonableness.

'In Re Beddoes', (1893) 1 Ch 547, Bowen L. J. observed that expenses "properly" incurred means expenses incurred "reasonably and honestly". In — 'R. v. Minister of Transport', (1934) 1-K.B. 277, it was held by the Court of Appeal that the wide powers conferred on the minister under S. 81 of the Road Traffic Act must be construed as limited by the subject-matter of the appeal before him. In 'C. M. P. No. 5942 of 1951 (Mad)' Subba Rao J. has put a similar construction on the scope of S. 64A. I am accordingly of opinion that the word "propriety" in S. 64A must be understood as meaning "reasonableness". Some criticism was also levelled against the use of the words "as it thinks fit'. If the authorities were given the power to come to a decision on their own subjective satisfaction it would be clearly illegal in so far as it related to fundamental rights. But the words in the statute are "as it thinks fit" and these words cannot be equated with the words "to its own satisfaction". For the above reasons it must be held that S. 64A is valid.

(43) When once it is held that the right of a citizen to ply buses on public pathways is a business which is protected by Art. 19(1)(g) then the only question that arises for determination is whether the restrictions on that right could be supported under Art. 19(6) on the ground that they are reasonable and made in the interests of the public. In America it has been held in a series of cases that where a fundamental right of a citizen is interfered with by legislation it is for the Courts to decide whether that legislation is valid as a proper exercise of the police power.

(44) In — 'Mclean v. Arkansas', (1909) 53 Law Ed 315, the Court observed as follows:

"The police power of the State is not unlimited and is subject to judicial review and when

exerted in an arbitrary or oppressive manner such legislations may be annulled as violative of the rights protected by the Constitution."

In — 'Meyer v. Nebraska', (1923) 67 Law Ed 1042, McRynolds J. observed as follows:

"The established doctrine is that this liberty may not be interfered with under the guise of protecting public interest by legislative action which is arbitrary or without reasonable relation to some purpose within the competency of the state to effect. Determination by the Legislature of what constitutes proper exercise of police power is not final or conclusive but is subject to supervision by the Courts."

On the same principle when a legislation which interferes with fundamental rights guaranteed under Part 3 of the Constitution is sought to be sustained as falling within the scope of Art. 19 (6) the question whether it is reasonable and made in the interests of the public is one open to judicial review. That was the view taken in — 'Chintamanrao v. State of Madhya Pradesh', 1950 S C J 571, wherein Mahajan J. observed:

"The determination by the Legislature of what constitutes a reasonable restriction is not final or conclusive which is subject to the supervision by this Court. In the matter of fundamental rights the Supreme Court watches and guards the rights guaranteed by the Constitution and in exercising its functions it has the power to set aside any act of the Legislature if it is in violation of the freedoms guaranteed by the Constitution."

With particular references to the provisions of the Motor Vehicles Act, the right of a citizen to ply buses may be abridged or taken away in two ways: by limiting the number of vehicles which can be put on the route under S. 48 (a) and by excluding the applicants in making the selection under S. 48(b). It was argued for the petitioners that even the decision of the Regional Transport Authority fixing the number of vehicles under S. 48(a) was liable to be reviewed by the Courts. This must be conceded as every step in the restriction of a fundamental right must be a matter for judicial review, though actually it is difficult to see how the Court is in a better position than the transport authority in coming to a correct decision on the question. The following passages occurring in the judgment of Hughes C. J. in — 'St. Joseph Stock Yards Co. v. United States', (1936) 80 Law Ed 1033 may be usefully quoted:

"The Court does not sit as a board of review to substitute its judgment for that of the legislature or its agent as to matters within the province of either, when the legislature appoints an agent to act within that sphere of legislative authority it may endow the agent with power to make findings of fact which are conclusive, provided the requirements of due process which are specially applicable to such an agency are met as in according a fair hearing and acting upon the evidence and not arbitrarily. In such cases the judicial enquiry into facts goes no further than to ascertain whether there is evidence to support the findings and the question of the weight of evidence in determining the issues of fact lies with the legislative agency acting within its statutory authority."

The more important aspect of this restriction consists in the power of selection resulting in the exclusion of non-successful applicants. As to this, as already observed, it is the duty of the Provincial Government to frame rules for selection solely in the interests of the public and the limits within which Courts might interfere with such rules have been discussed; and the authorities are under a duty to apply such rules fairly and impartially; and their orders are liable to be reviewed by Courts and set aside if they are unreasonable or arbitrary.

(45) (4) A contention was raised that the restrictions imposed by the Motor Vehicles Act are repugnant to Art. 301 which provides that trade, commerce and intercourse throughout the territory of India shall be free. It is not disputed that commerce includes all forms of transportation and motor traffic is within that section but Art. 305 provides that nothing in Art. 301 shall affect the provisions of any existing law, and that will cover the Motor Vehicles Act. This objection must accordingly be overruled.

(46) To sum up (1) the citizens have a right to ply motor vehicles on public pathways and that is a business which is protected by Art. 19 (1)(g). (2) Any infringement of that right can be justified only if it falls within the scope of Art. 19(6). (3) Sections 42, 43A. Sec. 47(1) clauses (a), (b), (d) and (f), S. 48(a) and (b) and S. 64A of the Motor Vehicles Act are valid. Section 47(1)(c) is in part valid and S. 47(1)(e) is wholly void. (4) The grant or refusal of permits by the transport authorities in all its stages including S. 64-A is a judicial act. (5) The Provincial Government should frame rules laying down the principles on which the selection from among the applicants is to be made and such rules must be, as required by Art. 19(6), reasonable and in the interests of the public. (6) The rules so laid down should be followed by all transport authorities including the Government acting under S. 64A without any discrimination. (7) The decisions of the transport authorities granting or refusing to grant permits are liable to be reviewed by the Courts and set aside if they are unreasonable, arbitrary or discriminatory.

(47) After this judgment had been prepared and when it was about to be delivered, the decision of the Supreme Court in — 'Veerappa Pillai v. Raman & Raman Ltd.', Cr. A. 159 of 1951 on the file of the Supreme Court, was reported. As it appeared that some of the views expressed herein might require re-consideration in view of that decision the petitions were posted for further hearing and arguments have been addressed to us by the learned counsel on both sides on the scope and effect of the decision of the Supreme Court, on the points which have now to be determined.

(48) The facts in — 'Veerappa Pillai v. Raman and Raman Ltd', Cri. A. 159 of 1951 (SC) are briefly these: One Balasubramania Pillai was the owner of five buses with permits for running them on the route between Kumbakonam and Karaikal. Messrs. Raman and Raman Ltd. purchased buses from Balasubramania Pillai and applied for transfer of the permits to them. On the application of one Veerappa Pillai proprietor of Sathi Vilas Bus Service, the Transport Authorities suspended the permits in favour of Balasubramania Pillai and granted them to him. Then Veerappa Pillai purchased the buses from Balasubramania Pillai who had gone back on his transfer to Messrs. Raman and Raman Ltd., instituted a suit in the Sub Court, Kumbakonam to establish his title to the buses and obtained

decree. Against that decree Messrs. Raman and Raman Ltd., preferred an appeal to the High Court. While these proceedings were pending Veerappa Pillai first obtained a temporary permit for the buses and on 18-4-1949 the Transport Authorities granted permanent permits to him. On 2-9-1949 the High Court decided, in the appeal preferred by Messrs. Raman & Raman Ltd., that they were entitled to the buses and that Veerappa Pillai had not validly acquired them. Then Veerappa Pillai applied on 14-10-1949 for renewal of the permanent permits which had been granted to him and that was granted on 5-1-1950 there having been no objection to it. Messrs. Raman and Raman Ltd. applied on 28-11-1949 to the Regional Transport Authority for withdrawal of the permits, which had been granted on 18-4-1949 to G. Veerappa Pillai. On 19-1-1950 an order was passed cancelling the permits issued on 5-1-1950 to Veerappa Pillai, declaring the route vacant and calling for fresh applications. The Central Road Traffic Board set aside this order on 3-3-1950 and directed that the grant of permanent permits to Veerappa Pillai on 5-1-1950 should stand. A revision preferred under S. 64A to the Government was dismissed on 7-11-1950.

Then Messrs. Raman and Raman Ltd. moved this Court by a writ under Art. 226 to quash the order dated 19-1-1950, 3-3-1950 and 7-11-1950 and praying that permits might be issued to them; and this was ordered by this Court on the ground that the permanent permits had been issued to Veerappa Pillai on 18-4-1949 on the understanding that it was subject to the result of the decision of the High Court in the appeal preferred by Messrs. Raman and Raman Ltd. and that, therefore, permits should issue to them in accordance with the decision in that appeal dated 2-9-1949. On appeal against this judgment by Veerappa Pillai the Supreme Court held that the Motor Vehicles Act created a hierarchy of authorities for dealing with applications for permits, that their duties were prescribed by the Act, that their decisions were liable to be reviewed by the courts only if there was an error of jurisdiction or error apparent on the face of the record, that in fact the authorities did take into consideration several matters of which the ownership of the buses was only one, that there was the fact that Veerappa Pillai was running service on temporary permits from 1944, that there was also the fact that he had a permit from the French authorities at Karaikal which Messrs. Raman and Raman Ltd, had not, that the latter did not follow the procedure prescribed by the Act in that they applied for the withdrawal of permits granted to Veerappa Pillai whereas they ought to have objected to the grant of permits to him and that a decision based on a consideration of these facts was not liable to be reviewed by courts as if they were sitting in appeal and that the order granting the permits, to Messrs. Raman and Raman Ltd. which could be done only by the Transport authorities was in excess of jurisdiction.

(49) The decision so far as it goes, it is conceded, does not directly deal with any of the points which arise for determination in these applications. But certain observations occurring in the judgment would appear to lend support to the contentions of Mr. M. K. Nambiar for the respondents. The Supreme Court observed:

> "The Motor Vehicles Act is a statute which creates new rights and liabilities and prescribes an elaborate procedure for their regulation. No one is entitled to a permit as of right even if he satisfies all the prescribed conditions. The grant of a permit is entirely within the description of the transport authorities and naturally depends on several circumstances which have to be taken into acount"

and again

> "As observed already, the issue or refusal of permits is solely within the discretion of the transport authorities and it is not a matter of right."

(50) These observations are general and if full effect is to be given to them the answer to the first of the four questions formulated in this judgment must be in the negative and the second question will not arise for consideration. It is argued for the petitioners that the question whether the business of transport of buses was one which fell under Art. 19(1)(g) of the Constitution was neither argued nor decided in — 'Veerappa Pillai v. Messrs. Raman and Raman Ltd.', Cri. A. 159 of 1951 (SC) and that the question did not even arise for determination on the facts of that case and that the decision lays down only the law relating to the rights of citizens under the provisions of the Motor Vehicles Act prior to the Constitution. As already mentioned the competing claims of Messrs. Raman and Raman Ltd., and Veerappa Pillai had their origin in transfers from Balasubramania Pillai of the year 1944; the grant of permits eventually turned upon the grant of a permanent permit on 15-4-1949 to Veerappa Pillai and the failure of Messrs. Raman and Raman Ltd., to object to the grant of the renewal of the permits to Veerappa Pillai which was duly made on 5-1-1950 and the unsustainability, under the provisions of the Motor Vehicles Act, of the application of Messrs. Raman and Raman Ltd., dated 28-11-1949.

It was the order passed on 19-1-1950 on the application of Messrs. Raman and Raman Ltd., dated 22-11-1949 that was taken up in appeal before the Central Road Traffic Board, in revision before the Government, in Writ in the High Court and in appeal to the Supreme Court. Therefore at all stages what had to be decided were the rights of the parties under the Motor Vehicles Act prior to the Constitution. The learned Advocate General and other Counsel who appeared in Supreme Court in — 'Veerappa Pillai v. Messrs. Raman and Raman Ltd.', C.A. 159 of 1951 (SC) also state that no question was raised and no arguments were addressed on the basis of the Constitution.

(51) When questions of a judicial character are entrusted to the decision of statutory bodies it will make a difference in the powers of interference which the Courts possess according as they relate to fundamental rights or not. Where there is no question of fundamental rights, involved, and that is the position in England where the Legislature is omnipotent and that will also be the position in India with reference to matters other than those falling under Part 3 the power of the court to interfere with the decisions is limited to cases in which there is an error of jurisdiction or error apparent on the face of the record and the like but where the decision is in respect of fundamental rights protected by the Constitution the Court

has the power and indeed is under a duty to examine whether the decision impugned satisfies all the statutory requirements, as for example, in a case falling under Art. 19 (1) (g) whether the restrictions are reasonable and in the interests of the public. The Motor Vehicles Act was passed in the year 1939 and at that time the powers of the Indian Legislature acting within the ambit of the jurisdiction conferred upon it, were sovereign plenary and therefore the decisions of the Transport Authorities constituted under the Act were liable to be questioned only if there was an error of jurisdiction or an error apparent on the face of the record.

In — 'Veerappa Pillai v. Messrs. Raman and Raman Ltd.', (Cri. A. No. 159 of 1951) the Supreme Court was called upon to decide the rights of the parties under the Motor Vehicles Act before the Constitution and it is in that context that the Supreme Court observed as follows:

> "Such writs as are referred to in Art. 226 are obviously intended to enable the High Court to issue them in grave cases where the subordinate tribunals or bodies or officers act wholly without jurisdiction or in excess of it, or in violation of the principles of natural justice, or refuse to exercise a jurisdiction vested in them, or there is an error apparent on the face of the record and such act, omission error or excess has resulted in manifest injustice."

That precisely is the jurisdiction of the English Courts in issuing Writ against the decisions of tribunals constituted under Acts of Parliament. As observed by Lord Sumner in — 'R. v. Nat Bell Liquors Ltd.', (1922) 2 A C 128 at p. 156, the supervisory jurisdiction through the writ of Certiorari extends "to two points". One is the area of the inferior jurisdiction and the qualifications and conditions of its exercise; the other is the observance of the law in the course of its exercise. Vide the decision of the Court of Appeal in R v. Northumberland Compensation Appeal Tribunal', 1952-1 All E R 122 affirming the decision in 1951-1 All E R 268.

The observations of the Supreme Court that the provisions of the Motor Vehicles Act which prescribe an elaborate procedure for the grant of permits are self-contained, that the applicant has no absolute right to get a permit and that it is within the discretion of the authorities to grant or refuse one, would if we may respectfully say so, correctly represent the position under the Act before the Constitution; for the legislature was the omnipotent and the citizen had no fundamental right on the ground of violation of which any legislation could be challenged. He must be content with what the legislature chose to give him; his rights were only under the Act. Thus all the observations in the judgment in—'Veerappa Pillai v. Messrs. Raman and Raman Ltd.', read along with the subject matter of the appeal clearly show that they define the rights of the applicants under the Motor Vehicles Act before the Constitution.

(52) Where the question arose with reference to fundamental rights the Supreme Court held that the validity of the decisions of the licensing authorities must be judged with reference to the provisions of Part 3 of the Constitution. Vide — 'Rashid Ahmed v. Municipal Board, Kairana', 1950 S C J 324.

(53) After bestowing the most anxious and careful consideration to the question we are of opinion that the observations in — 'Veerappa Pillai v. Raman and Raman Ltd.', Cri. A. No. 159 of 1951 (SC) quoted above must be limited to cases under the Motor Vehicles Act arising before the Constitution.

(54) In this view the petitions will be posted for arguments on the merits.

A/D.H. Order accordingly.

A.I.R. 1953 MADRAS 296 (Vol. 40, C.N. 103)

SATYANARAYANA RAO
AND RAJAGOPALAN JJ.

P. L. SP. NK. Nagappa Chettiar, Appellant v. Veeyares and Co. by its Sole-Proprietor, NL. VR. VR. Veerappa Chettiar, Respondent.

Appeal No. 568 of 1948, D/- 8-8-1952.

Contract Act (1872), S. 23 — Budla Contract — Defence of India Rules, Rule 94 C — Public Policy.

Penal provisions of any statutory rule must be construed strictly. Rule 94-C, Defence of India Rules, in terms did not prohibit 'budla' contracts, nor did it penalise the parties themselves who entered into such budla contracts. That rule only made it illegal for the Stock Exchange to afford facilities for entering into such a contract or settling the claims on the basis of such a contract. Hence a right to enforce a budla contract entered into when R. 94-C was in force, cannot be negatived on the ground that such a contract is opposed to public policy. C. S. No. 226 of 1945 (Mad), Not foll.; O. S. A. No. 4 of 1948 (Mad), Disting. (Paras 22, 23)

Where the rules of the Stock Exchange prohibited anything but ready delivery contracts, thereby prohibiting budla contracts and carry over, it was held that the rules did not prohibit any settlement between the two contracting parties so long as that settlement was without recourse to the Stock Exchange itself. (Para 25)

Anno: Contract Act, S. 23 N. 12.

G. Jagadisa Aiyar, for Appellant; P. Somasundaram and G. R. Jagadisa Aiyar, for Respondent.

REFERENCES: Courtwise/Chronological/ Paras

('45) C. S. No. 226 of 1945 (Mad) 26
('48) O. S. A. No. 4 of 1948 (Mad) 26
(1900) In re Overweg; Haas v. Durant, (1900) 1 Ch 209 9

RAJAGOPALAN J.: The proprietors of the plaintiff firm described it as a firm of stock and share brokers. His place of business was Devakottah. In para 4 of his written statement the defendant contended that the plaintiff was both a broker and a dealer in shares. The defendant did not challenge the correctness of the plaintiff's description of the defendant as a dealer in shares. The defendant was also a resident of Devakottah. Both parties agreed that transactions between them in purchase and sale of shares commenced on 7-6-1945. The plaintiff claimed that the transactions between himself and the defendant formed the basis of an open, mutual and current account between them. The plaintiff's claim in the suit was for the amount due to him on an account stated to the defendant. The learned Subordinate Judge decreed the plaintiff's claim. The defendant appealed.

(2) Though the appeal was against the decree as a whole, learned counsel for the appellant confined his arguments to four sets of transactions.

He explained that the liability the plaintiff sought to enforce on the defendant under these four sets of transactions more than covered the amount decreed.

(3) The genuineness of the contracts evidenced by Exs. B. 1 to B. 4 was not in dispute. Ex. B. 1 was on 7-11-1945 under which the defendant sold 200 steel Corporation shares at Rs. 36-11-0 a share. The contract number was 1031. Contract No. 1067 evidenced by Ex. B. 2 was on 13-11-1945, for sale by the defendant of 100 more Steel Corporation shares, at the same price Rs. 36-11-0 a share. Under contract number 1066, Ex. B. 3 dated 13-11-1945, the defendant sold 100 Indian Iron shares at Rs. 41-8-0 a share. The fourth contract, Ex. B. 4, No. 1094, was on 24-11-1945, for the sale by the defendant of 100 more Indian Irons at Rs. 42-9-0 a share. Ex. B. 1 recorded that the delivery of the shares was subject to the rules and usages of the Bombay Stock Exchange. The date of the contract was 7-11-1945 and the date of settlement was shown in Ex. B. 1 as 13-11-1945. The other three contracts, Ex. B. 2, B. 3 and B. 4 were for delivery under the rules etc of the Calcutta Stock exchange. Neither the plaintiff nor the defendant was a member of either of the Stock Exchanges at Bombay and at Calcutta.

(4) It was common ground again that before September 1943, the rules of the Bombay Stock Exchange provided for budla contracts, i.e., forward contracts in shares while the Calcutta Stock Exchange provided only for ready delivery contracts. But in 1945-46 neither the Bombay nor the Calcutta Stock Exchange rules provided for budla contracts. The rules of both the Stock Exchanges were in accordance with Rule 94-C, Defence of India Rules, which was in force between 24-9-1943 and 30-9-1946. The Bombay, Calcutta and Madras Stock Exchanges, which framed the rules consistent with Rule 94-C of the Defence of India Rules, provided only for ready delivery contracts.

(5) The plaintiff's claim as formulated in paras 4, 5, and 6 of the plaint was as follows:

"4. It is the usual course of business of the plaintiff to be employed by his several constituents as broker to effect purchases and sales of shares on their behalf they agreeing and undertaking to indemnify the plaintiff against the liability to be incurred by him in the course of such sales and purchases on their behalf according to practices and usages incidental in the said line of business and to pay the plaintiff such amounts as he may employ in respect of the orders to him by the constituents or for which they may render themselves liable together with interest thereon and commission at the agreed rate and to open as directly flowing from such employment a running account of dealings with such constituents debiting and crediting the several amounts in the account against such constituents which may arise in the course of such employment ..... Inter alia it is necessarily incidental in the course of such business to credit or debit as the case may be, customary 'carry over' charges ..... as well as to buy or sell out shares on behalf of the constituents by way of covering their orders, at the discretion of the said broker after previous demand, to fulfil their orders according to their tenor and after carrying over in accordance with trade usage for such time at their discretion as may be thought necessary to enable the constituents to fulfil such orders.

"5 In accordance with the said usual course of business and subject to the incidents of trade usage and undertaking in the manner aforesaid, the defendant employed the plaintiff as broker to effect purchases and sales of shares on his behalf under his order on and from 7-6-45 at Devakottai. Consequently a mutual open and current account of dealings was opened for him in the ledger folio kept by the plaintiff ..... The defendant has been also advised from time to time of the several transactions and entries regularly and promptly in the course of business made in accordance with the orders and requests of the defendant from time to time. Statements of account also have been furnished from time to time to him.

"6 On 3-4-1946 the excess debit in dealings on account as on that date came to Rs. 7356-10-0. A letter of demand was communicated on that date to the defendant calling upon him to pay that amount & also to deliver the 200 Indian Irons and 300 steels which he had not delivered till then in spite of time being granted to him at his request. The defendant did not comply with the same. Consequently on 12-4-1946, 200 Indian Irons and 300 Steels were "bought in" in the usual course of business in the market and the accounts were closed....."

(6) The history of the four sets of transactions commencing with Ex. B. 1 to Ex. B. 4 was explained during the trial. The plaintiff's case was that the two contracts Ex. B. 1 and B. 2 were carried over on 15-12-45 under contract No. 1262, with the price of the 300 steels shares at Rs. 44 a share, as against the original price of Rs. 36-11-0 a share. The next carry over was on 20-2-1946 under contract No. 1557, with the price Rs. 46-0-6 per share. This was again carried over on 11-3-46 under contract No. 1603 at Rs 54 a share. The final carry over was on 12-4-1946 under contract No. 26 with the price Rs. 52-12-0 a share. This was less than the contract price of Rs. 54 which was the market rate on 11-3-1946, and the defendant was credited with the difference. On the earlier occasions, he was debited with the differences. Virtually the plaintiff's claim was for the difference between the Rs. 36-11-0 and Rs. 52-12-0 a share.

(7) Ex. B. 3 and B-4, the plaintiff claimed, were carried over on 15-12-1945 under contract No. 1263 at Rs. 50 for each of the 200 Indian Irons dealt with under Exs. B. 3 and B. 4. This was carried over on 1-2-1946 under contract No. 1515 and again on 22-2-1946 under contract No. 1554. On 11-3-1946 it was again carried over under contract No. 1605 at Rs. 59 a share. On each of these dates, the defendant was debited with the differences between the rates of the previous contract and the next contract. The final carry over was on 12-4-1946 under contract No. 25. The price had fallen by then to Rs. 57-10-0 and the defendant was credited with the difference between Rs. 59 and Rs. 57-10-0 a share.

(8) The defence, as reiterated by learned counsel for the appellant during his arguments before us, was (1) neither under any of the contracts Exs. B. 1 to B. 4 nor at any time thereafter had the plaintiff a right to carry over, (2) even if such a contract could be spelled out, it was illegal and unenforceable in law, and (3) since the plaintiff's claim was that of a broker, based on a right to indemnity, in the absence of proof of loss sustained by the plaintiff, he was not entitled to recover anything.

(9) In Halsbury's Laws of England (Hailsham Edn) Vol 31, page 581, Para 797 the learned author explained the scope of carry over. He observed:

" 'Carry over' or 'continuation' consists of two operations, namely: (1) a repurchase for

the current account of securities sold for that account (or conversely a resale of securities bought) effected in order to close an existing bargain: and (2) a new sale or purchase, as the case may be, for the new account."

In para 840, it was further explained thus:

"Continuation or carrying over is in form and in law a sale and repurchase, or a purchase and resale, as the case may be. It is a new contract and not merely getting further time for the performance of the old contract."

Much the same was said at greater length in the Laws of Stock Exchange, Schwabe and Branson, 2nd Edn. pages 66 and 67. Winding up the discussion, the learned authors pointed out:

"The result of these two operations is that the bargain is closed and a new one is opened for the ensuing account at the price fixed."

In re,—'Overweg: Haas v. Durant', (1900-1 Ch 209) furnished the authority for the statement in para 316 at page 539 of Vol. 31 of Halsbury's Laws of England:

"In the absence of instructions to do so, a broker has no authority to carry over his client's bargains."

The learned authors proceed further:

"Such instructions will not be implied from the fact that a client who has purchased does not provide money by account day with which to take up the securities bought; but an authority to carry over may be implied from instructions to do so given in respect of a previous account and not revoked."

(10) The right of carry over that the plaintiff claimed in this case was explained by him as P. W. 1:

"Delivery must be made to me in time .... In default carry over charge must be paid in addition to delivery. In default it will automatically be carried over to the next settlement. I will carry over so long as I find it convenient. Then I would give notice to say that if delivery is not made within a particular time, I would cover the transaction. In case of default I would buy in the market and fulfil the contract .....It was expressly agreed between us that the business should be done according to the trade usage as spoken to by me now."

From the history of the transactions furnished in the earlier paragraphs, it should be clear that the carry over was not on each of the settlement dates following the original contracts Ex. B. 1 to B. 4, but on dates chosen by the plaintiff. Such a usage or a right based on such a usage has to be negatived even on the basis of the evidence of P. W. 4, who represented a firm of stock brokers at Madras, and who was examined as an expert witness. P. W. 4, stated

"The business with our clients is adjusted either by giving delivery or taking delivery as the case may be, or otherwise carrying over the outstanding transactions to the next weekly settlements or delivery dates. I mean by carrying over the following: If there is a sale by a particular client the sale is bought back for the same settlement at the board rate fixed for that settlement and a sale note given for the next settlement leaving a difference between the bought and sale rates representing the carry over charges. We are carrying forward the same transactions. The carry over charges represent the difference between the purchase or sale or the current settlement and the corresponding sale or purchase for the next settlement. The carry over charge may be either a debit or a credit. In adopting the carry over charges we adopt the procedure followed by the Bombay brokers."

Even P. W. 1's evidence extracted above would support the claim of P. W. 4, that the right to carry over must be exercised on the ensuing settlement date.

(11) It should be remembered that only the rules of the Bombay Stock Exchange permitted carry over, and that too was before September 1943. Between 1945 and 1946, neither Bombay nor Calcutta Stock Exchange permitted carry over in the rules framed by them.

(12) It is not really necessary in this case to refer to the rules and usages of the Calcutta or Bombay Stock Exchange to determine the real nature of the transactions between the plaintiff and the defendant, the real basis of the liability which the plaintiff seeks to enforce in this suit. Whether the plaintiff had an automatic right to carry over at his convenience need not arise for decision at all in this case. Whether on each of the occasions subsequent to Exs. B. 1 to B. 4. i.e., when, according to the plaintiff, the contracts bearing Nos. 1262, 1557, 1603 and 26 (with reference to Ex. B. 1 and B. 2) and the contract Nos. 1263, 1515, 1554, 1605 and 25 (i. e., with reference to Exs. B. 3 and B. 4) were entered into there was a fresh contract between the plaintiff and the defendant, and whether each of those contracts was enforceable would be the real points for determination at this stage. To illustrate: the plaintiff's case was that Exs. B. 1 and B. 2 were carried over to contract No. 1262 on 15-12-1945. The effect of contract No. 1262 was that the defendant's liability under Exs. B. 1 and B. 2 was ascertained on 15-12-1945; he had to pay the difference between Rs. 36-11-0 and Rs. 44 a share, which latter figure represented the market price of the shares on 15-12-1945. There was a fresh sale on 15-12-1945. If that was the scope of contract No. 1262, was such a contract accepted by both the plaintiff and the defendant, and was such a contract enforceable are the questions. In other words, was the basis of the defendant's liability a unilateral act of the plaintiff or a bilateral contract between the plaintiff and the defendant? If contract No. 1262 evidenced a bilateral agreement which both the plaintiff and the defendant accepted, the question whether Ex. B. 1 or Ex. B. 2 or both provided for a carry over exercised by the plaintiff by his unilateral act need not be considered at all.

(13) It was common ground that Exs. B. 1 to B. 4 represented contracts concluded between the plaintiff and the defendant. Exs. B. 1 to B. 4 were styled memoranda of confirmation. They were sent by the plaintiff to the defendant. It was the acceptance of each of these memoranda of confirmation that marked the conclusion of each of those contracts.

(14) The procedure adopted by the plaintiff and the defendant in the course of their dealings can be gathered from the evidence on record. We have already pointed out that, though before September 1943 the Bombay Stock Exchange rules permitted carry over, in 1945-46 neither of the Stock Exchanges permitted carry over transactions by their rules. Ex. A. 4 showed that even prior to 7-11-1945, i. e., even before the date of Ex. B. 1, there were carry over transactions between the plaintiff and the defendant. No doubt, the receipt of Ex. A. 4 was denied by the defendant, but we agree with the learned Subordinate Judge in rejecting that denial as untrue. Apart from these transactions being consistent with the procedure followed with reference

to Exs. B. 1 to B. 4 also, nothing very much really turns on the transactions prior to the date of Ex. B. 1.

(15) Either on the basis of standing or specific instructions, the plaintiff bought or sold shares for the defendant. That was followed up by the despatch of confirmation memoranda by this plaintiff which also gave the number of the contract for each transaction. (After tracing the procedure adopted by the parties and weighing the evidence His Lordship agreed with the Subordinate Judge who held that no credence could be attached to the testimony of the defendant and concluded:) There was this ample evidence to prove the plaintiff's case, that each of the contracts that followed Exs. B. 1 to B. 4 was accepted then and there by the defendant. He never repudiated any of them till after the receipt of the plaintiff's notice.

(16) We have already referred to the implications of the acceptance by the defendant of each of the contracts subsequent to Exs. B. 1 to B. 4. On each occasion there was a fresh contract for the delivery of shares. It should be remembered that the fresh contract was not for the delivery of the identical shares of the previous contract but a fresh contract for the delivery of a similar number of shares.

(17) Learned counsel for the appellant contended that the confirmation memoranda did not constitute evidence of fresh contracts, but that they evidenced only an exercise of the right to carry over, which right was not conferred by any of the original contracts, Exs. B. 1 to B. 4 under their terms: We are unable to accept this contention. The course of transactions between the parties, to which we have referred in detail above, even independent of the very essence of a carry over, clearly indicated that on each occasion when a confirmation memorandum was sent by the plaintiff to the defendant, acceptance of that memorandum marked the conclusion of a fresh contract.

(18) Were any of these contracts unenforceable in law is the next point for consideration.

(19) Learned counsel for the appellant urged that budla contracts were illegal and unenforceable. 'Ex facie' the documents even Exs. B. 1 to B. 4 did not profess to be budla contracts. No doubt, Ex. B. 1 showed that the contract was governed by the rules of the Bombay Stock exchange, and the date of settlement was shown as 13-11-1945; but by then even the Bombay Stock exchange did not allow for budla contracts. Thus each of the contracts, Exs. B. 1 to B. 4 were 'ex facie' only ready delivery contracts. That the settlements were not effected between the plaintiff and the defendant on the due settlement dates fixed by the rules of the Bombay or Calcutta Stock Exchange but were effected long after does not make the contracts themselves, Exs. B. 1 to B. 4 any the less ready delivery contracts. So the question, whether budla contracts were illegal and unenforceable, does not really arise for determination in this case. Each of the contracts between the plaintiff and the defendant was for ready delivery.

(20) Even if we assume that despite the tenor of the memoranda of confirmation evidencing the contracts, in substance, each of the contracts was not for ready delivery but for budla, we should hold that none of the contracts was unenforceable in law. S. 23 of the Indian Contract Act runs:

"The consideration or object of an agreement is lawful unless—
It is forbidden by law; or
is of such a nature, that, if permitted, it would defeat the provisions of any law; or
is fraudulent; or
involves or implies injury to the person or property of another; or
the Court regards it as immoral, or opposed to public policy.
In each of these cases, the consideration or object of an agreement is said to be unlawful. Every agreement of which the object or consideration is unlawful is void."

(21) The contention, that budla contracts were illegal and, therefore, came within the scope of S. 23, Contract Act, was based on Rule 94-C, Defence of India Rules. Rule 94(C)(1) contained the definitions including the definition of budla. Rule 94-C(2) ran:

"No stock exchange shall, after the 24th September 1943, permit or afford facilities for—
(a) the transaction of budla;
(b) the making of any contract other than a ready delivery contract; or
(c) the carrying out or settlement of any bulda transaction or any contract other than a ready delivery contract."

Sub-section (3) of Rule 94-C ran:

"Any director, Manager, secretary or other officer of a Stock Exchange who contravenes any of the provisions of this rule shall be punishable....."

(22) The provisions of Rule 94-C, Defence of India Rules, did not specifically prohibit budla contracts as such. The rule prohibited the authorities of the Stock Exchange from affording facilities to its members for entering into budla contracts or for settling such contracts. The prohibition & the penal clauses applied only to the stock exchanges. Penal provisions of any statutory rule must of course be construed strictly. Possibly, it was not considered necessary by those who enacted R. 94-C, Defence of India Rules, to penalise gambling in shares by forward or budla contracts so long as facilities for such gambling were penalised. It is not however necessary to consider what prompted such legislation. What we have to consider is the effect of the statutory rule Rule 94-C, as it stands. As we have said before, R. 94-C in terms did not prohibit budla contracts, not did it penalise the parties themselves who entered into such budla contracts. Rule 94-C in our opinion, does not furnish any basis for an argument, that a budla contract was itself illegal.

(23) The next question is, in view of Rule 94-C, Defence of India Rules, were budla contracts opposed to public policy, and as such did they come within the scope of S. 23, Contract Act. It should be remembered that Rule 94-C, Defence of India Rules, was in force only for a period of three years between September 1943 and September 1946. Budla contracts with a right to carry over were known and accepted by many Stock Exchanges including the Bombay Stock exchange. No instance has been brought to our notice where before 1943, a right to enforce a budla contract. i.e., a right to carry over, was negatived on the ground that such a contract was opposed to public policy. If, as we have already pointed out, R. 94-C, Defence of India Rules, did not make the contract itself illegal, but only made it illegal for the Stock Exchange to afford facilities for entering into such a contract or settling the claims on the basis of such a contract, we fail to see any real basis in R. 94-C for an argument that such a contract was opposed to public policy.

(24) Rule 94-C, Defence of India Rules, in our opinion, is not enough to bring within the scope of S. 23, Contract Act, any contract for budla or carry over Rule 94-C, Defence of India Rules does not bar the enforcement of rights and liabilities under such contracts by a court. No doubt it was common ground that the stock exchanges all over India framed rules to accord with R. 94-C, Defence of India Rules. The rules of the Madras Stock Exchange during the relevant period, and the rules of the other stock Exchanges were similar to these, ran:

"Read the Defence of India rule No. 94-C published by the Government of India coming into force from the 24th September 1943.

1. Resolved, that notwithstanding the existing rules of the Association to the contrary:

(a) all transactions shall be done by Members for Ready Delivery and the terms 'Ready delivery' be mentioned in all contracts passed by the Members of the Association; on no other terms shall Members be allowed to do business;

(b) .....

(c) Members shall not accept havalas between themselves or from non-members in respect of deliveries to be made under 'ready delivery' contracts mentioned in para (a) above; this however shall not preclude members from accepting delivery instructions from clients."

The rules of the Stock Exchanges subsequent to September 1943 no doubt prohibited anything but ready delivery contracts. But it was not these rules that made budla contracts providing for carry over illegal; nor could it be urged on the basis of the rules of the Stock Exchange that a budla contract was opposed to public policy. As we have already pointed out, if R. 94-C, Defence of India Rules, itself did not make a budla contract as such illegal or opposed to public policy, Rules of the Stock Exchange framed to conform to R. 94-C, Defence of India Rules, could not be opposed to public policy. Besides, it should be fairly obvious that the rules of the Stock Exchanges were modified subsequent to 24-9-1943 only to give effect to R. 94-C, Defence of India Rules, which laid certain obligations on the stock Exchanges and their officers. No doubt the plaintiff was not a member of any Stock Exchange, but then the contracts he entered into with the defendant were made subject to the rules of the Bombay or Calcutta Stock Exchange.

(25) Though the rules of the Stock Exchange prohibited anything but ready delivery contracts, thereby prohibiting budla contracts and carry over, we are unable to construe the rules as prohibiting any settlement between the two contracting parties so long as that settlement was without recourse to the Stock Exchange itself. Nor are we able to see anything in the rules of the Stock Exchange or in R. 94-C, Defence of India Rules, prohibiting a fresh contract between the parties, a contract not prohibited either by law or by the rules of the Stock Exchange.

(26) Learned counsel for the appellant invited our attention to an unreported decision of Mack J. in 'C. S. No. 226 of 1945 (Mad)' etc. With all respect to that learned Judge we find ourselves unable to follow his reasoning. The decision, we are informed, is the subject-matter of an Original Side Appeal, and we have therefore refrained from considering in detail the reasons given by that learned Judge for holding that a budla contract fell within scope of S. 23, Contract Act, and was unenforceable, if the contract was entered into during the period R. 94-C, Defence of India Rules was in force. The unreported decision of Rajamannar C. J. and Panchapakesa Aiyar J. in 'O. S. A. No. 4 of 1948 (Mad) was also referred to during the course of the arguments before us. But that dealt with a case of an extension of time & it afforded no direct authority for a decision of the question, whether a contract to carry over entered into between 1945 and 1946 was unenforceable.

(27) Our finding is that each of the contracts subsequent to Exs. B. 1 to B. 4, i.e., contracts Nos. 1262, 1557, 1603, and 26, and 1266, 1515, 1554, 1605 and 25 was true and that each of the contracts was enforceable.

(28) The only other contention of the learned counsel for the appellant that remains to be disposed of is that in the absence of proof of any claim in the suit was really based on a right to loss sustained by the plaintiff he was not entitled to any damages; he was only a broker, and the indemnity. In analysing the transactions between the parties we have already pointed out that at the date of each contract, there was a determination of the liability under the previous contract and a fresh contract to sell i.e., to sell for ready delivery. After the last of those contracts, 25 and 26, the plaintiff proved he bought in shares to cover the contracts that had been entered into by the defendant. Though there was reference to a right to indemnity in the plaint, the real nature of the transactions between the parties, in our view, was to ascertain the liability of the parties at each stage. That itself was accepted by both the parties and that led to a fresh contract at each stage. The appeal fails and is dismissed with costs.

B/V.S.B. Appeal dismissed.

A.I.R. 1953 MADRAS 300 (Vol. 40, C.N. 104)

RAJAMANNAR C. J. AND VENKATARAMA AIYAR J.

V. L. Narasu, carrying on business under the name and style of Narasu Pictures Circuit, Appellant v. P. S. V. Iyer and others, Respondents.

Original Side Appeal No. 49 of 1950, D/- 1-8-1952.

Contract Act (1872), Ss. 56 and 39 — Becomes impossible — Suit for damages for breach of contract — Contract in writing but not containing condition excusing non-performance — Applicability of doctrine of frustration — Self-induced frustration — Burden of proof — (Evidence Act (1872), Ss. 101-103).

A contract may be in writing and embody the terms agreed to by the parties and may not contain a condition excusing non-performance under certain contingencies; but still in the absence of any thing to indicate a contrary intention, there is an implied condition that the contract will cease to operate if the basis on which it rests disappears or becomes fundamentally altered. (Paras 6, 10)

The change, however must be of a fundamental and sweeping character which kills the contract itself and not merely one of a temporary nature which leaves the contract alive and capable of being performed at a future date. That question is a question of fact to be determined on a consideration of all the facts. (Para 14)

Where the contract is one to which this principle known as the doctrine of frus-

tration is applicable the fact that the performance under the contract is a continuing one over a period and not confined to a single venture does not make it inapplicable. (Para 11)

But mere frustration does not excuse the parties of non-performance. As a result of the combined effect of Ss. 56 and 39, Contract Act, which is the law in India governing the matter, the frustration must be one which is not self-induced. (Para 22)

The burden of establishing that the frustration is self-induced is on the plaintiff. (Para 23)

That it is self-induced cannot be established by showing the existence of mere passive negligence. It is not every negligent act or omission to which the frustration might ultimately be traced that can be held to be default or neglect such as would exclude the application of the principle of frustration. It should be of such a character that it might be fairly inferred therefrom that the promisor has no intention of performing the contract and has in effect repudiated it. The conduct must be such as could be held to amount to repudiation within the meaning of S. 39 of the Contract Act. (Para 20)

The fundamental basis, upon which a contract between the producer and a theatre owner to show a picture at the theatre, for a period and share the profits during that period rests, is the continued existence of the theatre. If the theatre owner who bought the theatre, was not aware of any defects in the building and subsequently owing to the authorities declaring it unsafe and ordering it to be demolished the show is interrupted there is frustration of a fundamental character and the plea of the producer that the theatre had been reconstructed subsequently and therefore the show could have been resumed is unsustainable when the reconstructed building, completed after a long lapse of time, radically differs from the original theatre in point of structure, accommodation and earning capacity and also due to the fact of delay the picture in question might not attract as much crowd as it might have done before because of the ephemeral and evanescent attractions that pictures generally have. If in such a case the producer only charges the theatre owner with mere negligence and not negligence which would amount to repudiation under S. 39, Contract Act he would not be entitled to any damages. (Paras 4, 10, 16, 17, 25, 27)

Anno: Cont. Act, S. 56 N. 2; S. 39 N. 2; Evi. Act, Ss. 101-103, N. 25, 44.

N. Rajagopala Iyengar, for Appellant; S. Sankara Iyer, T. S. Rangarajan, K. S. Sankara Ayyar, V. Sundaresan and A. K. Sriraman, for Respondents.

REFERENCES: Courtwise/Chronological/ Paras

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(1918) AC 119: (87 LJ KB 370) 17
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(1926) AC 497: (95 LJ PC 121) 7
(1942) AC 154: (110 LJ KB 433) 6, 8, 21, 22, 23
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(1863) 3 B & S 826: 122 ER 309 4, 6, 8, 21
(1875) 10 CP 125: (44 LJ CP 27) 17
(1856) 5 HLC 673: (25 LJ Ex 253) 6
(1916) 1 KB 811: (85 LJ KB 919) 15
(1921) 2 KB 526: (90 LJ KB 707) 21, 22
(1948) 1 KB 184: (1947-2 All ER 666) 17

VENKATARAMA AIYAR J.: This is an appeal by the defendant against the judgment and decree in C. S. No. 118 of 1947 on the file of the Original Side of this court. The appellant is the Managing Director of a company called the Presidency Talkies Ltd., which owns a cinema house called "the Paragon Talkies". The plaintiff is the producer of a film called "Rukmangadan". On 31-8-1946 an agreement was entered into between the parties, (Ex. P. 1) for exhibiting this picture in the Paragon Talkies. The agreement runs as follows:

31st August 1946

"To
Mr. P. S. V. Aiyar,
Messrs. Ayyar Productions,
Mount Road, Madras.
Dear Sir,

In continuation to our letter of the 28th inst. and with further reference to our personal interview of the 30th, we agree to release your picture 'Rukmangadan' featuring G. N. B. and others, in continuation of "Mayamachindra" in our Paragon Talkies, Madras, on the following terms:

1. Date of release: In continuation to 'Mayamachindra' failure on your part to supply your picture immediately in continuation of "Mayamachindra" shall make this contract null and void, but on or before 10-10-1946.
2. Percentage: Sixty per cent of the nett collections, for the first week, 55 per cent for the second week and 50 per cent thereafter throughout to be to your share.
3. Hold over: The picture will be stopped when the weekly nett collections fall below the hold over figure of Rs. 3600 nett.
4. Publicities: All publicities inclusive of Banners, Posters, press publicities, Theatre decorations, etc., to be done by you, and towards our share of advertisement charges we will pay you a sum of Rs. 125 per week for the first eight weeks and thereafter Rs. 100 only per week.
5. General: Usual Theatre free passes will be issued by us. Your share of the picture will be paid at the end of each week.

Yours faithfully
for Narasu Pictures Circuit,
(signed) V. L. Narasu
I agree to the above for Ayyar Productions.
(signed) P. S. V. Ayyar."

The picture was put on board on 23-10-1946 and was running till 5-12-1946. In the beginning of December 1946 there were heavy rains and on the night of 5th December a portion of the rear wall of the talkies collapsed and three persons were killed. On receipt of this information the Police telephoned to Mr. Meeran, Engineer of the Corporation of Madras to inspect the premises and report on their condition. The report which he sent is Ex. P. 2(a). Therein he stated that pending a thorough investigation by him which could not then be carried out owing to rains, "the performance in the Theatre should be suspended". On this, the Commissioner of

Police directed the defendant "to suspend shows in the Talkies from today onwards until further orders, as the Engineer of the Corporation of Madras has certified that the Talkies is unfit to be used for the shows at present" (Exs. P. 2 dated 6-12-1946). By Ex. P. 3 the defendant communicated this to the plaintiff on the same day.

(2) On 14-12-1946 the premises were again inspected both by the Corporation Engineer and the Commissioner. The Engineer was definitely of the opinion that the building was "unsafe for being used as a Cinema Theatre or for any other public purpose". On this, the Corporation Commissioner wrote to the Commissioner of Police Ex. P. 4 as follows:

> "In my opinion, the whole building should be pulled down immediately so as to avoid any further mishaps and should be reconstructed as I do not consider the existing structure to be sound.....Under the circumstances, I would request you to cancel the licence already issued to the Paragon Talkies and not to renew it until the building is reconstructed and the Chief Engineer to Government certifies it to be sound and safe."

This was communicated to the defendant, who thereupon wrote Ex. P. 5 to the plaintiff on 19-12-1946. Therein, after setting out the above facts, the defendant wrote "consequently we regret to inform you that our contract to exhibit your picture 'Rukmangadhan' at the Paragon Talkies has lapsed because of impossibility of performance." A cheque for Rs. 307-15-6 being the amount due to the plaintiff on account of the collections on the 4th and 5th December 1946 was also enclosed along with Ex. P. 5 and was received by the plaintiff without prejudice to his rights under the contract. After a preliminary exchange of notices, Ex. P. 7 and Ex. P. 8, the plaintiff instituted the suit, out of which the present appeal has arisen claiming Rs. 35000 as damages for breach of contract by the defendant. In the plaint, it is alleged that under the agreement between the parties the defendant was under an absolute obligation to exhibit the picture; that he was further negligent in that he did not maintain the Theatre in a proper state of repair; and that, therefore, he was in default and liable for damages. The defendant filed a written statement denying that he was under any absolute liability to exhibit the picture whether the Theatre was in existence or not; he also denied that he was negligent in the maintenance and upkeep of the Theatre. He contended that the contract had in the events which had happened become impossible of performance and frustrated; that he was, therefore, discharged from his liabilities thereunder, and that, in any event, the damages claimed were excessive. The suit was heard by Mr. Mack J. who held that there was in the contract an implied warranty by the defendant "that the Paragon Talkies would be available for the running of this picture throughout the period the parties contemplated"; and that further "the plaintiff had succeeded in proving positively default or neglect on the part of the defendant in addition to establishing the breach of the implied warranty in the suit contract." On the question of damages, he held that there were no data available for determination of the same and awarded a decree for Rs. 25000 in favour of the plaintiff. The defendant appeals.

(3) On the contentions that have been urged before us three questions arise for determination:

(1) Whether the liability undertaken by the defendant under Ex. P. 1 was absolute and whether he is, in consequence, liable for a breach of warranty; or whether there has been frustration of the contract so as to discharge him from his obligations thereunder;

(2) Whether the defendant is liable on the contract on the ground that the frustration resulted from his own default or neglect, and

(3) to what damages, if any, the plaintiff is entitled.

(4) On the first question, it is necessary to refer to the facts on which the contentions are based. Under Ex. P. 1 the appellant agreed to exhibit the picture in "our Paragon Talkies". This Theatre belonged to the Presidency Talkies Ltd. of which he was the Managing Director and in which he held the majority of shares and the agreement was for sharing of collections between the producer of the picture and the owner of the Theatre. The continued existence of the Theatre is the fundamental basis on which this agreement rests and that is also implied in clause (3) which prescribes the hold over figure and clause (5) which refers to the issue by the defendant of the "usual Theatre free passes". The following observations of Justice Blackburn in — 'Taylor v. Caldwell', (1863) 3 B & S 826: 122 E R 309 at 312 construing a similar agreement aptly apply to the suit contract:

> "The effect of the whole is to shew that the existence of the Music hall in the Surrey Gardens in a state fit for a concert was essential for the fulfilment of the contract—such entertainments as the parties contemplated in their agreement could not be given without it."

(5) It is also established that it had become impossible to exhibit the picture in Paragon Talkies after 5-12-1946. On 6-12-1946 the Commissioner of Police prohibited further shows in the Talkies pending final orders and eventually the Theatre itself was condemned and ordered to be pulled down and the licences which had to be obtained under the Cinematograph Act and the City Police Act were cancelled. The theatre itself was in fact pulled down and a fresh theatre was constructed by April 1948. Thus, the contract had become impossible of performance both by reason of the cancellation of the licences and the disappearance of the very theatre in which, under the agreement, the picture had to be exhibited.

(6) These facts are not seriously in dispute. The argument on behalf of the plaintiff, however, is that when there is a contract in writing embodying the terms agreed to by the parties, that alone should govern the rights of the parties and that in the absence of a provision excusing non-performance in the events which happened, the defendant would be liable for damages for breach of the agreement; and that the same result would follow, if it is held that the defendant had impliedly warranted that the theatre would be available for the performance of the contract in which case he would be liable for damages for breach of warranty. As observed

in an old English case — 'Paradyne v. Jane', (1647) Aleyn, 26

"When the party, by his own contract, creates a duty or charge upon himself, he is bound to make it good, if he may, notwithstanding any accident by inevitable necessity, because he might have provided against it by his contract."

It is not disputed that the rights and obligations of parties to a contract are those that flow from the terms to which they have agreed under the contract and that what the court has to do is merely to interpret those terms for the purpose of giving effect to them. "When a lawful contract has been made .....a court of law has no power to discharge either party from the performance of it", and "no court has an absolving power" per Earl Loreburn in — 'F. A. Tamplin Steamship Co. Ltd. v. Anglo-Mexican Petroleum Products Co. Ltd.', (1916) 2-A. C. 397 at pp. 403 and 404. But that, however, does not conclude the matter. It is settled by a long course of decisions that even though a contract might on the face of it be absolute and positive it may nevertheless be subject to an implied condition that in certain events it should become inoperative and void. In — 'Joseph Constantine Steamship Line Ltd. v. Imperial Smelting Corporation Ltd. (1942) A. C. 154, Lord Wright observed:

"It is true that a contract absolute in terms may be absolute also in effect. The contractor, if he cannot perform, must pay damages. 'Prima facie', the actual language governs. But a contract absolute in terms is not necessarily absolute in effect. It is in all cases a question of construction as Lord Cranworth L. C. pointed out in — 'Couturier v. Hastie', (1856) 5 H. L. C. 673 at p. 681."

This principle is well established in the class of cases known as frustration cases. A leading case on the subject is — 'Taylor v. Caldwell', (1863) 3 B & S 826: 122 E R 309 at pp. 312 and 314, already referred to. The facts of that case were that Messrs. Caldwell and Bishop who were the owners of a Music Hall, called the Surrey Gardens, agreed with Messrs. Taylor & Louis that they should have the use of the hall on 4 specified days for music concerts. Before the due dates the Hall was burnt by an accidental fire. Taylore & Louis sued Caldwell & Bishop for damages for breach of contract and the contention on their behalf was that there being no provision in the contract absolving the defendant from liability in case the premises were destroyed, they were liable absolutely for damages for breach of the contract. The decision in — 'Paradyne v. Jane', (1647) Aleyn 26 was relied on in support of this contention. Repelling this contention and holding that the contract had come to an end, Blackburn J. observed as follows:

"The parties when framing their agreement evidently had not present to their minds the possibility of such a disaster, and have made no express stipulation with reference to it, so that the answer to the question must depend upon the general rules of law applicable to such a contract. There seems no doubt that where there is a positive contract to do a thing, not in itself unlawful, the contractor must perform it or pay damages for not doing it, although in consequence of unforeseen accidents, the performance of his contract has become unexpectedly burthensome or even impossible.....But this rule is only applicable when the contract is positive and absolute, and not subject to any condition either express or implied; and there are authorities which, as we think, establish the principle that where, from the nature of the contract, it appears that the party must from the beginning have known that it could not be fulfilled unless when the time for the fulfilment of the contract arrived some particular specific thing continued to exist, so that, when entering into the contract, they must have contemplated such continuing existence as the foundation of what was to be done; there, in the absence of any express or implied warranty that the things shall exist, the contract, is not to be construed as a positive contract, bus as subject to an implied condition that the parties shall be excused in case, before breach, performance becomes impossible from the perishing of the thing without default of the contractor.

There seems little doubt that this implication tends to further the great object of making the legal construction such as to fulfil the intention of those who entered into the contract."

The learned Judge then referred to various other classes of contracts including personal contracts in which it had been held that the death of the person had put an end to them and observed:

"In none of these cases is the promise in words other than positive, nor is there any express stipulation that the destruction of the person or thing shall excuse the performance; but that excuse is by law implied, because from the nature of the contract it is apparent that the parties contracted on the basis of the continued existence of the particular person or chattel."

(7) The principles enunciated above are firmly established in the law of England and have been affirmed by decisions of the highest authority. In — 'Bank Line Ltd. v. Arthur Capel Co.', (1919) A. C. 435 at 445 Viscount Haldane observed:

"What is clear is that where people enter into a contract which is dependent for the possibility of its performance on the continued availability of the subject-matter and that availability comes to an unforeseen end by reason of circumstances over which its owner had no control, the owner is not bound unless it is quite plain that he has contracted to be so."

In — 'Hirji Mulji v. Cheong Yue Steamship Co. Ltd.', (1926) A. C. 497 at p. 507, the law is thus stated by Lord Sumner:

"An event occurs, not contemplated by the parties and therefore not expressly dealt with in their contract, which, when it happens, frustrates their object. Evidently it is their common object that has to be frustrated, not merely the individual advantage which one party or the other might have gained from the contract. If so, what the law provides must be a common relief from this common disappointment and an immediate termination of the obligations as regards future performance. This is necessary, because otherwise the party would be bound to a contract, which is one that they did not really make. If it were not so, a doctrine designed to avert unintended burdens would operate to enable one party to profit by the event

and to hold the other, if he so chose, to a new obligation."

(8) The principle of the decision in — 'Taylor v. Caldwell', (1863) 3 B & S 826: 122 E R 309, is not confined to cases where a specific thing, de certo corpore', the continued existence of which is the basis of the contract, has perished before the time for performance. It has been applied to cases in which there is such a vital change of circumstances as to render the contract obsolete and unreal. In — 'Joseph Constantine Steamship Line Ltd. v. Imperial Smelting Corporation Ltd.', (1942) A. C. 154 at p. 172, Viscount Maugham classified the frustration cases into four groups. He observed:

"Frustration may occur as I have already mentioned in very different circumstances. First, in cases resembling the present where there has been the destruction of a specific thing necessary for the purpose of the contract. Secondly, where performance becomes virtually impossible owing to a change in the law. Thirdly, where circumstances arise which make the performance of the contract impossible in the manner and at the time contemplated. Fourthly, where performance becomes impossible by reason of the death or incapacity of a party whose continued good health was essential to the carrying out of the contract."

(9) In Halsbury's Laws of England, Vol. 7, page 213, the law on the subject is stated in the following terms:

"Where it appears from the nature of the contract and the surrounding circumstances that the parties have contracted on the basis that some specified thing without which the contract cannot be fulfilled will continue to exist or that a future event which forms the foundation of the contract will take place, the contract, though in terms absolute, is to be construed as being subject to an implied condition that if before breach, performance becomes impossible without default of either party and owing to circumstances which were not contemplated when the contract was made, the parties are to be excused from further performance."

(10) The result of the authorities, therefore, is that in the class of cases to which the doctrine of frustration applies, there will be implied in the contracts a condition that they will cease to be operative if the basis on which they rest disappears or becomes fundamentally altered. This, however, is a rule of construction and must yield to any contrary intention which the agreement might disclose. But our attention has not been drawn to anything in Ex. P. 1 indicative of a contrary intention. We are, therefore, unable to accede to the contention of the respondent that a warranty by the defendant that the theatre would be available for performance during the entire period of the contract should be implied therein. On the other hand, on the finding that the continued existence of the Paragon Talkies was the basis on which both parties entered into the contract and that performance therein became impossible both by reason of the cancellation of the licences and the disappearance of the Theatre, there must be implied in the agreement a condition that it should terminate in case the licenses are cancelled or the Theatre ceases to exist.

(11) Mr. K. S. Sankara Iyer, the learned Advocate for the respondent put forward two contentions based on — 'F. A. Tamplin Steamship Co. Ltd. v. Anglo Mexican Petroleum Products Co. Ltd.', (1916) 2 A. C. 397. One is that the principle of frustration would not apply when the performance under the contract is a continuing one extending over a period, whether fixed or indeterminate, as distinguished from a single venture or a specific act and that, therefore, there could be no frustration of an agreement like Ex. P. 1. In support of this position, the following observations of Lord Parker were relied on:

"There is, so far as I can find, no case in which this principle has been applied to time charterparties as distinguished from charterparties which contemplate particular voyages."

It was argued that if the principle of frustration was inapplicable to time charterparties, it would for the same reason be inapplicable to a continuing contract like Ex. P. 1. It may be mentioned that Viscount Haldane did not share this opinion and observed that the contract being for a period was only an element to be taken into consideration; while Lord Atkinson expressed himself definitely against this view. He observed:

"I am quite unable to agree with the contention urged by the respondents that the principle of these decisions can never apply to a time charter."

This controversy was set at rest by the decision in — 'Bank Line Ltd. v. Arthur Capel & Co.', (1919) A C 435, where it was held that the fact that the charterparty was for a time did not exclude the application of the doctrine of frustration. This contention must, therefore, be rejected.

(12) The second contention is that even on the facts as found in the present case, there was no scope for the application of the doctrine of frustration. The argument is that there could be no frustration, unless the change of circumstances is of a permanent and fundamental character; that the cancellation of the licences and demolition of the theatre were temporary features; that it was possible to build a new theatre in accordance with the police requirements within a measurable period and that was in fact done by April 1948; and such temporary interruptions could not be held to frustrate the contract. Reliance is placed on the decision of the majority of the House in — 'F. A. Tamplin Steamship Co. Ltd. v. Anglo Mexican Petroleum Products Co. Ltd.', (1916) 2 A C 397. In that case, a steamship was chartered for a period of five years under a charter-party dated 18-5-1912. In December 1914 the vessel was requisitioned by the Admiralty and structural alterations were made so as to make it suitable for transport of troops. At this juncture the owner of the vessel brought an action for a declaration that the contract dated 18-5-1912 had come to an end as a result of requisition by the Government. The majority of the House consisting of Lord Buckmaster L. C. Earl Loreburn and Lord Parker held that there was no frustration of the contract, while Viscount Haldane and Lord Atkinson held the contrary. Earl Loreburn stated the principles applicable in the following words:

"A Court can and ought to examine the contract and the circumstances in which it was made, not of course to vary, but only to

explain it, in order to see whether or not from the nature of it the parties must have made their bargain on the footing that a particular thing or state of things would continue to exist. And if they must have done so, then a term to that effect will be implied, though it be not expressed in the contract. In applying this rule it is manifest that such a term can rarely be implied except where the discontinuance is such as to upset altogether the purpose of the contract. Some delay or some change is very common in all human affairs, and it cannot be supposed that any bargain has been made on the tacit condition that such a thing will not happen in any degree."

(13) This statement of the law does not materially differ from what Viscount Haldane stated. He observed:

"And where the interruption is simply one of an interim character and likely to cease so soon as to leave the rest of the period stipulated free for the revival of the rights and duties of the parties after what amounts to no more than a temporary cessation of the power of performance, then, not only where there is an express stipulation covering the case which has occurred, but possibly even where there is no such stipulation, the contract may be regarded as not becoming destroyed but only suspended..... But if the facts be such that it appears that the power of performance has been wholly swept away to such an extent that there is no longer in view a definite prospect of this power being restored, then the contract must be looked upon as being wholly dissolved, and the courts cannot take any course which would in reality impose new and different terms on the parties."

As was remarked in — 'Bank Line Ltd. v. Arthur Capel & Co.', (1919) A C 435 the difference between the two views expressed in — 'F. A. Tamplin Steamship Co. Ltd. v. Anglo Mexican Petroleum Products Co. Ltd.', (1916) 2 A C 397 was not so much with reference to the principles applicable as to their application to the facts of the case.

(14) On these principles, the question to be determined is whether the change of circumstances established in this case was of an interim and temporary character which left the contract alive and capable of being performed at a future date or whether it was so sweeping and fundamental that it killed the contract itself. That is a question of fact to be determined on a consideration of all the facts and circumstances of the case.

(15) What then are the facts? There is an order of the Police authorities condemning the theatre as unsafe and directing it to be pulled down. That was done. Was there thereafter any further obligation on the part of the appellant to rebuild the theatre? If not, on what ground is it to be held that the contract still subsisted in a state of suspended animation? To visualise the situation, could the plaintiff have obtained in 1947 after the old theatre had been demolished and before the new theatre had been built a declaration that the contract, Ex. P. 1 was subsisting between the parties and could be put into operation if and when a new theatre was constructed? If the contention of the respondent is right, he would be entitled to such a declaration. To grant such a declaration would be in the words of Rowlatt J. in — 'Distington Hematite Iron Co. Ltd. v. Possehl & Co.', (1916) 1 K B 811 at p. 814,

"Not to maintain the original contract but to substitute a different contract for it."

It is this feature that completely distinguishes this case from — 'F. A. Tamplin Steamship Co. Ltd. v. Anglo Mexican Petroleum Products Co. Ltd.', (1916) 2 A C 397, in which the steamship which was the subject-matter of the contract continued to exist, though having been requisitioned by the Admiralty, it was not immediately available for performance under the contract.

(16) Then again, the theatre which came into existence in 1948 was far different from the one which was pulled down, in point of structure, accommodation and earning capacity. This appears on the evidence of D. W. 2 who stated that the entire structure of the old theatre was pulled down, new foundation and new structures made and that the new theatre provided accommodation for 100 people more in the higher classes and the balcony. Thus the Paragon talkies which came into existence in 1948 was substantially different from the Paragon talkies which was the subject-matter of the contract, Ex. P. 1.

(17) The nature of the trade is again a very material element in determining whether the events which happened merely suspended the performance under the contract or put an end to it. It is well known feature of the Cinema business that the pictures have an ephemeral existence and their attractions are evanescent. When they are first put on board, they draw crowds and after running their course for a season of longer or shorter duration they lose their hold over the cinema-going public and are consigned to the limbo of oblivion, seldom to be seen again on the screen. The exhibition of "Rukmangadhan" in 1948 would commercially be a proposition totally different from the continuance of "Rukmangadhan" in December 1946 in terms of Ex. P. 1. In — 'Jackson v. The Union Marine Insurance Co. Ltd.', (1875) 10 C P 125, there was a charterparty in November 1871 under which the ship was to proceed with all possible despatch from Liverpool to Newport and there load a cargo of iron rails and then proceed to San Franscisco. On its way from Liverpool to Newport on 3-1-1872 the ship ran aground amidst rocks. The charterer threw up the charter on 15-2-1872. In an action by the owner of the ship on the charterparty, it was held that the delay which must happen in carrying out repairs to the ship frustrated the agreement as a commercial venture and that both parties were released from their obligations thereunder. The repairs were in fact completed in August 1872. In — 'Metropolitan Water Board v. Dick Kerr & Co. Ltd.', (1918) A C 119 the defendant agreed in 1914 to contruct a reservoir within six years. In February 1916 the Ministry of Munitions prohibited him from proceeding with his work under the contract. In May 1916 the plaintiff sued for a declaration that the agreement of 1914 was still subsisting. The defendant contended that it had come to an end. It was held that the interruption caused by the prohibitory order issued by the Ministry of Munitions was of such a character and duration as to make the contract, when resumed, a different one from the contract which was interrupted and that therefore, the agreement had been frustrated and ceased to be operative.

On the facts — 'Metropolitan Water Board v. Dick Kerr & Co. Ltd.', (1918) A C 119 is very near the present case. The position of the defendant on whom Ex. P. 2 and Ex. P. 4 had been served by the Commissioner of Police in this case is not different from that of the defendant in — 'Metropolitan Water Board v. Dick Kerr & Co. Ltd.'. (1918) A C 119 on whom a prohibitory order had been served by the Ministry of Munitions in February 1916. Moreover, that was a building contract, whereas the present one is a commercial contract as to which the following observation of Lord Finlay L. C. is apposite:

> "It was not disputed, as I understand the argument for the appellants, that in the case of a commercial contract, as for the sale of goods or agency, such a prohibition would have brought it to an end."

It was held that the position was the same even with reference to the building contract. In — 'Bank Line Ltd. v. Arthur Capel & Co.', (1919) A C 435 there was a charterparty dated 16-2-1915 for a period of one year. On 11-5-1915 the steamer was requisitioned by the Admiralty, but released in September. The owner sold the vessel to a third party and in an action on the charterparty for damages for non-delivery, it was held that the requisition and detention of the steamer destroyed the identity of the chartered service and entitled the defendants to treat the charterparty as at an end. The latest case on the subject in England is the one reported in — 'Morgan v. Manser', (1948) 1 K B 184, where a contract entered into in 1938 for a period of ten years was held frustrated and not merely suspended by the defendant being called for war service in 1940. In the light of the principles adopted in the above cases, it is impossible to hold that the interruption in this case was merely of a temporary character and that the entire contract was not frustrated.

(18) It was also sought to be contended that the Paragon talkies theatre was not in such an unsafe condition in December 1946 as to be required to be demolished completely; that by reconstructing the walls with bricks the theatre might have been put in a working condition; and that, therefore, the appellant could not plead frustration. There is unimpeachable documentary evidence that the theatre was unsafe for use by the public. That was the opinion which P. W. 2 himself expressed as recorded in Ex. P. 4. The opinion of the Government Engineer was that the structure was quite unsound and that the whole building should be pulled down and properly reconstructed (vide Ex. P. 9). As against this, we are unable to attach any weight to the oral evidence on the side of the plaintiff, that the theatre could have been set right by reconstruction of the walls. But apart from that, there was the order of the appropriate authorities directing the demolition of the theatre and the appellant was bound to carry out that order and had no choice in the matter. Likewise the order of the Police Commissioner cancelling the licences was final and not open to question. These orders struck at the very foundation of the contract and rendered it impossible of performance. Our conclusion on the first question accordingly is that in the events which happened, the agreement became frustrated and the appellant was discharged from his obligations thereunder.

(19) On this conclusion, the question next arises for consideration whether the frustration of the contract was due to the default or neglect of the defendant. Mr. N. Rajagopalan, the learned advocate for the appellant, did not controvert the position that if frustration was brought about by the default or neglect of the appellant, he would continue to be liable on his obligations under the contract. The very authorities which recognise that frustration terminates the contract also lay down that it must be without default or neglect of either party. The controversy before us has been as to what constitutes default or neglect for the purpose of this rule and whether such default or neglect has been established against the appellant. The authorities in which this question had actually to be decided are few; and it cannot be said that the law on the subject is finally settled in England.

(20) In — 'Bank Line Ltd. v. Arthur Capel & Co.', (1919) A C 435 at p. 452, there are certain observations in the speech of Lord Sumner which may be taken as the starting point for discussion. He observed:

> "I think it is now well settled that the principle of frustration of an adventure assumes that the frustration arises without blame or fault on either side. Reliance cannot be pleaded on a self-induced frustration; indeed, such conduct might give the other party the option to treat the contract as repudiated."

The words "self-induced" frustration are important and furnish a clue to the solution of the question. They clearly imply that the act or omission which results in frustration must be something deliberate and intentional; frustration cannot be said to be "self-induced" if what is shown is merely passive negligence. This inference is further reinforced by the observation that the conduct must be such as to amount to a repudiation of the agreement. Now, an agreement can be repudiated either by words expressive of an intention not to perform the contract or conduct from which the said intention could be gathered. That is what is laid down in S. 39 of the Contract Act. Mere failure to perform a contract without more cannot be said to be a repudiation of it. It would follow from this that it is not every negligent act or omission to which the frustration might ultimately be traced that can be held to be default or neglect such as would exclude the application of the principle of frustration. It should be of such a character that it might be fairly inferred therefrom that the promisor has no intention of performing the contract and has in effect repudiated it. The conduct must be such as could be held to amount to repudiation within the meaning of S. 39 of the Contract Act.

(21) The authorities on the subject may now be reviewed. In — 'Mertens v. Home Freeholds Co.', (1921) 2 K B 526 the facts were that one Lawrence agreed on 12-5-1916 to construct a house for the plaintiff on terms which were unremunerative. On 14-7-1916 an order was made by the Minister of Munitions prohibiting all construction of works except under licence which could be issued under certain circumstances. Lawrence welcomed this notification as "a God-send", deliberately shirked work and delayed the construction with the result that the licence was, as desired, refused. The plaintiff completed the building through other agencies in 1919 and sued the defendant who was a

partner of Lawrence for damages. On the question of frustration which was raised by the defendant Lord Sterndale M. R. observed as follows:

> "But, so far as I know, it has never been held that a man is entitled to take advantage of circumstances as a frustration of the contract if he has brought those circumstances about himself..... For instance, to go back to the leading case of — 'Taylor v. Caldwell', (1863) 3 B & S 826: 122 E R 309, where the frustration was the destruction of a music hall the letting of which was the subject matter of the contract, I do not think any authority has gone so far as to decide that if the defendant had burned down the music himself, he would have been entitled to say the subject matter was gone and the contract was frustrated, and I am certainly not prepared to go to that length myself."

Then, accepting the finding of the Official Referee that Lawrence knowing that he had made a bad bargain, and having made up his mind to get out of it, deliberately delayed the work in order to get the licence refused, the learned Judge observed:

> "That being so, it seems to me that Lawrence cannot be allowed to take advantage of the intervention of the Minister of Munitions, which is what he played for and what he got."

There cannot be any doubt that on the facts as found, this was a case of "self-induced" frustration; and that the conduct of Lawrence amounted to a repudiation of the contract before the Ministry of Munitions refused the licence. In — 'Maritime National Fish Ltd. v. Ocean Trawlers Ltd.', (1935) A C 524, the facts were that the respondents were the owners of a Trawler called St. Cuthbert. The appellants chartered it in July 1932 for a period of one year for the purpose of fishing. Under a Canadian Statute licences had to be taken from the Government for taking out trawlers for deep-sea fishing. The appellants who chartered other trawlers as well applied for licence to use five trawlers. They were informed that licences would be granted for use of only three trawlers which they were asked to name. They mentioned the names of other trawlers and omitted St. Cuthbert. Consequently, no licence was issued for taking out St. Cuthbert. The appellants claimed that the contract had, under the circumstances, come to an end by frustration. In rejecting this contention Lord Wright observed as follows:

> "The essence of 'frustration' is that it should not be due to the act or election of the party ..... It cannot in their Lordships' judgment be predicated that what is here claimed to be a frustration, that is, by reason of the withholding of the licence, was a matter for which the appellants were not responsible or which happened without any default on their part. In truth, it happened in consequence of their election. If it be assumed that the performance of the contract was dependent on a licence being granted, it was that election which prevented performance, and on that assumption it was the appellants' own default which frustrated the adventure; the appellants cannot rely on their own default to excuse them from liability under the contract."

This again is clear authority for the position that there must be some act or election of the party which brings about the frustration.

This question came up for considerable discussion in — 'Joseph Constantine Steamship Line Ltd. v. Imperial Smelting Corporation Ltd.', (1942) A C 154. The point for decision there was whether the party who pleaded frustration had in law the burden cast on him of proving that it was without any default or neglect on his part. The decision of the House was that it was not for him to prove the negative and that when once he had established frustration, it would be for the other side to prove that it was brought about by the default or negligence of the party who sought to rely on it. But the question what would amount to default or negligence for the purpose of this rule came in incidentally for consideration. Viscount Simon L. C. has the following on this subject:

> "For purposes of clearness and to avoid possible misunderstanding hereafter, I must add (though this is not necessary for the present decision) that I do not think that the ambit of "default" as an element disabling the plea of frustration to prevail has as yet been precisely and finally determined. 'Self-induced' frustration, as illustrated by the two decided cases already quoted, involves deliberate choice, and those cases amount to saying that a man cannot ask to be excused by reason of frustration if he has purposely so acted as to bring it about. 'Default' is a much wider term and in many commercial cases dealing with frustration is treated as equivalent to negligence. Yet in cases of frustration of another class, arising in connection with a contract for personal performance, it has not, I think, been laid down that, if the personal incapacity is due to want of care, the plea fails. Some day it may have to be finally determined whether a 'prima donna' is excused by complete loss of voice from an executory contract to sing if it is proved that her condition was caused by her carelessness in not changing her wet clothes after being out in the rain. The implied term in such a case may turn out to be that the fact of supervening physical incapacity dissolves the contract without inquiring further into its cause, provided, of course, that it has not been deliberately induced in order to get out of the engagement."

Referring to this aspect Lord Russell observed:

> "My Lords, I desire to add a word in relation to the phrase 'self-induced frustration'. No question arises on this appeal as to the kind or degree of fault or default on the part of the contractor which will debar him from relying on the frustration. The possible varieties are infinite, and can range from the criminality of the scuttler who opens the sea-cocks and sinks his ship, to the thoughtlessness of the 'prima donna' who sits in a drought and loses her voice. I wish to guard against the supposition that every destruction of corpus for which a contractor can be said, to some extent or in some sense, to be responsible, necessarily involves that the resultant frustration is self-induced within the meaning of the phrase."

Lord Wright discussed this matter at some length. He observed:

> "The Court of Appeal do not define what in this context is the meaning of 'fault' or 'default'..... In — 'Sailing Ship Blaimore Co. Ltd. v. Macredie', (1898) A C 593 at p. 607, Lord Watson observed: 'The rule of law applicable to contracts is that neither of the

parties can by his own act or default defeat the obligations which he has undertaken to fulfil. Willes J. in the passage already cited, gave as an instance of a party preventing performance the case of a man poisoning before delivery a horse which he has promised to deliver. Lord Sumner, in speaking of a self-induced frustration, has clearly in mind positive acts against the faith of the contract which amount to a repudiation and would justify rescission. This test would apply to — 'Mortens v. Home Free-holds Co.', (1921) 2 K B 526 at p. 607, and—'Maritime National Fish Co. Ltd. v. Ocean Trawlers', (1935) A C 524 On the other hand, mere negligence seems never to have been suggested as sufficient to constitute 'fault' in this connection."

Lord Porter, discussing this question referred to passages in the text book of Salmond & Winfield on Contracts and observed:

"A contractor who negligently destroys the subject-matter of the contract is not free from blame and in some cases may not be within the exception 'without default' as used in the cases, but I prefer to leave the question for determination until it comes directly in issue."

Thus, though the point now under consideration was not actually decided, there is a pronounced trend in favour of the view that the default or negligence for the purpose of this rule must be something more than mere negligence and that it must be such conduct as could be construed as repudiation of the agreement.

(22) Turning now to the provisions of the Indian Contract Act, S. 56 is the governing section and omitting portions not relevant for the purpose of this case, runs as follows:

"Sec. 56: "A contract to do an act which, after the contract is made, becomes impossible, or, by reason of some event which the promisor could not prevent, unlawful, becomes void when the act becomes impossible or unlawful."

It is significant that whereas in the case of contracts whose performance becomes unlawful, the section requires that it should be by reason of some events which the promisor could not prevent, there is no similar limitation with reference to contracts which become impossible—in which cases the contract becomes void without more. It would appear as though under the Indian law frustration puts an end to the contract without any further question as to default or neglect of the promisor. It does not, however, follow from this that the principle of 'self-induced' frustration laid down in — 'Bank Line Ltd. v. Arthur Capel & Co.', (1919) A C 435 adopted in — 'Mertens v. Home Freeholds Co.', (1921) 2 K B 526 and — 'Maritime National Fish Ltd. v. Ocean Trawlers Ltd.', (1935) A C 524 and discussed in — 'Joseph Constantine Steamship Line Ltd. v. Imperial Smelting Corporation Ltd.', (1942) A C 154 has no application under the Indian law. Such cases will be really covered by S. 39, which, as already mentioned, enacts that when a party to a contract repudiates his obligations thereunder, the other party has a right to treat the contract as cancelled and claim damages. The combined effect of S. 56 and S. 39 of the Contract Act is that frustration renders a contract void, unless there has been conduct antecedent to frustration amounting to a repudiation thereof and this view will be in accordance with the weight of judicial opinion in England as to the meaning of default or neglect in this context.

(23) That being the legal position we have now to see whether there has been any such default or neglect on the part of the appellant as would preclude him from pleading frustration. The burden of establishing this is on the plaintiff. (Vide — 'Joseph Constantine Steamship Line Ltd. v. Imperial Smelting Corporation Ltd.', (1942) A C 154). The argument of the respondent is that the theatre was "a jerry-built and unsafe structure"; that it was not a matter for surprise that it should have collapsed during the rains; that during the material period it was the appellant who held and managed the Theatre and, therefore, he cannot escape from the contract by relying on the collapse of the walls, cancellation of the licences and the demolition of the building, for which he must bear the ultimate responsibility. That the construction was not of a very substantial character clearly appears from Exs. P. 2 (a), P. 14 and P. 9. The walls were built of "brick and clay"; they were 24 feet high, while the normal height should be 20 feet; the thickness of the walls was 11", whereas it should have been 2 feet 3 inches; in some places the walls were out of plumb; there was an old crack in the eastern wall which had only been partially closed and the zinc roofing was worn out. These facts are clearly proved. But, are they sufficient to sustain a charge of default or neglect by the appellant?

(24) It is now necessary to refer to some facts forming the history of this theatre. The site on which the theatre stood belongs to certain Charities. On 7-4-1932 it was leased as a vacant site to one Mr. Kamath. In 1934 the lessee constructed a theatre and named it The Paragon Talkies. In December 1935, the Presidency Talkies Ltd., acquired the superstructure and the rights under the lease. On 22-12-1936 the Charities executed a lease of the site in favour of the Presidency Talkies Ltd. Vide D. 3. In the middle of 1945 the appellant became the purchaser of a substantial number of shares in the Presidency Talkies Ltd. and became its Managing director. Thus, whatever the defects in the construction of the theatre, the appellant was not responsible for them. There is no satisfactory evidence that he had any knowledge of the nature of the construction. Reference was made to the evidence of D. W. 2 that everybody knew that the walls were built of clay & brick. Mr. N. Rajagopalan, the learned advocate who appeared at the trial for the appellant stated that there was some mistake in the recording of this evidence. We do not propose to base our conclusion on this statement. But there is the fact that while the appellant was in the box, no questions were put to him about the condition of the walls or about his knowledge thereof. Under the circumstances it will be unsafe to build anything on the answer given by D. W. 2. Reliance was also placed on the licences Exs. P. 17 and P. 18 in which the walls are described as of brick and mortar. The argument of the respondent is that it was a misleading statement and betrays a consciousness that the walls were built of clay. But it must be remembered that the licences must have been first issued in 1934 and subsequently renewed from time to time; so that the application made in 1945 on which Exs. P. 17 and P. 18 were issued must be mechanical reproductions of the contents of previous applications. P. W. 2 was asked in examination in chief whether, when the applications for licence were made, it was represented that the "Walls were built in brick,

mortar and reinforced concrete". The answer was in the negative. A careful reading of Exs. P. 17 and P. 18 shows that what was stated therein was only that the side walls were constructed of brick and mortar. This is correct as will be seen from Ex. P. 4 wherein the walls are described as "plastered over with lime mortar." There is no statement that the walls were of reinforced concrete. It was only the gallery and staircase that are described as built of cement concrete. Thus, there is no satisfactory evidence that the appellant knew that the walls were built in clay until a portion of them fell down on the night of 5th December.

(25) Even if the walls had been constructed of brick and clay. it does not follow that the theatre must necessarily be unsafe. The following extract from the evidence of P. W. 2 may be quoted:

"Q. If you had known that the wall had been built in brick and clay, would the licence have been granted?

A. I do not know whether the licence would have been granted or not. It would depend on the condition of the wall. Here, with regard to these walls at the time of inspection they were considered safe."

In this connection it must be remembered that the buildings are inspected once in six months both by the Commissioner of Police and the Corporation Engineer; that directions are issued for effecting suitable repairs and alterations, and licences are renewed only after these directions are carried out. The fact that inspections are made periodically and licences renewed raises a strong presumption that the theatre was in a good condition and the appellant who came on the scene in the middle of 1945 had ample justificatior for acting on the issue of licences by the authorities continuously from 1934 as prima facie evidence that the theatre was in a sound condition. That the defects of the theatre, such as they were, were not visible to the ordinary eye would be clear from Ex. P. 2(a) dated 6-12-1946, wherein P. W. 2 states that other side walls were "safe to all appearances". Even in Ex. P. 4 it was stated that no "immediate danger" was apprehended to the wall "on account of the rigidity which it obtains owing to the number of cross walls at close intervals". There is, therefore, not sufficient evidence to establish that the appellant knew that the building was inherently defective or that he could have discovered it with ordinary diligence.

(26) It is argued for the appellant that there were heavy and unprecedented rains in the City from the night of the 30th November 1946 continuously till the 7th December as appears from Exs. D. 1 and D. 2 and that the collapse of the walls on the night of the 5th was due to 'force majeure'. It is just possible that for all their latent defects the walls of the theatre might have stood, had it not been for the exceptionally heavy rains. It is not necessary to pronounce on this. It is sufficient for the present purpose to say that the plaintiff has failed to discharge the burden which lies on him of proving default or neglect on the part of the appellant.

(27) And even assuming that the appellant was negligent in not taking proper steps for ensuring that the theatre was in a fit condition for performing the contract, that is not, for the reasons already given, sufficient to deprive him of the benefit of the plea of frustration. In neglecting to effect the repairs to the theatre he was not actuated by any intention to break the contract, Ex. P. 1 or injure the plaintiff. His conduct had no relation to the suit contract and he did "nothing against the faith of the contract which would amount to repudiation and would justify rescission". There was no act or election on the part of the appellant made "in order to get out of the engagement". The appellant had, it would seem, invested Rs. 3½ lakhs for the purchase of this theatre and it is not likely that he would have acted with gross negligence in the matter. That he believed that the theatre was in a sound condition and would be available for performing contracts appears from Ex. D. 1. It is an advertisement that a picture called "Gubbi's Hemareddy Mallamma" was to be exhibited in the Paragon Talkies in succession to "Rukmangadhan". This advertisement is dated 5-12-1946, on the evening preceding the night on which the walls collapsed. The appellant would certainly not have wished or played for the fall of the Paragon talkies for spiting the plaintiff or tearing up Ex. P. 1. That is admitted by the plaintiff. He only charges that the defendant was negligent. Even if there was any negligence or default on the part of the appellant, it was not such as would preclude him from relying on frustration as putting an end to the contract.

(28) It remains to deal with the question of damages. On our finding that there was frustration and that there was no default or neglect on the part of the appellant, the suit must fail and the question of damages would not arise. But as the matter has been fully argued, we shall record our finding as to what damages should be awarded to the plaintiff, in case his claim is well founded. The amount claimed in the plaint is Rs. 85000 made up of (1) Rs. 60000 being the half share of the estimated collections if the picture should run from 15-12-1946 to 15-3-1947 and (2) Rs. 25000 for advertisement charges incurred. Taking the first item this figure rests on two assumptions, that the picture would have been exhibited for the three months if the Theatre were available and that the weekly collections would have been Rs. 10000. There is no legal evidence to support either of these assumptions and in the very nature of things it is not possible to adduce any satisfactory evidence on the matter. Ex. D. 4 shows the collections for this picture for six weeks commencing from 23-10-1946. It shows a steady decline, the collections for the sixth week being only Rs. 3690. Under clause (3) of Ex. P. 1 the appellant was entitled to stop the picture if the hold over figure for the week fell below Rs. 3600. It is argued for the appellant that in the normal course if the picture had gone on for the full week, the collections should have gone below the hold over figure and that in fact for two days the 4th and 5th December only Rs. 544-8-0 were collected. It is also elicited in evidence that when once the collections begin to go down they "keep the pace" and do not rise again. The respondent replies that the decline in the collections was due to rains and that they would have recovered later on in December. The plaintiff relied on the evidence of P. Ws. 3 and 4 in support of this contention. P. W. 3 is a clerk of a firm of film producers called "Kousika combines" and he speaks to a picture called "Vikata Yogi" having run in the Gaiety Theatre during this

period. Ex. P. 13 was produced as showing the actual collections and from this it was argued that though the collections went down week after week down to 3rd December they improved thereafter. But this document was rejected by Mr. Mack J. for want of proof and it has not been sought to be relied on before us. If this document is put aside, there is nothing in the evidence of P. W. 3 to help the plaintiff. He definitely admitted that he did not remember what happened two years previously. P. W. 4 is the producer of "Vikata Yogi" and he also admitted that he could not give the exact figures of collections for this picture in October and November 1946. He gave general evidence that "Rukmangadha" was a good picture and might run from 16 to 20 weeks. This evidence apart from being vague, is not helpful as the witness does not know the hold over figure. General evidence as to what happened to other pictures in other theatres cannot be of much use, even if it is relevant. The picture "Rukmangadan" was exhibited in the Gaiety theatre for two weeks from 23-5-1947; for two weeks from 18-10-1947 in Kinema Central; and in Brighton Talkies during the weeks 20-12-1947 to 27-12-1947. In none of these exhibitions did the weekly collections come up to the hold over figure. The plaintiff attributes it to the fact that the picture got a bad name when it was stopped in the Paragon talkies. There might have been something to be said for this if the Paragon Talkies had been in existence and exhibited other pictures. But the stoppage of "Rukmangadhan" was due to the collapse of the theatre and the evidence of the plaintiff that the public did not know of the collapse of the theatre cannot be accepted. On the second item it has not been explained to us how advertisement charges could be claimed as damages. They had not been incurred for any period subsequent to the 5th December 1946. The plaint describes the claim as "advertisement charges incurred before starting the run of the picture at Paragon talkies theatre" (Vide paragraph 25). If so, the plaintiff must have reaped the benefit of these advertisements in the collections already made in which he took his share. Mr. Mack J. observes that there are no data for assessing the damages and merely awards a decree for Rs. 25000 in favour of the plaintiff without indicating the basis on which the figure was arrived at. We are of opinion that the plaintiff on whom the burden lies has not adduced any satisfactory evidence on the quantum of damages sustained by him. Under the circumstances, we are unable to hold that the plaintiff is entitled to anything more than the sum of Rs. 2000 which the defendant was prepared to pay.

(29) In the result, the appeal will be allowed and the suit dismissed with costs of the defendant throughout to be paid by the plaintiff. The third respondent who is a liquidator will take his costs out of the estate.

B/M.K.S. Appeal allowed.

A. I. R. 1953 MADRAS 310 (Vol. 40, C. N. 105)

RAJAMANNAR C. J.
AND VENKATARAMA AIYAR J.

The Council of Institute of Chartered Accountants, Forwarding Authority v. M. Rajamany, Chartered Accountant, Respondent.

Referred Case No. 55 of 1951, D/- 4-4-1952.

(a) Chartered Accountants Regulations, Regns. 11, 11A — Proceedings on information — Procedure — (Chartered Accountants Act (1949), S. 21).

Regulation 11, in terms, applies only when there is a complaint and not information.

Where though the starting point for the action taken by the Council was a letter dated 9-10-1949 purporting to have been written by one Viswanathan he disclaimed all knowledge of it:

Held that there was before the Council only information and no complaint, because there can be no complaint when there is no complainant. There was no regulation at that time laying down the procedure to be followed in the case of enquiries made on information received and the requirements of law would be satisfied if the rules of natural justice are observed. If the respondent had notice of the charges which were the subject of enquiry and there was proper hearing, the proceedings are not open to any objection on this score. (Para 2)

(b) Chartered Accountants Act (1949), S. 22 and Sch. Cl. (V) — Misconduct.

The matters mentioned in the Schedule are only illustrative and not exhaustive. Under S. 22 there is a residual jurisdiction in respect of matters other than those specified in the schedule including therein whatever might be added under clause (V) of the Schedule. In respect of matters which are not specified in the Schedule, it will be for the Council and ultimately for the Court to decide whether the acts or omissions complained of are such as to render a delinquent unfit to be a member of the institute. (Para 3)

(c) Chartered Accountants Regulations, Regns. 38 and 39 — Accountant taking as articled clerk, person engaged in business.

It is true that the Regulations 38 and 39 under the Act apply in terms only to articled clerk and not to the accountant. But the question still remains whether apart from the rules and regulations aforesaid the conduct of the accountant in taking as an articled clerk a person who was engaged in business was proper and in accordance with the traditions of the profession. It is the duty of the accountant not to take as an articled clerk one who is already in business and not to permit him to engage in business during the period of service. Any breach of this rule must be considered conduct which renders him unfit to be a member of the institute. The relationship of the accountant and the articled clerk is mutual with correlative rights and obligations. If the conduct of the articled clerk in engaging in business is improper it is equally improper for the accountant to connive at such conduct and make it possible for him to break rules and regulations, framed for the benefit of the public. If, however, the accountant can show that he was not aware that the clerk was doing business, different considerations might arise. (Para 4)

(d) Chartered Accountants Act (1949), Ss. 20 (2) and 21(3) — Scope — Proper punishment.

It is an unreasonable construction to be put on S. 20(2) to hold that in every case

in which there is a finding of misconduct as defined in S. 22 there must be a removal irrespective of the nature of the act or omission of which the accountant is found guilty. The powers of the High Court to pass any orders under the Act under S. 21(3) must extend to removal of a member permanently or suspending him for a period or even warning him, and S. 20(2) must accordingly be read as subject to the powers of the High Court under S. 21(3).

(Held that under the circumstances of the case it was sufficient punishment to the respondent that he was warned.)

(Paras 6, 7, 8)

R. Ramamurthi Aiyar, for the Forwarding Authority; S. Gopalan, for Respondent.

VENKATARAMA AIYAR J.: The respondent is a chartered Accountant practising at Tanjore. In October 1949, information was received by the Council of the Institute of Chartered Accountants of India that one Natarajan who was an articled clerk under the respondent from 2-8-1946 to 1-8-1949 was during that period employed in the post office at Tanjore, that he did not undergo proper training and that he was not eligible for a certificate of service. The Council called for information on the subject from the Postmaster, Tanjore, who replied on 29-10-1949 that "Natarajan was in the department upto 23-6-1949 after which he resigned the appointment". On 18-1-1950, the Council enquired of the respondent whether permission had been obtained under Rule 44 of the Auditor's Certificates Rules, 1932, for the articled clerk being engaged in business as an employee in the post office. The respondent replied on 24-1-1950 that he was not aware that Natarajan was employed in the post office at the time he was an articled apprentice and that he performed his duties as a clerk satisfactorily. Thereupon on 3-8-1950 the Council referred the matter for enquiry by the Disciplinary Committee, who framed two charges against the respondent: (1) that he allowed Natarajan to work as an articled clerk while he was in employment in the post office, and (2) that he issued improperly a certificate of completion of service.

The respondent filed a written statement in which he reiterated that he was not aware that Natarajan was employed in the post office, when he was an articled clerk and that he did his work as an articled clerk satisfactorily. He also raised some legal contentions which have been repeated in the arguments before us and they will be considered presently. The Committee heard the matter fully and submitted a report that the respondent must have had knowledge that Natarajan was in service in the post office while he was an articled clerk and that his conduct in entertaining him as an articled clerk was, therefore, unprofessional; that Natarajan could not have discharged his duties as an articled clerk properly; that the training was inadequate and that the certificate of completion of service on which Natarajan was enrolled as a chartered accountant did not represent the true position. The respondent was accordingly found guilty on both the charges and held to be unfit to be a member of the Institute. The matter comes before us under S. 21, Chartered Accountants Act (Act 38 of 1949).

(2) Mr. Gopalan, the learned advocate who appeared for the respondent firstly contended that the proceedings before the Disciplinary Committee were vitiated by irregularities because the respondent had not been given 14 days time for filing written statement as required by R. 11A of the Regulations. There is no substance in this objection. S. 21 of the Act provides that the Council might enquire into charges of misconduct against any member of the Institute either on receipt of information or of complaint. Where there is a complaint the procedure to be followed for enquiry thereunder is prescribed by Regulation 11 and sub-clause (6) of that Regulation provides that a member against whom a complaint is made may file his written statement within 14 days. This regulation in terms applies only when there is a complaint and not information. In this case though the starting point for the action taken by the Council was a letter dated 9-10-1949 purporting to have been written by one Viswanathan he disclaimed all knowledge of it, with the result, that there was before the Council only information and no complaint; because there can be no complaint when there is no complainant. There was no regulation at that time laying down the procedure to be followed in the case of enquiries made on information received and the requirements of law would be satisfied if the rules of natural justice are observed. It is not contended that the respondent had not notice of the charges which were the subject of enquiry or that there was no proper hearing. The proceedings are, therefore, not open to any objection on this score. Regulation 11A was added later on to cover cases of enquiry on information. It provides that "the procedure prescribed by Regn. 11 shall so far as may be apply to any information received under S. 21 of the Act." This regulation came into force on 26-5-1950. Therefore the regulation did not affect the enquiries which had commenced before that date, as in January 1950 in the present case. Moreover Regn. 11A requires that the procedure under Regn. 11 should be followed as far as possible and on this language it is difficult to hold that in respect of proceedings under that regulation, anything more is required than that they should be in accordance with the rules of natural justice.

(3) It is next contended by Mr. Gopalan that under the regulations it is not misconduct to take as an articled clerk one who is in employment or engaged in business, because in the schedule appended to the Act as many as 21 acts or omissions are enumerated as misconduct and this is not one of them. It is conceded and in our opinion rightly that the matters mentioned in the schedule are only illustrative and not exhaustive but it is contended that any other act or omission in order to be held to be misconduct, be specified and notified by the council in the manner provided under cl. (V) of the schedule and that in the absence of such a notification it cannot be a ground for taking disciplinary action but this contention is opposed to the plain language of S. 22 which runs as follows:

> "For the purposes of this Act the expression 'conduct which, if proved, will render a person unfit to be a member of the Institute', shall be deemed to include any act or omission specified in the schedule but nothing in this section shall be construed to limit or abridge in any way the power conferred on the Council under sub-s. (1) of S. 21 to enquire into the conduct of any member of the Institute under any other circumstances."

Under this section the acts or omissions specified in the schedule shall be "deemed" to be conduct which will render a person unfit to be a member. It is not open to argument, in respect of such matters, that they are not such as to render a person unfit to be a member of the institute but in respect of matters which are

not specified in the schedule, it will be for the Council and ultimately for the court to decide whether the acts or omissions complained of are such as to render a delinquent unfit to be a member of the institute. Under S. 22 there is a residual jurisdiction in respect of matters other than those specified in the schedule including therein whatever might be added under cl. (V) of the schedule. This objection must, therefore, be overruled.

(4) It is also contended that under R. 41 of the Auditors' Certificates Rules, 1932, a registered accountant has to satisfy himself only whether the articled clerk is not less than 16 years of age and whether he had passed one of the examinations mentioned in the sub-rule; that it is no part of his duties to see whether the articled clerk was employed or not; that R. 44 imposes a restriction only on the articled clerk that he should not engage in business during the period of service and R. 45 imposes a penalty on him for breach of the Rule; that the position is the same under Regns. 35, 38 & 39 of the Act, and that the rules or regulations read as a whole do not impose any duty on the accountant with reference to a clerk who is carrying on business. It is true that the Rr. 44 and 45 of the Auditor's Certificate Rules, 1932 and Regns. 38 and 39 under the Act apply in terms only to the articled clerk and not to the accountant. But the question still remains whether apart from the rules and regulations aforesaid the conduct of the respondent in taking as an articled clerk a person who was engaged in business was proper and in accordance with the traditions of the profession. The object of the Rules & Regns. imposing a prohibition against an articled clerk engaging in business is that he should train himself properly and adequately so that when he, in turn, is enrolled as a chartered accountant he might perform his duties efficiently. These regulations are prescribed in the interests of the general public who entrust their work of audit to chartered accountants relying on their qualifications. When a person is enrolled as a chartered accountant, the public have a right to expect that the authorities would have duly satisfied themselves that he is fitted by this training and character to discharge his duties satisfactorily.

If there is no proper training it is the public at large that has to suffer and so there is an obligation cast on the accountant to see that the clerks are trained and equipped adequately so that the public can safely entrust to them their work & it is only then that a certificate of completion of service should be granted. Consistently with this, it is the duty of the accountant not to take as an articled clerk one who is already in business and not to permit him to engage in business during the period of service. Any breach of this rule must be considered conduct which renders him unfit to be a member of the institute. It is immaterial that Rr. 44 and 45 & Regns. 38 & 39 apply in terms only to the articled clerk. The relationship of the accountant & the articled clerk is mutual with correlative rights and obligations. If the conduct of the articled clerk in engaging in business is improper it is equally improper for the accountant to connive at such conduct and make it possible for him to break rules and regulations, framed for the benefit of the public. If, however, the accountant can show that he was not aware that the clerk was doing business, different considerations might arise and that indeed is the defence put forward by the respondent. It is, therefore, necessary to examine the facts to decide whether the respondent was or was not aware that Natarajan was employed in the post office during the period of service.

(5) The finding of the Disciplinary Committee is that he must have been aware and we are in agreement with this conclusion. The parties were all living near each other in Tanjore. The evidence shows that Natarajan did not regulary attend the office during the usual hours of 11 a. m. and 5 p. m., that he sometimes attended in the morning and sometimes in the evening and that he adjusted his hours of work in the post office and in the office of the respondent. It is difficult to accept the statement of the respondent that all this happened without his knowing that Natarajan was employed in the post office. The evidence of Natarajan is that he informed the respondent of this fact and that is in accordance with the probabilities. We, therefore, accept the finding of the Disciplinary Committee that the respondent had knowledge that Natarajan was employed in the post office during the period of his service and that his conduct in keeping him as an articled clerk renders him unfit to be a member of the Institute.

(6) On this finding we have now to decide what order should properly be passed on this reference. S. 20(2) provides that

> "The Council shall remove from the Register the name of any member who has been found by the High Court to have been guilty of conduct which renders him unfit to be a member of the Institute."

This would seem to imply that whenever there is a finding that the accountant has been guilty of conduct which renders him unfit to be a member of the Institute he has to be removed from the register. It is difficult to believe that such a result was contemplated by the Legislature. Not all the acts or omissions mentioned in the schedule are of the same gravity. For example, failure to keep monies of the clients in separate banking account as provided in cl. (t) of the schedule, will without more, be only a technical breach, while making a false return under cl. (u) is of a serious character involving moral turpitude. The two cannot be put on the same level. It is an unreasonable construction to be put on S. 20 (2) to hold that in every case in which there is a finding of misconduct as defined in S. 22 there must be a removal irrespective of the nature of the act or omission of which the accountant is found guilty.

(7) This matter is governed by S. 21 cl. (3) which defines the jurisdiction of this court in dealing with references under that section. It runs as follows:

> "The High Court may, thereafter, either pass such final orders on the case as it thinks fit or refer it back for further enquiry by the Council and upon receipt of the finding after such enquiry, deal with the case in the manner provided in sub-s. (2) and pass final orders thereon."

Regulation 13 framed under this Act provides for the restoration to the Council of a person "whose name has been permanently or temporarily removed from the register of members." Temporary removal is suspension and therefore, it is clear that a permanent removal is not the only order that is contemplated. The powers of the High Court to pass any orders under the Act under S. 21(3) must extend to removal of a member permanently or suspending him for a period or even warning him, and S. 20(2) must accordingly be read as subject to the powers of the High Court under S. 21(3).

(8) In this view we have to consider what order should be passed on the facts of this case. We are satisfied that Natarajan did perform his duties as an articled clerk efficiently and satisfactorily. He had passed his G. D. A. examination in 1934 and was of sufficient age and experience in 1946 to realise his responsibilities. He had decided to resign his place in the post office and take up the profession of chartered accountant with the object of increasing his income and it is not likely that he would have neglected his duties as an articled clerk because his chances of earning in the profession depended on his success as an accountant. It is also proved that during this period he took leave of absence in the post office for 392 days being the maximum number of days available and this is in addition to casual leave and this was for the purpose of enabling him to do his work as an articled clerk.

Even during the days in which he was on duty in the post office he was allowed to adjust work there, as is seen from the certificates of two postmasters which have been exhibited as part of the record. It is pointed out by the Disciplinary Committee that there were only 26 files in all showing the audit work done by Natarajan and that would have engaged him only for 15 months but we think it would not be safe to judge of the work by such an arithmetical approach. There is ample evidence that Natarajan also took part in audits conducted by the other assistants in the office. Vide the affidavits of T. J. Rajagopalan, R. Venkataraman and A. Sankar Rao. It also appears that from February 1949 there was a fall in the business of the respondent. But for the knowledge that Natarajan was employed in the post office one would not consider the work turned out by him as inadequate or insufficient to qualify him as an accountant.

(9) The Committee was naturally impressed by the fact that it would have been impossible for Natarajan to ride two horses at the same time and that he could not have done justice to his work in the post office and in the office of the respondent. But the evidence clearly establishes that in the discharge by Natarajan of his dual functions, it was not his work with the respondent that was neglected. We are not satisfied that Natarajan did not work properly in the office of the respondent or that he was not trained adequately by him or that the certificate of completion of service given by the respondent was in any material particular incorrect. We also take into account that the respondent has been practising as an auditor from 1926 without any imputation on his character. He has had extensive practice and the evidence shows that in 1946 there were several persons who applied to him to be taken as articled clerk. It cannot, therefore, be that he was tempted into accepting Natarajan as an articled clerk for the sake of the premium. All the facts in evidence show that he had committed an error of judgment in taking Natarajan as an articled clerk but that normally no blame attached to him. Under the circumstances, we think that it is sufficient punishment to the respondent that he is warned and that no further action is called for.

(10) The counsel for the institute does not press for costs.

B/D.H. Order accordingly.

A. I. R. 1953 MADRAS 313 (Vol. 40, C. N. 106)

RAJAMANNAR C. J. AND VENKATARAMA AIYAR J.

Mrs. Margaret Jean Massy Westmorland Wood, Appellant v. Colonel Granville Alric Richard Spain, Respondent.

Appeal No. 697 of 1949, D/- 18-4-1952.

(a) **Transfer of Property Act (1882), Ss. 111 (g) and 114A — Two separate notices — Necessity.**

Two notices in writing, namely, one under S. 111(g) and one under S. 114A are not necessary. S. 114A was added by an amendment of 1929 and must be deemed to have specified the nature of the notice required under S. 111(g). AIR 1938 Cal. 589, Rel on. (Para 7)

Anno: T. P. Act, S. 111 N. 16; S. 114A N. 1.

(b) Transfer of Property Act (1882), S. 114A — Technical defects.

The object of S. 114A is that the lessor should have clear information as regards the breaches complained of and he should have an opportunity of remedying them if possible. Once the purpose of this provision is substantially complied with, mere technical defects should not prevent the lessor from availing herself of the right of forfeiture if she was otherwise entitled to it. The commonsense view of the matter should be taken in construing S. 114A. Case law discussed. (Para 8)

Anno: T. P. Act, S. 114A N. 1, 3.

(c) Civil P. C. (1908), S. 35 — Defendant succeeding and plaintiff's suit dismissed — However defendant's attitude towards plaintiff not commendable — Held that costs should not follow events. (Para 10)

Anno: C. P. C., S. 35 N. 7.

K. Rajah Iyer and V. Seshadri, for Appellant; O. T. G. Nambiar instructed by King and Partridge, for Respondent.

REFERENCES: Courtwise/Chronological/ Paras

('38) ILR (1938) 2 Cal 434: (AIR 1938 Cal 589)	7
(1897) 1 Ch 271: (66 LJ Ch 177)	9
(1898) 1 Ch 652: (67 LJ Ch 344)	9
(1900) 2 Ch 156: (69 LJ Ch 493)	9
(1917) 1 KB 762: (86 LJ KB 614)	8
(1898) 1 QB 276: (67 LJ QB 11)	8

RAJAMANNAR, C. J.: This is an appeal by the plaintiff in O. S. No. 162 of 1948 on the file of the Subordinate Judge of the Nilgiris at Ootacamund against the dismissal of her suit. The plaintiff is the owner of lands and premises known as Niton Estate which contains a tea plantation and is situated in Kotagiri in the District of the Nilgiris. The plaintiff demised the said estate to the defendant under a lease deed dated 1st July 1945 (Ex. A. 1). The lease was for a period of ten years. The annual rental was fixed at Rs. 1800 to be paid in four instalments of Rs. 450 each in advance on or before the 1st July, 1st October, 1st January and 1st April each year. Besides the estate, a small house used for the occupation of the writer was also let out to the defendant at a monthly rental of Rs. 5. The lease contained both covenants by the lessor and covenants by the lessee. It was provided 'inter alia' in the lease that in case of breach or nonperformance of any of the covenants and conditions contained in the lease on the part of the lessee, then it shall be lawful for the lessor to re-enter upon the de-

mised premises and to re-possess the same without prejudice to any right of action or remedy of the lessor in respect of any such breach of the covenants and conditions.

The suit was instituted on the allegation that there had been many breaches of several of the covenants and conditions of the lease and that, therefore, the plaintiff as lessor had become entitled to lawfully re-enter upon the premises and to forfeit the defendant's rights under the lease. The plaintiff therefore prayed for a decree in ejectment. She also prayed for the recovery of a sum of Rs. 5776-2-6 as compensation for the damage caused to the estate by the said breaches by the defendant. She also claimed mesne profits from the date of suit till date of delivery of possession at the rate of Rs. 1000 per month and compensation for the deterioration of the premises from the date of suit till date of possession.

(2) The defendant denied the breaches alleged by the plaintiff and disclaimed any liability. The defendant also pleaded that some of the covenants were not binding on him because they were inserted fraudulently and on misrepresentations made by the plaintiff's husband to the defendant. He also raised a further plea that the suit must fail because of the want of a proper and valid notice of ejectment.

(3) The following issues were raised on the pleadings:

1. Has the defendant committed a breach of any of the covenants mentioned in the plaint, and if so, does it work out a forfeiture of the lease?

2. Was a proper and valid notice of ejectment given by plaintiff to defendant?

3. Has plaintiff a cause of action and is her suit for ejectment and possession maintainable?

4. Are covenants 5, 9 and 9 (a) void and invalid for the reasons alleged by the defendant?

4(a) If issue 4 is in the negative, has there been sufficient compliance by defendant with the said covenants?

4(b) Is it competent for the defendant to say that plaintiff is not entitled to insist on his performance of the covenants to the extent mentioned in the lease deed itself?

5. Whether any and what damages have been incurred, and what sum is plaintiff entitled to on that account?

6. Is plaintiff entitled to claim in this suit future damages?

7. Is plaintiff entitled to any and what mesne profits?

8. To what relief if any is plaintiff entitled?

(4) On issue 1 the learned Subordinate Judge found that it could not be said that defendant had not sufficiently complied with the covenants and therefore he was not liable to forfeit the lease. On issue 4 he held that covenants 5, 9 and 9(a) were not void and that they were not included on the faith of any misrepresentation made by the plaintiff's husband that these covenants had to be performed according to the ordinary meaning of the terms thereof. On issue 2 he held that there was no valid notice such as was required by S. 114A, T. P. Act. He decided issue 5 against the plaintiff. Issues 4(a) and 4(b) were not discussed separately by him as the subject matter of these issues was covered by his finding on the other main issues. In view of his findings on issue 1, issue 6 was answered in the negative. As the plaintiff's suit in ejectment was dismissed no question arose about mesne profits and issue 7 was also found against the plaintiff. There was no finding on issue 3 as it was really unnecessary. On these findings the suit failed and it was dismissed. As regards costs the learned Judge thought that he should deviate from the general rule that costs should follow the event on account of the peculiar circumstances present in the case and so he awarded the defendant only three-fourths of his costs. Hence the appeal.

....

(After discussing the facts of the case His Lordship proceeded) :—

(5) On these findings of ours, namely, that none of the covenants was broken, the suit must fail. It is, however, necessary to deal also with the plea raised on behalf of the defendant and which found favour with the Court below, namely that there was no proper and valid notice of ejectment and therefore the suit must be dismissed. Mr. Rajah Aiyar attacked the finding of the trial Court on this point. The material provisions are Ss. 111(g) and 114A, T. P. Act, which do not expressly govern agricultural leases, but principles underlying which have often applied to such leases.

These provisions run as follows:

"S. 111. A lease of immoveable property determines (g) by forfeiture; that is to say, (1) in case the lessee breaks an express condition which provides that on breach thereof the lessor may re-enter or (2) in case the lessee renounces his character as such by setting up a title in a third person or by claiming title in himself; or (3) the lessee is adjudicated an insolvent and the lease provides that the lessor may re-enter on the happening of such event; and in any of these cases the lessor or his transferee gives notice in writing to the lessee of his intention to determine the lease."

114A: Where a lease of immoveable property has determined by forfeiture for a breach of an express condition which provides that on breach thereof the lessor may re-enter, no suit for ejectment shall lie unless and until the lessor has served on the lessee a notice in writing—

(a) specifying the particular breach complained of; and (b) if the breach is capable of remedy requiring the lessee to remedy the breach; and the lessee fails within a reasonable time from the date of the service of the notice, to remedy the breach, if it is capable of remedy.

Nothing in this section shall apply to an express condition against the assigning, underletting, parting with the possession, or disposing of the property leased, or to an express condition relating to forfeiture in case of non-payment of rent."

(6) In the plaint the relevant allegations on this point are that by the plaintiff's advocate's letter dated 27th August 1948, Ex. A. 2, the defendant was given notice to vacate and hand over the demised premises by the 15th September and that the plaintiff again informed the defendant through her Solicitors that he should vacate by the 30th September. It is clear, therefore, that the notice of 27th August, Ex. A. 2, is the notice relied upon by the plaintiff. But Mr. Rajah Aiyar, her learned counsel, also referred us to an earlier notice, Ex. A. 96, dated 7th July 1948. In this the plaintiff complained to the defendant of cattle trespass and other breaches of the agreement and warned him that unless he took adequate steps to prevent them and in future abide strictly by the word and spirit of the agreement he will have to face the consequences of any action she might take to enforce her rights. There

is reference to this letter of the 7th July in the Advocate's letter Ex. A. 2. The learned Judge held that the notice of 27th August 1948, Ex. A. 2, did not fulfil the requirements of S. 114A. He thought it was not permissible to read Ex. A. 96 in conjunction with Ex. A-2. The ground on which he came to this conclusion was that the plaintiff did not give the defendant an opportunity to remedy the breaches.

(7) Though there is room for some doubt we are inclined to agree with the learned Judges of the Calcutta High Court that two notices in writing, namely, one under S. 111(g) and one under S. 114A are not necessary, vide —'Provat Chandra v. Bengal Central Bank Ltd.', ILR (1938) 2 Cal 434. S. 114A was added by an amendment of 1929 and must be deemed to have specified the nature of the notice required under S. 111(g).

(8) We do not agree with the learned trial Judge that Ex. A. 2 is bad because the defendant was not required to remedy the breaches. Firstly the breaches complained of in Ex. A. 2 were not capable of remedy because the damages had been done already. No doubt at one stage the plaintiff was willing in spite of the breaches not to resort to the drastic step of forfeiture if at least in the future the defendant did not allow further breaches. But so far as the breaches which had occurred were concerned they were not capable of remedy. Secondly, even if it be considered that there was no opportunity given to the defendant to make good, we think that Ex. A. 2 should be read along with the prior notices in which the plaintiff did call upon the defendant to remedy the breaches and gave him reasonable time for that purpose. These considerations also meet the objection of Mr. Nambiar that Ex. A. 2 does not contain a list of all the breaches which were subsequently alleged in the plaint. It is obvious that the object of S. 114A is that the lessor should have clear information as regards the breaches complained of and he should have an opportunity of remedying them if possible. Once the purpose of this provision is substantially complied with mere technical defects should not prevent the lessor from availing herself of the right of forfeiture if she was otherwise entitled to it.

In —'Penton v. Barnett', (1898) 1 QB 276, Collins L. J. dealing with similar notice required under the Conveyancing Act of 1881 observed as follows:

> "I think, however, that we ought to construe the words 'particular breach' in the section according to the obvious intention of the Legislature, which was that the tenant should be informed of the particular condition of the premises which he was required to remedy. The expression 'breach' means the neglect to deal with the condition of the premises so pointed out, and not merely failure to comply with the covenants of the lease. The commonsense of the matter is that the tenant is to have full notice of what he is required to do".

These observations were followed by Rowlatt J. in — 'New River Co. v. Crumpton', (1917) 1 K. B. 762. In our opinion the commonsense view of the matter should be taken in construing S. 114A.

(9) Mr. Nambiar cited to us certain decisions of the English Courts, but none of them has any application to the facts of this case. In — 'Fletcher v. Nokes', (1897) 1 Ch. 271, the notice by the lessor was in the following terms:

> "You have broken the covenants for repairing the inside and outside of the house".

It was held that the notice was insufficient because it was far too general and that the notice to be served by a lessor on his lessee to entitle the lessor to enforce by action a right of remedy of the breach must be given in such detail as will enable the lessee to understand what is complained of so that he may have an opportunity of remedying the breach before action is brought. Surely the defendant cannot be heard to say that he did not understand what was being complained of. This decision was followed in — 'In Re Serle; Gregory v. Serle', (1898) 1 Ch. 652. In that case the lessor merely informed the lessee that he had not kept the premises well and sufficiently repaired and the party and other walls thereof. In — 'Jacob v. Down', (1900) 2 Ch. 156, there was a notice, but it referred to the breach of only one of the covenants. But there was a subsequent waiver as to this breach. There was a breach of another covenant on which the plaintiffs-lessors wanted to rely, but that was not mentioned in the notice. It was, therefore, held that the notice was insufficient. We have nothing like this in the case before us. If we had held that the defendant was guilty of breach of any of the covenants, then we would have held that there was proper notice under Ss. 111 (g) & 114A, T.P. Act. But having regard to our finding that the defendant was not guilty of the breach of any of the covenants the suit must fail. The appeal is dismissed.

(10) We do not, however, think that this is a case in which costs should follow the event. It is true that we have held that the defendant did not commit a breach of any of the covenants. But we cannot certainly commend the attitude of the defendant to the complaints made by the plaintiff. It may be that the plaintiff and her husband were far too much insisting on their rights and were also prone to a little exaggeration. But it must not be forgotten that the estate belonged to them and they were vitally interested in its proper maintenance and also that the plaintiff and her husband were actually on the estate. The defendant might have got a little irritated by the tone and frequency of the letters from the plaintiff and her husband, but it was the duty of the lessee to satisfy the lessor that he was taking every step to see that the covenants were kept properly. Having regard to this conduct of the defendant we think that there should be no order as to costs in this appeal.

(11) The memorandum of objections filed by the defendant relates to that portion of his costs of the trial which was disallowed by the learned Judge. We see no reason to interfere with the discretion exercised by the learned Judge. The memorandum is dismissed. No costs.

B/D.H. Order accordingly.

A. I. R. 1953 MADRAS 315 (Vol. 40, C. N. 107)

SATYANARAYANA RAO AND RAJAGOPALAN JJ.

Jakka Devayya and Sons, Tenali, Applicant v. Commissioner of Income-tax, Madras, Respondent.

Refd. Cases Nos. 1 and 2 of 1950, D/- 13-3-1952.

(a) Income-tax Act (1922), Ss. 25 A, 26 A and 2 (6-B) — Hindu undivided family — Partition — Family of three brothers one of whom was minor — Unequivocal intention to separate and actual division of movable property — Parties entering into partnership deed under which joint family cloth business was agreed to be continued as joint — Minor represented by guar-

dian — Joint family business ceases to be family property — Partnership valid for purposes of registration under S. 26 A — Partnership Act (1932), Ss. 4, 30.

Up to June 1942 the assessee was a Hindu undivided family consisting of three brothers L, K and S who was a minor. On 24-6-1942 an unregistered partition list was drawn up between the members, the minor S being represented by the manager. The members decided to become separate and to divide the properties but only the moveable property was divided actually and the physical division of the assets consisting of houses was postponed to a later date. As regards the cloth business an account of the business was taken after valuing the stock on hand and a balance sheet was embodied in the document. On 22-6-1943 two documents viz. a registered partition deed & a partnership deed came into existence. In the partition deed S being still a minor was represented by his father-in-law. It was recited in this deed that the members had begun to live separately from 24-6-1942 taking possession of such properties as were physically divided. It also contained a resolution to keep the house and house sites as joint and to carry on the cloth business jointly in the name of J. D. and Sons. Regarding the business, the profits of each sharer were separately shown and the balance that was available in the accounts of the business was also separately entered. The whole stock was valued. In the partnership deed, the shares of the three sharers were fixed at one-third each, and as there was no fixed capital for business during the time when the business was joint family business, it was stated in the document that they had invested amounts standing to the credit of each in their individual accounts as well as the amount credited in the name of J. D. & Sons as capital. During the assessment year 1943-44 the assessee claimed that there was a partition of the family properties in June 1942 and the Income-tax Officer after examining the evidence adduced by the assessee held that there was a division of the family properties on 4-4-1943. On the strength of this decision, the assessee claimed during the assessment year 1944-45 that the business carried on during the accounting year was the business belonging to a firm consisting of the erstwhile members of the Hindu undivided family, and that the firm should be registered under S. 26-A of the Act, and the assessment should be also remade from that date. These two claims were rejected by the Department and also by the Appellate Tribunal. The Appellate Assistant Commissioner found as a fact that there was division of the profits during the years 1942-43 and 1943-44, and that the profits of the first year were entered in the books on 4-4-1943 and of the second year on 24-3-1944, and that the mutation of the family account was effected by transferring the balance to the credit of the business to the ledger folios opened for the three sharers.

Held (i) that on the facts and in the circumstances of the case and on a proper construction of the deeds of partnership and partition dated 22-6-1943, the finding of the Tribunal that cloth business continued to belong to the Hindu undivided family was erroneous in law. There was a division of the business into definite portions, and the asset was effectively taken out of the joint family properties by constituting it a partnership after division. (Paras 6, 8)

(ii) That on the facts and circumstances of the case there was undoubtedly a valid partnership in respect of the cloth business which could be registered under S. 26-A of the Act. The fact that the minor was included in the contract would not make the partnership as between the two adults invalid, and the minor may be deemed to have been admitted to the benefits of the partnership by the two adults. Under the Income-tax law a minor admitted to the benefits of a partnership becomes a partner. Similarly the fact that the minor was made liable for losses which was not permissible under the law, would not make the partnership invalid. AIR 1928 Rang 160; AIR 1928 PC 135, Rel. on; AIR 1922 Lah 441 and AIR 1931 All 327, Ref. (Paras 10, 12)

Anno: Income-tax Act, S. 25 A N. 3 and S. 26 A N. 1; Partnership Act, S. 4 N. 6; S. 30 N. 1, 3.

(b) Income-tax Act (1922), S. 25 A — Hindu undivided family — Joint family business — Partition of — What constitutes — Partition under Hindu Law and one recognised under S. 25-A — Distinction — (Hindu Law — Joint family — Partition).

What constitutes "partition" under S. 25-A of the Income-tax Act and its requirements are different from "partition" under Hindu Law. Under Hindu Law the word "partition" is used in two senses: It may be a mere division of the right i.e., the disruption of the status of the joint family, or it may be not only a division of the status of the family but also a physical division, or in other words a division by metes and bounds of the properties. Under S. 25-A of the Act, it is not enough to establish that there was a mere division in status, but it must be proved that the family property was partitioned among the various members or groups of members in definite portions. Unless this requirement is established, the partition cannot be recognised under the Act, and the family is deemed to continue as a Hindu undivided family, notwithstanding the fact that its status as joint family had been terminated. (Para 4)

A partition in the case of business in definite portions may be brought about by a specification of the shares in the accounts and making the necessary entries therein to show that thereafter the business was held in severalty in specified or definite portions or shares. It is open to the members of the Hindu joint family to enter into a partnership thereafter in respect of the family business which they have divided by specified shares in the accounts, among themselves. The property so held in partnership is taken out of the joint family, and thereafter the income derived from the partnership would not be the income of the joint family. In other words, it ceases to be an asset owned by a Hindu undivided family. The rest of the properties and the status of the family regarding them may continue to be joint. The only

effect of taking out an asset from and out of the assets of the joint family is not to attract S. 25A of the Act but to make it an asset whose income cannot be taken into consideration in computing the income of the joint family for the purpose of assessment. It has to be assessed separately. AIR 1951 Mad 506; AIR 1942 PC 57, Rel. on. (Para 5)

When a business is conducted by a joint family there need not necessarily be an allocation of capital separately for the business. The joint family may from time to time supply the necessary capital for the successful prosecution of the business. In the case of a joint family business there will be no division of the profits periodically, for no member is entitled to claim that the profits should be so divided, and whatever income is earned in the business will accrue to the benefit of all the members of the coparcenary. The members are not partners in the business but parceners. Death of a member does not dissolve the business as in the case of a partnership. Birth of a member will give him an automatic right in the business which is a family asset. There is a clear contrast between joint family business and business belonging to a firm of partnership. It is therefore unreasonable to expect the existence of a separate capital for a joint family business, and if it does not exist, or if it is not divided, it cannot be said that there was no division of the business. (Para 6)

Anno: Income-tax Act, S. 25A N. 1.

(c) Hindu Law — Joint family — Partition — Minor co-parcener not represented by lawful guardian — Partition when can be challenged.

A partition of joint family property cannot be impugned as invalid by the minor co-parcener merely because he was not represented by a lawful guardian. So long as the interests of the minor have not suffered, it is open even to a person other than the natural guardian to represent the minor in the partition, and it would be binding on him. If the minor after attaining majority thinks that it was unfair or prejudicial, it would be open to him to attack the partition by appropriate proceedings. 35 All 126 and 30 Cal 738 (PC), Rel. on. (Para 7)

M. Subbaraya Aiyar, for Applicant; C. S. Rama Rao Sahib, for Respondent.

REFERENCES: Courtwise/Chronological/ Paras

('03) 30 Cal 738: (30 Ind App 139 PC) 7
('28) AIR 1928 PC 135: (107 Ind Cas 453) 12
('42) 1942-10 ITR 457: (AIR 1942 PC 57) 5
('13) 35 All 126: (17 Ind Cas 846) 7
('31) 53 All 479: (AIR 1931 All 327) 11
('22) AIR 1922 Lah 441: (67 Ind Cas 95) 11
('50) 1950-18 ITR 586: (AIR 1951 Mad 506) 5
('28) 6 Rang 198: (AIR 1928 Rang 160) 12

SATYANARAYANA RAO J.: These two referred cases arise from the same facts, and the assessee in both is the same. R. C. No. 1 of 1950 relates to the assessment for 1944-45, the accounting year being the year ending on 24-3-1944. In R. C. No. 1 of 1950 the question referred to us for decision by the Income-tax Appellate Tribunal is

"Whether on the facts and in the circumstances of the case and on a proper construction of the deeds of partnership and partition dated 22-6-1943, the finding of the Tribunal that cloth business continued to belong to the Hindu undivided family is erroneous in law."

R. C. No. 2 of 1950 arises out of proceedings for registration of the partnership of Jakka Devayya and Sons under S. 26A of the Income-tax Act, and the question referred to us for decision under S. 66(1) Income-tax Act by the Income-tax Appellate Tribunal is,

"Whether on the facts and in the circumstances of the case, there was a valid partnership in respect of the cloth business which could be registered under S. 26A, Income-tax Act?"

Upto June 1952 the assessee was a Hindu undivided family. During the assessment year 1943-44 the assessee claimed that there was a partition of the family properties in June 1942 and the Income-tax Officer after examining the evidence adduced by the assessee held that there was a division of the family properties on 4-4-1943. On the strength of this decision the assessee claimed during the assessment year now under consideration that the business carried on during the accounting year was the business belonging to a firm consisting of the erstwhile members of the Hindu undivided family, and that the firm should be registered under S. 26A of the Act, and the assessment should be also remade from that date. These two claims were rejected by the Department and also by the Appellate Tribunal. Hence these two references.

(2) The family consisted of three brothers, Lakshminarayana, Krishnamurthi and Subbarao. Subbarao was a minor. On 24-6-1942 an unregistered partition list was drawn up between the members, and the minor Subbarao was represented by the eldest brother and manager Lakshminarayana. The family owned gold jewels, silverware, utensils, and furniture, houses and house sites and cloth business. On the date of this list Subbarao was unmarried. The jewels, silverware and other movables were divided between the sharers, and they took separate possession of those properties which were divided. They did not however divide by metes and bounds the houses and house-sites, because as per the directions of their deceased father they had to make provision for their widowed sister, and the division of the dwelling houses and the sites would necessitate certain structural alterations for the convenient enjoyment of the sharers which they did not intend to carry out during the minority of Subbarao, especially as he was unmarried. They therefore decided to keep these properties jointly. As regards the cloth business in this document, an account of the business was taken after valuing the stock on hand, and a balance sheet was embodied in the document. Details with reference to the property which was kept in joint possession were given in Sch. D appended to the document. The document contains a clear determination and an unambiguous declaration that the members decided to become separate and to divide the properties; only the physical division of the assets included in Sch. D was postponed to a later date.

By June 1943 Subbarao was married. On 22-6-1943, two documents came into existence. One was a partition deed, and the other was a deed of partnership. The partition deed was registered. In this deed the minor was represented by his father-in-law. It contains a resolution to keep the houses and house-sites joint, and that as there was no possibility to divide the cloth business consisting of cloth, furniture etc, the business

should be carried on jointly in the name of Jakka Devayya and Sons. The members began to live separately from 24-6-1942 taking possession of such of the properties as were physically divided. The shares allotted to each member in gold, silverware and utensils are described in Schs. A, B and C and the property kept joint was included in Sch. D. Regarding the business, the profits of each sharer were separately shown and the balance that was available in the accounts of the business was also separately entered. The whole stock was valued. In the partnership deed, the shares of the three sharers were fixed at one-third each, and as there was no fixed capital for the business during the time when the business was joint family business, it is stated in the document that they had invested amounts standing to the credit of each in their individual accounts as well as the amount credited in the name of Jakka Devayya and Sons as capital. If any further amount was required for the business it was provided in the deed, that it should be borrowed either in cash or in kind. It has been found by the Appellate Assistant Commissioner — and there is no dispute — that there was division of the profits during the years 1942-43 and 1943-44, and that the profits of the first year were entered in the books on 4-4-1943 and of the second year on 24-3-1944, and that the mutation of the family account was effected by transferring the balance to the credit of the business to the ledger folios opened for the three sharers. Apparently they did not wish to discontinue the business as a result of the partition arrangement, as it ended in profit but agreed to continue it though as a partnership.

(3) On these facts, the first point for consideration is whether the business ceased to be a joint family asset during the relevant period, or whether it continued to belong to the Hindu undivided family. A further question for determination is whether the partnership is valid and could be registered under S. 26A of the Act.

(4) What constitutes "partition" under S. 25A, Income-tax Act and its requirements are different from 'partition" under Hindu Law. Under Hindu law it is well established that the word "partition" is used in two senses: It may be a mere division of the right, i. e., the disruption of the status of the joint family, or it may be not only a division of the status of the family but also a physical division, or in other words a division by metes and bounds of the properties. Under S. 25A of the Act, it is not enough to establish that there was a mere division in status, but it must be proved that the family property was partitioned among the various members or groups of members in definite portions. Unless this requirement is established, the partition cannot be recognized under the Act, and the family is deemed to continue as a Hindu undivided family, notwithstanding the fact that its status as joint family had been terminated.

(5) The meaning of the expression "in definite portions" has been construed by myself and Viswanatha Sastri J. in recent case in —'Meyappa Chettiar v. Commissioner of Income-tax', 1950-18 ITR 586 (Mad) following the decision of the Privy Council in —'Sundar Singh v. Commissioner of Income-tax', 1942-10 ITR 457. In that case we both expressed the view that in order to constitute partition of a business belonging to a joint family, it was not necessary to establish physical division of the business for to insist on this requirement would be to destroy the proverbial goose that lays the golden eggs. The physical division of the business into definite portions will only mean the winding up of the business and a division of the assets realised from the business. This need not be insisted upon. A partition in the case of business in definite portions may be brought about by a specification of the shares in the accounts and making the necessary entries therein to show that thereafter the business was held in severalty in specified or definite portions or shares. It is open to the members of the Hindu joint family to enter into a partnership thereafter in respect of the family business which they have divided by specified shares in the accounts, among themselves. The property so held in partnership is taken out of the joint family, and thereafter the income derived from the partnership would not be the income of the joint family. In other words, it ceases to be an asset owned by a Hindu family. That this is permissible follows, in our opinion, from —'Meyappa Chettiar v. Commissioner of Income-tax', 1950-18 ITR 586 and from the decision in —'Sundar Singh Najitha v. Commissioner of Income-tax', 1942-10 ITR 457. The rest of the properties and the status of the family regarding them may continue to be joint. The only effect of taking out an asset from and out of the assets of the joint family is not to attract S. 25A of the Act but to make it an asset whose income cannot be taken into consideration in computing the income of the joint family for the purpose of assessment. It has to be assessed separately. It therefore follows from this, whether in fact the family houses and house-sites were divided or not physically, if it is established that the joint family business was partitioned in definite portions, then it will be taken out of the property of the joint family.

(6) The inference to be drawn from the two documents which came into existence on the same date namely, 22-6-1943, the partition deed and the partnership deed, in our opinion, is clearly to establish that this asset was divided and was taken out of the joint family assets. The necessary entries in the accounts were made on 4-4-1943 and on 24-3-1944. The shares were specified in the partnership deed. The contentions found in favour with the department and the Appellate tribunal were that the capital of the business was not divided, and that the documents themselves gave a clear indication that the members agreed to continue this asset also as joint. Regarding the first, it must be observed that when a business is conducted by a joint family there need not necessarily be an allocation of capital separately for the business. The joint family may from time to time supply the necessary capital for the successful prosecution of the business. That was the very reason why it was stated in the partnership deed that no capital was fixed for the business. It became necessary to fix the capital for the first time on 22-6-1943 when the partnership deed was executed.

It must be mentioned that in the case of a joint family business there will be no division of the profits periodically, for no member is entitled to claim that the profits should be so divided, and whatever income is earned in the business will accrue to the benefit of all the members of the coparcenary. The members are not partners in the business but parceners. Death of a member does not dissolve the business as in the case of a partnership. Birth of a member will give him an automatic right in the business which is a family asset. There is a clear contrast between joint family business and business belonging to a firm of partnership. It is therefore unreasonable to expect the existence of a separate capital for a joint family business, and if it does not

exist, or if it is not divided, it cannot be said that there was no division of the business. The necessity for constituting the capital arose when the business was separated from the family assets, and it was then that the precaution of appropriating in the business the amounts specified in the partnership deed, i. e., the amounts standing to the credit of the individual partners in the accounts and that in the name of Jakka Davayya and Sons as capital was taken.

The Appellate Tribunal and the Appellate Assistant Commissioner thought that the recitals in the documents that the business was not divided, as there was no possibility of dividing it, and that they agreed to carry it on in the name of Jakka Devayya and Sons precluded an inference of division of the business into definite portions. The intention to carry on the business jointly, in the context and reading the recital in the partnership deed, can only be that they intended to carry on the business as a separate firm. "Joint" in the context does not mean "as joint family property." Apart from other difficulties which would be dealt with presently, on a plain reading of the two documents together it seems to us obvious that there was a division of the business into definite portions, and that the asset was effectively taken out of the joint family properties by constituting it a partnership after division.

(7) It is no doubt true that in the matter of partition under the first document of 1942 Lakshminarayana, the eldest brother, represented Subbarao. In the later document, the registered partnership deed of 1943, Subbarao was represented by his father-in-law. It might be argued that as the minor was not represented by a lawful guardian, the partition was invalid. The two brothers Lakshminarayana and Krishnamurthi, were adults. On account of certain family reasons they decided to become separate. If two out of the three brothers cut themselves out from the family, the third brother remains divided. As pointed out by the Judicial Committee in —'Balkishendas v. Ramnarain Sahu', 30 Cal 738;

> "There is no doubt that a valid agreement for partition may be made during the minority of one or more of the coparceners. That seems to follow from the admitted right of one coparcener to claim a partition; and (as has been said) if an agreement for partition could not be made binding on minors, a partition could hardly ever take place. No doubt if the partition was unfair or prejudicial to the minors' interests, he might, on attaining his majority, by proper proceedings, set it aside so far as regards himself."

So long therefore as the two adult brothers made a division of the properties which was fair which was not unequal or prejudicial, to the minor's interest, the division would be binding, and if the minor after attaining majority thinks that it was unfair or prejudicial, it would be open to him to attack the partition by appropriate proceedings. So long as the interests of the minor have not suffered, it is open even to a person other than the natural guardian to represent the minor in the partition; this is recognised in — 'Bhagavati Prasad v. Bhagwati Prosad', 35 All 126. In that case, as in the present, the brother acted on behalf of the minor, though there was the mother. Partition was already determined in the present case in 1942 and the registered partition was only an affirmation of what was decided in 1942, and the fact that the father-in-law represented the minor as the guardian in the matter of the execution of the deed is of no consequence. The partition therefore cannot be impugned on this ground.

(8) It follows from the foregoing that the business ceased to belong to the Hindu undivided family, and the view taken by the Appellate Tribunal is erroneous. The question referred to us in R. C. No. 1 of 1950 must be answered in the affirmative and against the Commissioner of Income-tax.

(9) This conclusion would not be enough to enable the assessee to insist that the assessment should be made on the various members separately, for unless they establish that there was a valid partnership they cannot achieve this result. If there is no valid partnership, the business carried on by the members would be assessed as an association and not as individuals. Vide S. 3, which refers to "other association of persons."

(10) Subba Rao was a minor on the date on which the partnership deed was entered into, and it is undoubted law that a minor cannot be made a partner even by a natural guardian acting on behalf of the minor. There can be no partnership between an individual and a minor represented by a person as a guardian. Such a contract does not bind the minor. But it is open to partners to admit a minor into the benefits of a partnership. (Vide S. 30, Partnership Act). If he is so admitted, under S. 2(6B), Income-tax Act, he becomes a partner for the purpose of the Act, for it says,

> "'Partner' includes any person who being a minor has been admitted to the benefits of partnership."

If he is not admitted to the benefits of the partnership but the assets in the business belonging to his share are utilised in the business continued by the other partners after division, the minor may be entitled to the profits attributable to the use of his share in the property in the business on the principle of S. 37, Partnership Act, though the section itself may not apply, or under the general principles indicated in Ss. 80, 90 and 95, Trusts Act. The difference between the two rights is that in the one case the minor will be entitled only to the profits attributable to his share which has been utilised in the business, while in the other case he would be entitled to the share of the profits to which he was admitted by the major members irrespective of the value of his share utilised in the business. In the deed of partnership the minor is given a right to the profits, and is made liable to losses. This of course is not permissible in law, as no guardian can enforce a personal obligation on behalf of the minor under a contract.

(11) It was argued with considerable force by Mr. Subbaraya Aiyar, the learned advocate for the assessee, that the main object of the brothers was to confer a benefit on the minor and to admit him to the benefits of the partnership. The parties being ignorant introduced in the deed the usual clauses of a partnership deed making the minor also equally liable for losses, and we should therefore construe the contract between the adults as tantamount to an admission of the minor to the benefits of the partnership. Admission to the benefits of a partnership undoubtedly implies the existence of a partnership. Where two persons, one a major and the other a minor, purport to enter into a partnership deed, as the minor had no contractual capacity, the partnership would be invalid, and there would not be an existing partnership. The question therefore of construing such a contract as admitting the minor to the benefits of a partnership does not

arise, as the partnership is non-existent. That was the position in the two cases referred to in the course of the arguments in —'Muhammad Rafiq v. Khwaja Qamar Din', AIR 1922 Lah 441 and —'Lachmi Narain v. Beniram', 53 All 479. But here, there could be a valid partnership between the two adults, Lakshminarayana and Krishnamurthi, and there would be an existing partnership to the benefit of which the minor could be admitted. And all that is required by S. 30 is that there should be a consent of all the partners for the time being to admit the minor to the benefits of the partnership. Lakshminarayana and Krishnamurthi were willing to admit the minor to the benefits of the partnership, and in fact in the accounts they opened a ledger page in his name and entered the profits earned on his behalf for the two years. We think therefore that too rigid a construction of the document need not be placed, and that the real intention of the parties can be gathered from the document and from their conduct in crediting the profits in the accounts. The father-in-law certainly must have had enough knowledge that the business was a profitable one and not a losing concern.

(12) The case which is analogous to the present is, in our opinion, the decision in — 'Khorasany v. Acha', 6 Rang 198. There a Mahomedan who was carrying on business in partnership with another died, leaving his widow and minor children. After the death of the husband, the widow entered into a contract of partnership on behalf of herself and also on behalf of the minor children. She had no power to enter into such a contract so as to bind the minors, but nevertheless it was held that as between the widow and the partnership to the extent of her interest the partnership was legal. It was observed in that case;

> "..both plaintiff 1 and the defendant at the time of making the agreement were not aware of the legal difficulty and believed that they were entering into a valid contract, and as between plaintiff 1 Amina Bi and the defendant I think that partnership was validly created by the agreement."

In Lindley on Partnership, 11th Edn., at page 87 it is pointed out:

> "Agreements entered into between several persons, some of whom are by law incompetent to contract are not wholly null and void, but are only in some respects less effective than if all the parties to them were competent."

See also — 'Jafferali v. Standard Bank', AIR 1928 P. C. 135 which to some extent supports our conclusion. The fact therefore that the minor was included in the contract would not make the partnership as between the two adults invalid, and the minor may be deemed to have been admitted to the benefits of the partnership by the two adults. Under the Income-tax law a minor admitted to the benefits of a partnership becomes a partner. It therefore appears to us that on the facts and circumstances of this case there was undoubtedly a valid partnership in respect of the cloth business which could be registered under S. 26A of the Act.

(13) The answer therefore to the question referred to us in R. C. No. 2 of 1950 is in the affirmative and in favour of the assessee. As the assessee has succeeded in both the references, we think he is entitled to costs one set, which we fix at Rs. 250.

B/K.S. Answer in the affirmative.

A. I. R. 1953 MADRAS 320 (Vol. 40, C. N. 108)

RAJAMANNAR C. J.

Yandapalli Venkataraju, Petitioner v. Hussain Shah and others, Respondents.

Civil Revn. Petn. No. 1566 of 1947, D/- 18-7-1952.

Partition Act (1893), S. 2 — Applicability — Section applies even after preliminary decree is passed.

Section 2, Partition Act, can be applied though a preliminary decree defining the share of a plaintiff and directing partition had been passed. It can be applied until the scheme of partition has been finally approved, i.e., until a final decree has been passed: 24 Mad 639, Foll. (Para 2)

Anno: Partition Act, S. 2 N. 2 Pt. 3.

K. Bhimasankaran, for Petitioner; C. V. Dikshitalu, for Respondent.

ORDER: In S. A. No. 4 of 1942 which arose out of O. S. No. 124 of 1930 in the Sub-Court, Kakinada, this court passed a decree inter alia directing a partition of item 1 of the plaint schedule into three equal shares and awarding the plaintiff an one-third share and the other contesting party who is the petitioner before me, a two-third share. Subsequent to the decree of this court, the petitioner filed an application in the court below purporting to be under Ss. 2 and 4 of the Partition Act, Act IV of 1893, praying that the provisions of that Act may be applied to him. Only the prayers were not happily worded and it is now conceded by Mr. Bhimasankaram, learned counsel for the petitioner, that the only provision under which the application was really sustainable was S. 2 of the Act. The learned Subordinate Judge did not go into the merits and decide whether S. 2 of the Partition Act applied and whether the petitioner was entitled to invoke its provisions in the circumstances of this case because he considered that the decree of the High Court precluded him from going into the matter. In other words, because the High Court had directed a division of the property, he thought an application invoking the provisions of the Partition Act was not competent thereafter. In this he was obviously in error.

(2) There is clear authority of this Court in — 'Kadir Batcha Sahib v. Abdul Rahman Sahib', 24 Mad 639 that S. 2, Partition Act, can be applied though a preliminary decree defining the share of a plaintiff and directing partition had been passed. The learned Judges pointed out that the Act can be applied until the scheme of partition has been finally approved, i.e., until a final decree has been passed. I therefore set aside the order of the learned Judge dismissing the application as not sustainable. He will restore the petition to his file and proceed to deal with it as an application under S. 2, Partition Act. I wish to say nothing at this stage on the merits of the application. There will be no order as to costs.

(3) The petition will be disposed of expeditiously without granting any adjournment.

B/D.R.R. Petition allowed.

A. I. R. 1953 MADRAS 321 (Vol. 40 C. N. 109)

SATYANARAYANA RAO AND RAJAGOPALAN JJ.

V. Krishnamurthy and another, Appellants **v. The Ceded** District Auto Transport Co. Ltd., **Kurnool,** represented by its Managing Director **at** Kurnool and others, Respondents.

Letters Patent Appeal No. 160 of 1951, D/- **3-9-1952,** from judgment of Subba Rao J., in **W. P.** No. 282 of 1951, D/- 12-9-1951.

(a) Motor Vehicles Act (1939), S. 64(a) — Applicability — Grievance accruing or arising subsequent to grant of permit — Appeal.

Clause (a) of S. 64 applies only to cases **where** by reason of the existence of a condition attached to a permit the grantee of **the** permit was aggrieved by that condition at the time of the grant of the permit. It is not a grievance which accrued **or** which arose subsequent to the grant of **the** permit, that can be agitated in an appeal. (Para 4)

Where, therefore, the original condition **of the** permit restricted the route from K **to A** and a subsequent application to extend the route to V having been declined **an** appeal was preferred against the order **of refusal.**

Held that no appeal lay under the circumstances as it could not be contended **that** the refusal to grant the application **amounted** in substance to a refusal to **alter** the original condition of the permit. (Para 4)

Anno: Motor Vehicles Act, S. 64 N. 1.

†(b) Motor Vehicles Act (1939), S. 64(b) — Refusal to vary conditions — Appeal.

The power to vary the conditions of **permit** does not carry with it the power to **refuse** to vary the conditions, and therefore it cannot be argued that when the **Legislature** conferred a right of appeal **under** cl. (b) to a person aggrieved by any **variation** of the conditions of the permit, **it implied** and carried with it also a right **of** appeal in a case where the Regional **Transport** Authority refused to vary the **conditions** of the permit. (Para 5)

Anno: Motor Vehicles Act, S. 64 N. 1.

(c) Motor Vehicles Act (1939), Ss. 64 and 68 — Rules under — R. 208 — Rule does not confer power of appeal by implication.

Rule 208, in terms, does not purport to **confer** a right of appeal; it purports to lay **down** the procedure applicable to applications for the variation of the conditions of **a permit.** A right of appeal must be expressly conferred by a statute and cannot **be inferred** by implication. It is not within the competence of the rule-making **authority** constituted under S. 68 to confer **a new** right of appeal not recognised or **granted** by S. 64. Clause (j) of S. 68(2) **does** not in terms confer a power to extend the right of appeal in cases not governed by S. 64 and from the language of **S. 68(1)** a power to lay down by rules **and** confer a right of appeal cannot be inferred. Unless the statute by its enacting **provisions** has expressly conferred a right **of** appeal, the rule-making authority **would** not be within their powers in conferring a new right of appeal expressly or **by** implication. It, therefore, follows that **R. 208** cannot be construed in such a manner as to transgress the limits of the power of the rule-making authority, which have been laid down and circumscribed by S. 68 of the Act. The application, therefore, of the procedure applicable to the disposal of the applications for grant of a permit to cases of variation of the conditions of a permit does not even by implication carry with it a right of appeal, assuming that otherwise the rule-making authority had the power to create a new right of appeal. (Paras 7 & 8)

Anno: Motor Vehicles Act, S. 64 N. 1.

(d) Motor Vehicles Act (1939), Ss. 64 and 68 — Rules under — R. 208(b) — Whether right of appeal exists has to be determined by provisions of S. 64 — Rule 208(b) does not confer right of appeal.

The Motor Vehicles Act is a self-contained Code and creates new rights and also provides for the adjudication of the disputes arising in respect of such rights. In such a case the remedy provided by the Statute alone must be followed and the principle that if a new power or new jurisdiction is conferred upon a Court which is regulated by a Code containing the procedure as well as a right of appeal, the exercise of that new jurisdiction by that Court will carry with it the ordinary incidents of procedure applicable thereto as well as the general right of appeal from its decisions has no application. Therefore to determine whether a right of appeal on the facts of the case exists or not, one has to look to the provisions contained in S. 64 and if a party claiming a right of appeal is not able to bring himself within any of the clauses enumerated in S. 64 he has no right of appeal. The mere fact that in the last part of R. 208(b) the Transport Authority is directed to deal with the matter as if it were an application does not carry with it by implication even a right of appeal, as if it was a refusal to grant a permit within the meaning of S. 64(a) of the Act. (Paras 9, 10)

Anno: Motor Vehicles Act, S. 64 N. 1.

K. Bhashyam, T. R. Srinivasan and V. V. Raghavan, for Appellants; Govt. Pleader and S. Obul Reddi, for Respondents.

REFERENCES: Courtwise/Chronological/ Paras

('16) 39 Mad 617: (AIR 1916 PC 21) 9
('36) 17 Lah 146: (AIR 1936 PC 93) 9
('40) ILR (1940) Mad 599: (AIR 1940 PC 105) 9
('50) Rayarappan v. Madhavi Amma, (AIR 1950 FC 140) 5
('87) 10 Mad 179 (FB) 5
('48) ILR (1948) Mad 505: (AIR 1948 PC 12) 9, 10
(1905) AC 369: (74 LJ PC 77) 6
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(1859) 141 ER 486: (6 CB (NS) 336) 9
(1864) 10 HL 704: (11 ER 1200) 6, 8

SATYANARAYANA RAO J.: This Letters Patent Appeal is against the judgment of our learned brother, Subba Rao J. setting aside the order of the Government and that of the Central Road Traffic Board and allowing Writ Petition No. 282 of 1951 to quash the orders. The only question, that was debated before him and now before us, is whether there was a right of appeal to the Central Road Traffic Board against the order of the Regional Transport Authority

dated 31st August 1950 refusing to grant the application of the appellants to extend the route of the bus service from Atmakur to Velgode. The learned Judge held that the appeal was incompetent, that therefore the order of the Central Road Traffic Board extending the permit in favour of the appellants to Velgode was without jurisdiction, and that the order passed by the Government in the exercise of their revisional jurisdiction confirming the order of the Central Road Traffic Board was also void.

(2) In order to appreciate the contention that the appeal to the Central Road Traffic Board is incompetent, it is necessary to state a few relevant facts. The appellants, two in number, were running buses along the route Kurnool-Atmakur from the year 1944 under permits granted by the Regional Transport Authority in that year. In 1949, it was decided by the Regional Transport Authority to extend the route to Velgode, i.e. a place beyond Atmakur. Applications for that route were filed by the first respondent and also by the appellants. On 16-6-1950 the Regional Transport Authority called for objections to grant the permits for the extended route to the applicants. By an order of 28th June 1950 the Regional Transport Authority granted a permit to the first respondent to run his buses up to Velgode.

The application by the appellants, however, was not disposed of till 31st August 1950, when the Regional Transport Authority made an order rejecting their application. The order of 28th June 1950 granting a permit to the first respondent was not carried on appeal by the appellants. The order made on their application was the subject-matter of an appeal to the Central Road Traffic Board, and notwithstanding the objection of the first respondent that the appeal was incompetent, the Central Road Traffic Board, overruling the objection, set aside the order of the Regional Transport Authority and granted permits in favour of the appellants also, extending their service to Velgode. The first respondent carried the matter unsuccessfully in revision to the Government, and thereafter he filed a writ petition, which was disposed by Subba Rao J. As stated above, he allowed the application, and held that the appeal to the Central Road Traffic Board by the appellants against the order of the Regional Transport Authority dated 31st August 1950 was incompetent.

(3) In this appeal by the appellants their Learned Counsel, Mr. Bhashyam, adopted a line of argument which was not the one adopted by him before Subba Rao J. It is unnecessary therefore to deal in detail with the reasoning of the learned Judge by which he arrived at the conclusion, that the appeal to the Central Road Traffic Board was incompetent. It will be sufficient if we deal in this appeal with arguments as presented before us by Mr. Bhashyam, the Learned Counsel for the appellants. He attempted to maintain his position that the appeal was competent by relying upon cls. (a) and (b) of S. 64. He further relied on R. 208 of the Rules framed by the Government under the Motor Vehicles Act by virtue of the power conferred upon the Provincial Government by S. 68 of the Act. His contention based on the said rule was that the applications made by the appellants should be treated as applications for the grant of a permit as laid down by that Rule, and, if so treated, the refusal to grant the extension should be deemed to be a refusal to grant a permit, which order would be appealable under S. 64 (a) of the Act. It is therefore necessary to deal with these contentions in the order in which they were stated above.

(4) Learned Counsel of the appellants relied upon the second part of cls. (a) and (b) of S. 64. It is as well that the two clauses (a) and (b) are quoted here:

> (a) "Any person aggrieved by the refusal of the Provincial or a Regional Transport Authority to grant a permit or by any condition attached to a permit granted to him, or
>
> (b) aggrieved by the revocation or suspension of the permit or by any variation of the conditions thereof may within the prescribed time and in the prescribed manner, appeal to the prescribed authority, who shall give such person and the original authority an opportunity of being heard."

Rule 147 lays down that:

> "An appeal under S. 64 of the Act against an order of the Road Traffic Board or against an order of the Secretary of the Board, shall lie to the Central Board within thirty days of the date of despatch of the order appealed against."

Rule 148 deals with appeals to the Government against an original order of the Central Board or against an order of the Secretary of that Board, with which we are not concerned. It was contended that the refusal to grant the application of the appellants amounted in substance to a refusal to alter the original condition of the permit restricting the route from Kurnool to Atmakur and declining to extend in to Velgode. The appellants therefore, it is claimed, are aggrieved by the condition attached to the permit that the route should be restricted to Kurnool-Atmakur, which was the effect of the decision of the Regional Transport Authority. If the order is so construed, it is urged that under the second part of S. 64(a) the appellants can be treated as persons aggrieved by the condition attached to the permit granted to them, and that the order will therefore be appealable.

This argument, in our opinion, proceeds on an erroneous view of clause in question. The clause, in our opinion, applies only to cases where by reason of the existence of a condition attached to a permit the grantee of the permit was aggrived by that condition at the time of the grant of the permit. If he was so aggrieved, it was open to him to have the condition removed or modified by an appeal under Cl. (a) of S. 64. It is not claimed on behalf of the appellants that the condition that the route should be restricted to Kurnool and Atmakur was, at the time it was imposed, prejudicial to them, and that they were aggrieved by it.

Under S. 48A of the Act it is open to the Regional Transport Authority when granting a permit to attach a condition that the stage carriages shall be used only on specified routes or in a specified area. In 1944 when the original permit was granted to the appellants the only route that was declared was the route between Kurnool and Atmakur, and they were perfectly satisfied at the time of the grant of the permit with the condition or restriction that they should be confined to the route between Kurnool and Atmakur, and they were not in

any manner aggrieved by such condition. It is, however, now curiously claimed that by subsequent events, the proposed extension of the route to Velgode and the restriction or the condition in the original permit act adversely to their interests, and that therefore they are aggrieved by the condition now.

It is not, in our opinion, the intention of the Legislature when it enacted Cl. (a) to give a right of appeal in such circumstances. The right of appeal is to be exercised within the period of thirty days from the date of the order granting the permit, under R. 147, and the grievance, if any, regarding the condition that exists in the permit must be one that existed by the date of the grant of the permit. It is not a grievance which accrued or which arose subsequent to the grant of the permit, that can be agitated in an appeal. According to the learned Advocate if the grievances (sic) by reason of subsequent events long after the grant of the permit it does not matter. To read the clause in the manner suggested by the learned Advocate for the appellants would be to put upon it an unnatural construction not intended by the Legislature when that clause was enacted. The contention therefore that the right of appeal could be justified under cl. (a) of S. 64 cannot be upheld.

(5) The next argument was that when the Legislature conferred a right of appeal under cl. (b) to a person aggrieved by any variation of the conditions of the permit, it implied and carried with it also a right of appeal in a case where the Regional Transport Authority refused to vary the conditions of the permit. The power to vary the conditions of a permit, it was argued, carries with it the power to refuse to vary the conditions, in other words, to reject the application for variation or alteration. In support of his argument learned Counsel relied strongly upon two decisions, one of the Federal Court and the other of this Court, both of which related to the right of appeal under the Civil Procedure Code against an order refusing to appoint a receiver.

Under the present Order 43, R. 1, Cl. (s), an order under R. 1 or R. 4 of Order 40 except an order under the proviso to sub-r. (2) of R. 4 is appealable. When we turn to R. 1, O. 40, the orders contemplated therein are: an order appointing a receiver or removing any person from the possession or custody of the property, an order committing the same to the possession, custody or management of the Receiver and an order conferring upon the receiver the powers enumerated in cl. (d) of R. 1 of O. 40. In none of these orders is an order refusing to appoint a receiver included expressly. It was however ruled by the Federal Court in — 'Rayarappan v. Madhavi Amma', AIR 1950 FC 140 in an appeal against a decision of this Court that when the Code refers to the power to appoint a receiver, it includes within it the power of removal of a receiver as a matter of construction of the rule, bearing in mind S. 16, General Clauses Act.

It was therefore held that though the Legislature did not specifically and expressly refer to an order removing a receiver as appealable, such order was made appealable by adopting the rule of construction enacted in S. 16, General Clauses Act. Though no express reference is made in the earlier decision of the Full Bench in — 'Venkatasami v. Stridavamma', 10 Mad 179 to S. 16, General Clauses Act, the reasoning of the learned Judges in that case is more or less on the same lines, namely, that as a matter of interpretation of Ss. 503 and 588, Civil P. C. then in force (the Code of 1882) the power to appoint carried with it also the power to refuse to appoint and therefore both orders were appealable, though the latter order was not expressly mentioned either in S. 503 or S. 588.

In our opinion, these decisions and the reasoning underlying them do not at all help the appellants and support their argument. No general rule of construction of the kind invoked and applied in the decision of the Federal Court is available to support the interpretation now sought to be placed upon the second part of cl. (b). No doubt, an application to vary the conditions of a permit may be granted or refused, but the Legislature for reasons best known to itself, thought fit to make an order which varies the conditions of the permit alone appealable. If one may attempt to find the reason, it seems to be this: If the original conditions of the permit were not such as would be prejudicial to the grantee, he would accept the permit; if not, he would have carried the matter in appeal to the Central Road Traffic Board under Cl. (a) of S. 64 within the time prescribed by R. 147. If he did not carry the matter in appeal, it must be presumed that he was satisfied with those conditions.

If, however, at any later stage those conditions are varied by the concerned authority to the detriment of the grantee of the permit, it is but legitimate and reasonable that he should be given a right of appeal to have the matter agitated in a higher forum. There is no reason to allow a right of appeal if the conditions are not varied, because so long as the permit lasts, those conditions will continue to attach to the permit, particularly as the grantee did not feel aggrieved at the time of the grant of the permit by the existence of those conditions in the permit. That is the reason why we think no right of appeal was conferred by the Legislature in cases where the variation was refused. The analogy, therefore, of the decision of the Federal Court and of this Court in — 'Venkatasami v. Stridavamma', 10 Mad 179 (FB) cannot be extended to the present case, and we are therefore unable to accept the argument of the learned counsel for the appellants based on the interpretation of the latter part of Cl. (b) of S. 64.

(6) Reliance was strongly placed on R. 208 which lays down the procedure to be followed in applications to vary the conditions of the permit. That rule consists of two parts and reads as follows:

"R. 208 (a). Upon application made in writing by the holder of any permit, the Transport Authority may, at any time, in its discretion, vary the permit or any of the conditions thereof subject to the provisions of sub-r. (b).

(b) If the application is for the variation of the permit by the inclusion of an additional vehicle or vehicles or if the grant of variation would authorize transport facilities materially different from those authorised by the original permit the Transport Authority shall deal with the application as if it were an application for a permit."

The argument is that the application for variation by reason of this Rule should be treated as an application for a permit and the refusal to grant it is a refusal to grant a permit, which

order is appealable under S. 64-A of the Act. In other words, the argument amounts to this, that by implication a right of appeal is conferred by this Rule against orders refusing to vary the conditions of a permit. There are very many difficulties in the way of accepting this argument. In the first place, it is well-settled law that a right of appeal is substantive right and not a matter of procedure and should be created or conferred expressly by a statute. It cannot be inferred by implication. In the very illuminating speech of the Lord Chancellor (Lord Westbury) in the case in — 'Attorney General v. Sillem', (1864) 10 H L 704 at p. 720 the learned Lord Chancellor expressed thus:

"The creation of a new right of appeal is plainly an act which requires legislative authority. The Court from which the appeal is given, and the Court to which it is given must both be bound and that must be the act of some higher power. It is not competent to either tribunal, or to both collectively, to create any such right. Suppose the Legislature to have given to either tribunal, that is, to the Court of the First Instance, and to the Court of Error or Appeal respectively, the fullest power of regulating its own practice or procedure, such power would not avail for the creation of a new right of appeal, which is in effect a limitation of the jurisdiction of one Court, and an extension of the jurisdiction of another. A power to regulate the practice of a Court does not involve or imply any power to alter the extent or nature of its jurisdiction."

In the well-known case of the Judicial Committee,—'Colonial Sugar Refining Co. v. Irving', (1905) A C 369 it was pointed out by Lord Macnaghten that a right of appeal was a substantive right and not a mere matter of procedure for the learned Lord observed at p. 372:

"It seems to their Lordships that the question does not admit of doubt. To deprive a suitor in a pending action of an appeal to a superior tribunal which belonged to him as of right is a very different thing from regulating procedure. In principle, their Lordships see no difference between abolishing an appeal altogether and transferring the appeal to a new tribunal. In either case there is an interference with existing rights contrary to the well-known general principle that statutes are not to be held to act retrospectively unless a clear intention to that effect is manifested."

(7) Rule 208, in terms, does not purport to confer a right of appeal; it purports to lay down the procedure applicable to applications for the variation of the conditions of a permit. It has been pointed out already that the substantive provision in the Act conferring a right of appeal in certain specified cases does not include within it a right of appeal against an order refusing to vary the conditions of a permit. If the rule in question does not in terms confer a right of appeal against an order refusing to vary the conditions of a permit, can it be said that it impliedly confers such a right? As has been pointed out above, a right of appeal must be expressly conferred by a statute and cannot be inferred by implication. It is not within the competence of the rule-making authority constituted under S. 68 of the Act to confer a new right of appeal not recognised or granted by S. 64 of the Act.

The Legislature would not have intended by implication, if from the language of S. 68 it could be implied at all, to have conferred a power on the rule-making authority to enlarge and extend the scope of S. 64, so as to confer a right of appeal not recognised by S. 64. As has been rightly pointed out by the learned Government Pleader in the course of the arguments, all that S. 68 lays down with reference to appeals is that in cl. (j) of sub-s. (2) of that section it is stated that the rule-making power extends to indicate the authorities to whom, the time within which and the manner in which the appeals may be made. This does not in terms confer a power to extend the right of appeal in cases not governed by S. 64 of the Act. It was claimed, however, on behalf of the appellants by Mr. Bhashyam that the generality of the language in cl. (1) of S. 68 might be construed as implying such a power for S. 68 (1) states:

"A Provincial Government may make rules for the purpose of carrying into effect the provisions of this Chapter",

the Chapter in which the provision relating the right of appeal, S. 64, is also included. From such a language a power to lay down by rules and confer a right of appeal cannot be inferred is gatherable from the decision of the House of Lords in—'R & W Paul Ltd. v. Wheat Commission', (1937) A C 139. The by-law there was made by the Wheat Commission under the Wheat Act of 1932. The power to make by-laws therein was conferred among other grounds for giving effect to the provisions of the Act. Notwithstanding the generality of such a provision it was held by the House of Lords that by-law No. 20 made by the Wheat Commission in 1933 excluding the application of the Arbitration Act, 1889 to arbitration proceedings contemplated by by-law No. 20 was ultra vires. Lord Macmillan in his speech at p. 154 observed:

"The Arbitration Act is a Statute of general application and it confers a valuable and important right of resort to the Courts of law. To exclude its operation from an arbitration is to deprive the parties to the arbitration of the rights which the Act confers. When a public general statute provides for the reference of disputes to arbitration it is to be presumed that it intends them to be referred to arbitration in accordance with the general law as to arbitrations, with all the attendant rights which the general law confers.

I do not think that when Parliament enacts by one statute that disputes under it are to be referred to arbitration it can be presumed to have empowered by implication the abrogation of another statute which it has enacted for the conduct of arbitration. Rather the contrary. If this is intended, express words to that effect are in my opinion essential, and there are here no such express words. I am accordingly of opinion that the Wheat Commission exceeded their powers when they made a by-law that every dispute as to whether any substance is flour should be determined by an arbitration to which the Arbitration Act should not apply. I have only to add that the by-law must, in my opinion, be condemned as a whole and that it cannot be solved by the excision of the objectionable provision, which is not a severable but a vital part of the by-law."

These observations of the learned Lord apply with equal force to the present case. Unless the statute by its enacting provisions has expressly conferred a right of appeal, the rule-making authority would not be within their powers in conferring a new right of appeal expressly or by implication. It therefore follows that R. 208 cannot be construed in such a manner as to transgress the limits of the power of the rule-making authority, which have been laid down and circumscribed by S. 68 of the Act.

(8) In — 'Attorney General v. Sillem', (1864) 10 H L 704 already cited, by the 26th Section of the Queen's Remembrancer's Act (22 and 23 Vict. C. 21) the Chief Baron and two or more Barons of the Court of Exchequer were empowered to make all such rules and orders as to the process, practice and mode of pleading on the Revenue Side of the Court and also to extend, apply or adapt any of the provisions of the Common Law Procedure Act, 1852 and the Common Law Procedure Act, 1854, and any of the rules of pleading and practice on the plea side of the said Court to the Revenue side of the said Court.

In exercise of this power the Chief Baron and two other Barons of the Court of Exchequer purported to confer a right of appeal, and the power was sought to be justified by placing reliance on S. 26 of the Act. Notwithstanding the very wide language employed in that section of making rules and orders as to the process, practice and mode of pleading on the Revenue Side of the Court it was held by the House of Lords that the Chief Baron and the two Barons of the Court of Exchequer had no power or authority to confer a right of appeal where it did not otherwise exist.

> "These rules" said Lord Westbury, Lord Chancellor at page 725, "are so many legislative enactments purporting to create a new jurisdiction in the Court of Exchequer Chamber and House of Lords and prescribing the mode in which such a new jurisdiction shall be exercised. It is simply an incorrect use of language to call such enactments provisions respecting the process, practice, or mode of pleading in the Court of Exchequer; but unless they can be properly and strictly so denominated, there is not, in my opinion, any authority to make such rules conferred by the 26th Section of the Act in question."

The application therefore of the procedure applicable to the disposal of the applications for grant of a permit to cases of variation of the conditions of a permit does not even by implication carry with it a right of appeal, assuming that otherwise the rule-making authority had the power to create a new right of appeal which, as already stated, did not, in fact, exist under S. 68. The reliance therefore placed by Mr. Bhashyam on R. 208 in support of the right of appeal cannot be justified by authority or by principle.

(9) Strong reliance was placed by learned Counsel for the appellants on the decision of the House of Lords in — 'National Telephone Co. Ltd. v. Postmaster General (No. 2)'. (1913) A C 546. It is a well recognised principle established by authority that if a new power or new jurisdiction is conferred upon a court which is regulated by a Code containing the procedure as well as a right of appeal, the exercise of that new jurisdiction by that court will carry with it the ordinary incidents of procedure applicable thereto as well as the general right of appeal from its decisions. It is this principle that is illustrated by the decision in—'National Telephone Co. Ltd. v. Postmaster General (No. 2)', (1913) A C 546. The same principle was again reiterated by the Judicial Committee in a very recent case which went up on appeal from this Court in — 'Adaikappa Chettiar v. Chandrasekhara Thevar', ILR (1948) Mad 505 (PC) a decision under Madras Act 4 of 1938. Lord Simonds in delivering the judgment stated at page 513 the principle in these terms:

> "The true rule is that where a legal right is in dispute and the ordinary Courts of the country are seized of such dispute the Courts are governed by the ordinary rules of procedure applicable thereto and an appeal lies, if authorized by such rules, notwithstanding that the legal right claimed arises under a special statute which does not in terms confer a right of appeal — see 'Secy. of State v. Chellikani Rama Rao', 39 Mad 617 (PC) & — 'Hem Singh v. Basant Das', 17 Lah 146 (PC)."

It is difficult to see how this principle would help the appellants. This is not a case where to an existing court a new jurisdiction has been added by the Act. The Act, it must be mentioned, is a self-contained Code, and creates new rights and also provides for the adjudication of the disputes arising in respect of such rights. In such a case the remedy provided by the Statute alone must be followed as pointed out by the Judicial Committee in — 'Secy. of State v. Mask & Co.', ILR (1940) Mad 599 (PC) quoting from Willes J.'s judgment in — 'Wolverhampton New Waterworks Co. v. Hawkesford', (1859) 141 E R 486,

> "Where the statute creates a liability not existing at common law, and gives also a particular remedy for enforcing it..... with respect to that class it has always been held, that the party must adopt the form of remedy given by the statute".

(10) In order to determine whether a right of appeal on the facts of the case exists or not, one has to look to the provisions contained in S. 64 of the Act, and if a party claiming a right of appeal is not able to bring himself within any of the clauses enumerated in S. 64 he has no right of appeal. If the jurisdiction had been conferred upon an ordinary civil court to adjudicate upon disputes of the nature contemplated by the Act without providing a right of appeal in the Act itself, the position would have been different. Probably to such a situation the principle of the decisions in — 'National Telephone Co. Ltd. v. Postmaster General (No. 2)', (1913) A C 546 and — 'Adaikappa Chettiar v. Chandrasekhara', ILR (1948) Mad 505 may be applied, but such is not the situation in the present case. The mere fact that in the last part of R. 208 (b) the Transport Authority is directed to deal with the matter as if it were an application for a permit does not carry with it by implication even a right of appeal, as if it was a refusal to grant a permit within the meaning of S. 64 (a) of the Act.

(11) For these reasons we agree with the learned Judge that the Control Road Traffic Board had no jurisdiction to entertain the appeal against the order of the Regional Transport Authority dated 31st August 1950. The decision appealed against is correct, and this Letters

Patent Appeal must therefore be dismissed with costs. Advocates fee Rs. 100/- one set.

A/V.R.B. Appeal dismissed.

A. I. R. 1953 **MADRAS 326 (Vol. 40, C. N. 110)**

SUBBA RAO J.

South India Bank Ltd., Petitioner v. T. D. Pichuthayappan and another, Respondents.

Writ Petition No. 296 of 1951, D/- 13-8-1952.

Madras Shops and Establishments Act (36 of 1947), S. 41 — Section is not ultra vires the Constitution of India, Art. 14 — Equality before law — Discrimination — (Constitution of India, Art. 14).

All persons are equal before the law is fundamental of every civilized constitution. Equality before law is a negative concept; equal protection of laws is a positive one. The former declares that every one is equal before law, that no one can claim special privileges and that all classes are equally subjected to the ordinary law of the land; the latter postulates an equal protection of all alike in the same situation and under like circumstances. No discrimination can be made either in the privileges conferred or in the liabilities imposed. It has also been held—for without that apparently just laws may in their application be so abused as to subvert the fundamental concept of equality before law — that the law should be applied by public authority without arbitrariness or discrimination. The law though apparently fair but contains inherent possibilities for discrimination and arbitrary action, is in itself bad. But these propositions conceived in the interests of the public, if logically stretched too far, may not achieve the high purpose behind them. In a society of unequal basic structure it is well nigh impossible to make laws suitable in their application to all persons alike. So a reasonable classification is not only permitted but is necessary if society should progress. But such a classification cannot be arbitrary but must be based upon differences pertinent to the subject in respect of, and the purpose for which, it is made. The Supreme Court of America evolved the doctrine of police power which enables the State to prescribe regulations to promote the health, peace, morals and good order of the people. But the Indian Constitution does not recognise any such power in the State but specifically prescribes the circumstances and to the extent the fundamental rights recognised can be restricted in the interests of the public: American Case law referred. (Para 11)

Ordinarily, the employer has the right to discharge the employee and the employee has the right to resign from the employment. This right is the subject matter of the legislation in S. 41, Madras Shops and Establishments Act. There are obvious differences between the two classes of persons which do not yield to common treatment; one is rich, the other is poor; one is powerful, the other is weak; one can dispense with the service of another and reappoint another in his place without detriment to his interest, but the other, if discharged may have to starve and go without any appointment. The purpose of the law is to protect this class of employees from the arbitrary action of the employers. The classification is based upon the differences pertinent to the subject matter and the purpose of the legislation. This differentiation of treatment between employer and employee can be justified on the principle of reasonable classification. (Para 12)

The section does not also make an unreasonable discrimination between the employer defined under the Act and the employers to whom the Act does not apply. The separate treatment meted out to the employers coming under the definition of the Act is not arbitrary classification. It cannot be said that the classification has no reasonable basis, either in respect of the subject matter of the legislation or the purpose for which it was enacted. (Para 13)

Similarly the provisions of the Act are not bad on the ground that they confer on the commissioner an arbitrary power to interfere with the rights of the employer. No such arbitrary power has been conferred under S. 41. An appeal lies to the prescribed authority and the prescribed authority has to decide on the merits whether the conclusion arrived at by the employer is correct or not. He is bound to dispose of the appeal judicially and as an appellate tribunal. He is bound to give his reasons, why in his opinion the order of the employer is wrong. The power conferred upon the authority is therefore a quasi-judicial power which in the nature of things cannot be exercised arbitrarily. (Para 16)

K. V. Venkatasubramaniam Aiyar and T. P. Gopala Krishnan, for Petitioner; S. Mohan Kumaramangalan, A. Ramchandran for Row and Reddy and Vepa Sarathi, for Govt. Pleader, for Respondents.

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(1921) 66 Law Ed 254: (257 US 312) 5

49 Md 217 7

ORDER:— This is an application for issuing a 'writ of certiorari' to quash the order of the Additional Commissioner for Workmen's Compensation, Madras, dated 23rd July 1951. The petitioner is the South India Bank Ltd. Respondent 1 was a clerk in the office of the petitioner. On 25-9-1950 he was served with a notice of termination of his employment. In the said notice it was stated that on account of retrenchment his services were terminated with effect from 1-10-1950. On 18-10-1950 he preferred an appeal under S. 41(2), Madras Shops and Establishments Act, 1947 (hereafter called the Act) to the Labour Commissioner, Madras, questioning the validity of the termination of service. The Additional Commissioner for Workmen's Compensation, after making the prescribed enquiry and after hearing the parties, held that the discharge of the applicant was not for a reasonable cause and set aside the order of the bank discharging the petitioner.

The bank filed the aforesaid writ for quashing that order.

(2) Learned counsel for the petitioner made a three-pronged attack on S. 41 of the Act based on Art. 14 of the Constitution of India which guaranteed to every person equality before the law and equal protection of the laws in the territory of India. It was said that the provisions of the Act made a discrimination between employee and employee & employer & employer & also conferred on the Commissioner a naked arbitrary power to interfere with the right of the employer to discharge the employee. To appreciate the contentions raised, it will be convenient at the outset to read the relevant sections of the Act and to consider the case law on the subject. S. 2(5):

"'Employer' means a person owning, or having charge of, the business of an establishment and includes the manager, agent or other person acting in the general management or control of an establishment;

S. 2(3): "Commercial establishment" means an establishment which is not a shop but which carries on the business of advertising, commission, forwarding or commercial agency, or which is a clerical department of a factory or industrial undertaking or which is an insurance company, joint stock company, bank, brokers' office or exchange and includes such other establishment as the Provincial Government may by notification declare to he a commercial establishment for the purposes of this Act.

S. 2(12): "Person employed" means (iii) in the case of a commercial establishment other than a clerical department of a factory or an industrial undertaking a person wholly or principally employed in connexion with the business of the establishment, and includes a peon;

S. 5: Notwithstanding anything contained in S. 4, the Provincial Government may, by notification apply all or any of the provisions of this Act to any class of persons or establishments mentioned in that section, other than those mentioned in Cls. (c) and (f) of sub-s. (1), and modify or cancel any such notification.

S. 6: The Provincial Government may, by notification exempt either permanently or for any specified period, any establishment or class of establishments, or person or class of persons, from all or any of the provisions of this Act, subject to such conditions as the Provincial Government deem fit.

S. 41(1): No employer shall dispense with the service of a person employed continuously for a period of not less than six months, except for a reasonable cause & without giving such person at least one month's notice or wages in lieu of such notice, provided, however that such notice shall not be necessary where the services of such person are dispensed with on a charge of misconduct supported by satisfactory evidence recorded at an inquiry held for the purpose."

The Act was passed to provide for the regulation of conditions of work in shops, commercial establishments, restaurants, theatres and other establishments and for other purposes, the Act was conceived and enacted to improve the conditions of the employees of the particular class of establishments under private control. Under S. 41, the validity whereof is now questioned, a person employed in an establishment defined in the Act is given protection against arbitrary determination of his services. He is also given a right of appeal to the authority prescribed in the Act. I shall revert to the subject of validity after noticing some of the leading American cases cited at the Bar.

(3) The relevant provision of the Constitution is Art. 14. It declares:

"The State shall not deny to any person equality before the law or the equal protection of the laws within the territory of India."

The phrase "equality before the law" occurs in all written Constitutions; but the phrase "equal protection of the laws" is adopted from the constitution of the United States — see Art. 14 of the Amendment of the Constitution of the United States of America. Article 14 says:

"No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

In —'William Adair v. United States', (1908) 52 Law Ed. 436, the question raised was the constitutionality of certain provisions of the Act of Congress concerning carriers engaged in interstate commerce and their employees. No employer shall threaten an employee with loss of employment or unjustly discriminate against any employee because of his membership in labour corporations, associations or organisations. William Adair discharged the employee, O. B. Coppage, because of his membership in a labour organisation. He was, therefore, charged for unjustly discriminating against an employee of a common carrier and an employer engaged in interstate commerce because of his membership in a labour organisation. The question was whether the impugned Part of the tenth section of the Act was repugnant of the Fifth Amendment to the Constitution declaring that no person shall be deprived of liberty or property without due process of law. It may be mentioned that the Fifth Amendment of the Constitution does not provide for "equal protection of the laws". The Supreme Court, therefore, was investigating in that case whether the right of property and personal liberty were violated by Art. 14. Harlan J. laid down the scope of the Fifth Amendment at page 441 as follows:

"In our opinion that section, in the particular mentioned, is an invasion of the personal liberty, as well as of the right of property, guaranteed by that Amendment. Such liberty and right embrace the right to make contracts for the purchase of the labour of others, and equally the right to make contracts for the sale of one's own labour; each right, however, being subject to the fundamental condition that no contract, whatever its subject-matter, can be sustained which the law, upon reasonable grounds, forbids as inconsistent with the public interests, or as hurtful to the public order, or as detrimental to the common good. This Court has said that 'in every well-ordered society, charged with the duty of conserving the safety of its members, the rights of the individual in respect of his liberty may, at times, under the pressure of great dangers, be subjected to such restraint, to be enforced by reasonable regulations, as the safety of the general public may demand....."

(4) To put it shortly, they approach the question from two aspects: 1. Whether the impugned section deprived the liberty of property without due process of law; and 2. Whether the restrictions imposed are reasonable regulations under what is technically called as the 'police power' in America. The passage strongly relied upon by the learned counsel may now be extracted. At page 442 Harlan J. observed:

"While, as already suggested, the right of liberty and property guaranteed by the Constitution against deprivation without due process of law is subject to such reasonable restraints as the common good or the general welfare may require, it is not within the function of government — at least, in the absence of contract between the parties — to compel any person, in the course of his business and against his will, to accept or retain the personal services of another, or to compel any person, against his will, to perform personal services for another. The right of a person to sell his labour upon such terms as he deems proper is, in its essence, the same as the right of the purchaser of labour to prescribe the conditions upon which he will accept such labour from the person offering to sell it. So the right of the employee to quit the service of the employer, for whatever reason, is the same as the right of the employer, for whatever reason, to dispense with the services of such employee. It was the legal right of the defendant, Adair — however unwise such a course might have been — to discharge Coppage because of his being a member of a labour organisation as it was the legal right of Coppage, if he saw fit to do so, — however unwise such a course on his part might have been, — to quit the service in which he was engaged, because the defendant employed some persons who were not members of a labour organisation. In all such particulars the employer and the employee have equality of right, and any legislation that disturbs that equality is an arbitrary interference with the liberty of contract which no Government can legally justify in a free land."

I have quoted the passage in extenso as this passage was the sheet anchor of the learned counsel's argument. The Supreme Court held that there was no such connection between inter-state commerce and membership of a labour organisation as to authorise Congress by the Act to make it a crime against the United States for an agent or officer of an inter-state carrier having full authority in the premises from his principal, to discharge an employee from service to such carrier, because of the membership on his part. In the aforesaid passage itself the Supreme Court recognised the right of the Congress to put reasonable restraints as the Common good or general welfare may require, but having regard to the facts of that case they held that the said restrictions would not come within the "police powers" of the State. Apart from the fact that that decision does not turn upon the phrase "equal protection of the laws" for that phrase is not found in the Fifth Amendment, it is only an authority for the position that the impugned section is an arbitrary interference with the liberty of contract in cases where the restriction so imposed does not come under the police power of the State. Under the Indian Constitution, liberty of contract is not one of the fundamental rights in Chapter 3.

In —'T. B. Coppage v. State of Kansas', (1915) 59 Law Ed. 441, the Supreme Court considered the scope of the 14th Amendment. There a person was convicted by the Kansas Chief State Court under information charging violation of a statute of a State forbidding employers to exact a promise not to join or retain membership in a labour organisation as a condition of securing or retaining employment. The Supreme Court of the United States set aside that order. The Supreme Court accepted the principles laid down in — 'William Adair v. United States', (1908) 52 Law Ed 436 and restated them at page 446 in the following manner:

"The principle is fundamental and vital. Included in the right of personal liberty and the right of private property — partaking of the nature of each—is the right to make contracts for the acquisition of property. Chief among such contracts is that of personal employment, by which labour and other services are exchanged for money or other forms of property. If this right be struck down or arbitrarily interfered with, there is a substantial impairment of liberty in the long-established constitutional sense. The right is as essential to the labourer as to the capitalist, to the poor as to the rich; for the vast majority of persons have no other honest way to begin to acquire property, save by working for money.

An interference with this liberty so serious as that now under consideration, and so disturbing of equality of right, must be deemed to be arbitrary, unless it be supportable as a reasonable exercise of the police power of the State."

At page 447 they again reiterated the principle of police power:

"We need not refer to the numerous and familiar cases in which this court has held that the power may properly be exercised for preserving the public health, safety, morals or general welfare, and that such police regulations may reasonably limit the enjoyment of personal liberty, including the right of making contracts."

The decision accepted two concepts:

1. The right of personal liberty and private property including the right to make contracts for acquisition of property, and

2. The power of the State to impose reasonable restriction of that right in exercise of the police power.

This decision also does not purport to deal with the ambit and the limits of the phrase "equal protection of the laws". On the facts of the case it was held that the impugned Act could not be sustained on the Police power of the State.

(5) In — 'Williams Truax v. Michael Corrigan', (1921) 66 Law Ed 254, the Supreme Court considered the scope of the phrase "equal protection of laws". There a dispute arose between the pltfs. & the defendants Union concerning the terms and conditions of employment of the members of the Union. As the plaintiffs refused to yield to the terms of the Union, the Union ordered a strike. To win the strike & to coerce & compel the plaintiffs to comply with the demands of the union, the defendants and others, unknown to the plaintiffs, entered into a conspiracy and boycott to injure plaintiffs, in their restaurant and restaurant business, by including plaintiffs' customers and others theretofore well and favourably disposed to cease to patronise or trade with the plaintiffs. To achieve that object they resorted to picketing, displaying banners, advertising the strike, denouncing plaintiffs and circulating handbills containing abusive and libelous charges against the plaintiffs etc. The defendants relied for immunity on 1464 of the Revised Statutes of Arizona, 1913 which says:

"No restraining order or injunction shall be granted by any Court of this State, or a Judge or the Judges thereof, in any case between an employer and employees, or between employers and employees, or between employees, or between persons employed and persons seeking employment, involving or growing out of a dispute concerning terms or conditions of employment, unless necessary to prevent irreparable injury to property or to a property right of the party making the application, for which injury there is no adequate remedy at law.....

And no such restraining order or injunction shall prohibit any person or persons from terminating any relation of employment, or from ceasing to perform any work or labour, or from recommending, advising, or persuading others by peaceful means so to do; or from attending at or near a house or place where any person resides or works, or carries on business, or happens to be for the purpose of peacefully obtaining or communicating information, or of peacefully persuading any person, to work or to abstain from working, or from ceasing to patronise or to employ any party to such dispute; or from recommending, advising or persuading others by peaceful means so to do."

(6) The Supreme Court held that the prohibition contained in the aforesaid section against interference by injunction between employers and employees in cases growing out of a dispute concerning terms or conditions of employment denies equal protection of the laws when applied to defeat injunctive reliefs which under the local statutes would have been proper had the controversy been any other than between employers and former employees. At page 262 Taft C. J. brought out in bold relief the distinction between the scope of the 14th Amendment and the 5th Amendment in the following terms:

"This brings us to consider the effect in this case of that provision of the 14th Amendment which forbids any State to deny to any person the equal protection of the laws. The clause is associated in the Amendment with due process clause, and it is customary to consider them together. It may be that they overlap, that a violation of one may involve at times the violation of the other, but the spheres of the protection they offer are not conterminous. The due process clause brought down from Magna Charta was found in the early State constitutions and later in the 5th Amendment to the Federal Constitution as a limitation upon the executive, legislative and judicial powers of the Federal Government, while the equality clause does not appear in the 5th Amendment and so does not apply to congressional legislation. The due process clause requires that every man shall have the protection of his day in Court, & the benefit of the general law, — a law which hears before it — condemns, which proceeds not arbitrarily or capriciously, but upon inquiry, and renders judgment only after trial, so that every citizen shall hold his life, liberty, property and immunities under the protection of the general rules which govern society. It, of course, tends to secure equality of law in the sense that it makes a required minimum of protection for every one's right of life, liberty, & property, which the Congress or the Legislature may not withhold. Our whole system of law is predicated on the general fundamental principle of equality of application of the law. 'All men are equal before the law'; this is a Government of laws, and not of men; 'No man is above the law' — are all maxims showing, the spirit in which Legislatures, executives and Courts are expected to make, execute and apply laws. But the framers and adopters of this Amendment were not content to depend on a mere minimum secured by the due process clause, or upon the spirit of equality which might not be insisted on by local public opinion. They therefore embodied that spirit in a specific guaranty. The guaranty was aimed at undue favour and individual or class privilege, on the one hand & at hostile discrimination or the oppression of inequality, on the other. It sought an equality of treatment of all persons, even though all enjoyed the protection of due process. The 14th amendment does not prohibit legislation which is limited either in the objects to which it is directed or by the territory within which it is to operate. It merely requires that all persons subjected to such legislation shall be treated alike, under like circumstances and conditions, both in the privileges confirmed and in the liabilities imposed. Thus, the guaranty was intended to secure equality of protection not only for all, but against all similarly situated .....Equal protection of the laws is a pledge of the protection of equal laws."

At page 264 the learned Judge elaborated the scope of the 14th Amendment in this way:

"The 14th Amendment, as this Court said in — 'Barbier v. Connolly', 1885-113 U. S. 27 already cited intended not only that there should be no arbitrary deprivation of life or liberty or arbitrary spoilation of property, but that equal protection and security should be given to all under like circumstances, in the enjoyment of their personal and civil rights; that all persons should be equally entitled to pursue their happiness and acquire and enjoy property; 'that they should have like access to the Courts of the country for the protection of their persons and property, the prevention and redress of wrongs, and the enforcement of contracts; that no impediment should be interposed to the pursuits of anyone except as applied to the same pursuits by others under like circumstances.....".

Having regard to the aforesaid principles, the Supreme Court held that the impugned section offended the provisions of the 14th Amendment.

(7) In 'Yick Wo v. Hopkins', (1886) 30 Law Ed 220, the Supreme Court considered the question of administrative arbitrariness in enforcing the law which was otherwise fair. One Yick Wo was deprived of his personal liberty by the Sheriff of the City and county of San Francisco. The Sheriff stated that he held the petitioner in custody by virtue of a sentence of the police Judge's court whereby he was found guilty of violation of certain ordinances of the Board of supervisors of that county and adjudged to pay a fine, and in default of payment, be imprisoned in the county jail. Under the ordinances the board of supervisors have a discretion for granting or withholding their assent to the use of wooden buildings as laundries, to be exercised in reference to the circumstances of each case, with a view to the protection of the public against the dangers of fire. There is nothing in the ordinance which points to such a regulation of the business of keeping and conducting laundries. They conferred a naked and arbitrary power to give or withhold consent, not only as to places, but as to persons. Mathews J. in dealing with the validity of the said ordinances, cited with approval the following passage from the judgment of the Court of Appeal of Maryland in the case of —'Baltimore v. Redecke', 49 Md 217,

"But it commits to the unrestrained will of a single public officer the power to notify every person who now employs a steam engine in the prosecution of any business in the City of Baltimore, to cease to do so, and by providing compulsory fines for every day's disobedience of such notice and order or removable renders his power over the use of steam in that city practically absolute, so that he may prohibit its use altogether. But if he should not choose to do this, but only to act in particular cases, there is nothing in the ordinance to guide or control

his action. It lays down no rules by which its impartial execution can be secured or partiality and oppression prevented. It is clear that giving and enforcing these notices may, & quite likely will, bring ruin to the business of those against whom they are directed, while others, from whom they are withheld, may be actually benefited by what is thus done to their neighbours; and, when we remember that this action or non-action may proceed from enmity or prejudice, from partisan zeal or animosity, from favouritism and other improper influences and motives easy of concealment and difficult to be detected and exposed it becomes unnecessary to suggest or comment upon the unjustice capable of being wrought under cover of such a power, for that becomes apparent to everyone who gives to the subject a moment's consideration. In fact, an ordinance which clothes a single individual with such power hardly falls within the domain of law, and we are constrained to pronounce it inoperative and void."

(8) The learned Judge applied the aforesaid principles to the Ordinances in question and proceeded to observe:

"In the present cases, we are not obliged to reason from the probable to the actual and pass upon the validity of the ordinances complained of, as tried merely by the opportunities which their terms afford, or unequal and unjust discrimination in their administration. For the cases present the ordinances in actual operation, and the facts shown establish an administration directed so exclusively against a particular class of persons as to warrant and require the conclusion that whatever may have been the intent of the ordinances as adopted, they are applied by the public authorities charged with their administration, and thus representing the State itself, with a mind so unequal and oppressive as to amount to a practical denial by the State of that equal protection of the laws which is secured to the petitioners, as to all other persons, by the broad and benign provisions of the Fourteenth Amendment to the Constitution of the United States. Though the law itself be fair on its face and impartial in appearance, yet, if it is applied and administered by public authority with an evil eye and an unequal hand, so as practically to make unjust and illegal discriminations between persons in similar circumstances, material to their rights, the denial of equal justice is still within the prohibition of the Constitution."

It was, therefore, held that the ordinances were invalid and the imprisonment based upon them was illegal. This judgment is a leading authority which establishes that a law, though apparently fair, but possessing inherent possibilities for illegal discrimination in its application, is void.

(9) The Supreme Court of India had to advert to this aspect in dealing with the question of the validity of S. 5(1), West Bengal Special Courts Act (10 of 1950) in — 'State of West Bengal v. A. A. Sarkar', 1952 S. C. J. 55. The Court by a majority, the Chief Justice dissenting, held that the section was constitutionally bad. The learned Judges in different judgments elaborately considered the scope and the application of the fundamental rights guaranteed under Art. 14 to the facts of the case before them. "Classification" has been defined by Bose J. in the following words:

"What after all, is classification? It is merely a systematic arrangement of things into groups or classes, usually in accordance with some definite scheme. But the scheme can be anything and the laws which are laid down to govern the grouping must necessarily be arbitrarily selected; also, granted the right to select, the classification can be as broad based as one pleases, or it can be broken down and down until finally just one solitary unit is divided of from rest. Even those who propound this theory are driven to making qualifications. Thus, it is not enough merely to classify but the classification must not be 'discriminatory', it must not amount to 'hostile action', there must be 'reasonable grounds for distinction', it must be 'rational' and there must be no 'substantial discrimination' ...."

Chandrasekhara Aiyar J. at page 93 makes the following remarks in respect of a statute conferring uncontrolled power on the executive;

"Discrimination may not appear in the Statute itself but may be evident in the administration of the law. If an uncontrolled or unguided power is conferred without any reasonable and proper standards or limits being laid down in the enactment, the Statute itself may be challenged not merely the particular administrative act."

As regards classification, Mahajan J. said at page 70:

"By the process of classification the State has the power of determining who should be regarded as a class for purposes of legislation & in relation to a law enacted on a particular subject. This power, no doubt, in some degree is likely to produce some inequality; but if a law deals with the liberties of a number of well defined classes, it is not open to the charge of denial of equal protection on the ground that it has no application to other persons. The classification permissible, however, must be based on some real and substantial distinction bearing a just and reasonable relation to the objects sought to be attained and cannot be made arbitrarily and without any substantial basis. Classification thus means segregation in classes which have a systematic relation, usually found in common properties and characteristics. It postulates a rational basis and does not mean herding together of certain persons and classes arbitrarily.

In — 'Gulf, Colorado and Santa fe Railway Co. v. W. H. Ellis' (1897) 41 Law Ed 666, Brewer J. of the Supreme Court of America held that a state statute imposing attorney's fee not exceeding 10 Dols. in addition to costs upon railway corporations omitting to pay certain claims after certain time after presentation, which applied to no other corporations or individuals, was constitutional as denying to them equal protection of the laws. At page 667, Brewer J. said:

"The act singles out a certain class of debtors. and punishes them when for like delinquencies it punishes no others. They are not treated as other debtors, or equally with other debtors. They cannot appeal to the Courts as other litigants under like condition and with like protection. If litigation terminates adversely to them, they are mulcted in the attorney's fees of the successful plaintiff; if it terminates in their favour, they recover no attorneys' fees. It is no sufficient answer to say that they are punished only when adjudged to be in the wrong. They do not enter the Courts upon equal terms. They must pay attorneys' fees if wrong; they do not recover any if right; while their adversaries recover if right and pay nothing if wrong. In the suits, therefore, to which they are parties they are discriminated against, and are not treated as others. They do not stand equal

before the law. They do not receive its equal protection."

The learned Judge proceeded to state at page 672:

"It is apparent that the mere fact of classification is not sufficient to relieve a statute from the reach of the equality clause of the 14th Amendment, and that in all cases, it must appear not only that a classification has been made but also that it is one based upon some reasonable ground—some difference which bears a just and proper relation to the attempted classification—and is not a mere arbitrary selection."

(10) In — 'Connolly v. Union Sewer Pipe Co.', (1902) 46 Law Ed 679 at p. 689, Harlan J. stated the law as follows:

"The 14th Amendment, in declaring that no State shall deprive any person of life, liberty, or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws, undoubtedly intended, not only that there should be no arbitrary deprivation of life or liberty, or arbitrary spoilation of property, but that equal protection and security should be given to all under like circumstances in the enjoyment of their personal and civil rights; that all persons should be equally entitled to pursue their happiness & acquire & enjoy property; that they should have like access to the courts of the country for the protection of their persons and property, the prevention and redress of wrongs and the enforcement of contracts; that no impediment should be interposed to the pursuits of anyone except as applied to the same pursuits by others under like circumstances; that no greater burdens should be laid upon one than are laid upon others in the same calling and condition, and that in the administration of criminal justice no different or higher punishment should be imposed upon one than such as is prescribed to all for like offences."

It is not necessary to multiply cases, for they only reiterate and reaffirm the principles so well stated in the cases already referred to.

(11) The law on the subject may now be summarised. "All persons are equal before the law" is fundamental of every civilized Constitution. Equality before law is a negative concept; equal protection of laws is a positive one. The former declares that every one is equal before law, that no one can claim special privileges and that all classes are equally subjected to the ordinary law of the land; the latter postulates an equal protection of all alike in the same situation and under like circumstances. No discrimination can be made either in the privileges conferred or in the liabilities imposed. It has also been held — for without that apparently just laws may in their application be so abused as to subvert the fundamental concept of equality before law — that the law should be applied by public authority without arbitrariness or discrimination. The law though apparently fair but contains inherent possibilities for discrimination and arbitrary action, is in itself bad. But these propositions conceived in the interests of the public, if logically stretched too far, may not achieve the high purpose behind them. In a society of unequal basic structure it is well nigh impossible to make laws suitable in their application to all persons alike. So a reasonable classification is not only permitted but is necessary if society should progress. But such a classification cannot be arbitrary but must be based upon differences pertinent to the subject in respect of, and the purpose for which, it is made. Further, the Supreme Court of America evolved the doctrine of police power which enables the State to prescribe regulations to promote the health, peace, morals and good order of the people. But the Indian Constitution does not recognise any such power in the State but specifically prescribed the circumstances and to the extent the fundamental rights recognised can be restricted in the interests of the public.

(12) Applying the aforesaid principles, I shall now consider whether S. 41 of the Act offends the provisions of Art. 14 of the Constitution of India. The object of that section is to prevent the arbitrary dismissal of the employees. Under the section, the employer cannot dispense with the service of a person employed for a continuous period of not less than six months except for reasonable cause. He is also bound to give one month's notice or wages in lieu of such notice. But such a notice is not necessary if the employee is found guilty of misconduct after due enquiry. The employee is given a right of appeal to the authority prescribed. Learned counsel argued that this section discriminates the employers from the employees. The discrimination pointed out is that the employee can resign with impunity, whereas the employer can discharge the employee only for reasonable cause or for proved misconduct, and that subject to an appeal to the prescribed authority. Can this differentiation of treatment between the two be justified on the principle of reasonable classification? Ordinarily, the employer has the right to discharge the employee and the employee has the right to resign from the employment. This right is the subject matter of the legislation. There are obvious differences between the two classes of persons which do not yield to common treatment; one is rich, the other is poor; one is powerful, the other is weak; one can dispense with the service of another and reappoint another in his place without detriment to his interest, but the other, if discharged, may have to starve and go without any appointment. The purpose of the law is to protect this class of employees from the arbitrary action of the employers. I have therefore no hesitation to hold that the classification is based upon the differences pertinent to the subject matter and the purpose of the legislation.

(13) It was then contended that the section also makes an unreasonable discrimination between the employer defined under the Act and the employers to whom the Act does not apply. The argument was that the law hits only the class of employers coming under the definition of the Act and leaves the other class of employers unaffected, and, therefore, is discriminatory. This argument again ignores the subject matter of the legislation and the purpose for which it is enacted. The preamble of the Act shows that the Act was passed to provide for the regulation of conditions in shops, commercial establishments, restuarants, theatres and other establishments. Establishments are of various kinds. Some are controlled by the law of the State and the others function under statutory regulations, but there are many which are under private control such as shops, theatres, restaurants, private banks and firm carried on by individuals or group of individuals. These institutions are not controlled by statute either in their inception or during their progress. The employees are working under great hardships and the employers were directing their own terms. In view of the small establishments and the lack of organisation among the labourers, the employers were able to exercise arbitrary powers and were

found not to care for the amenities of the employees. A separate Act, therefore, became necessary to regulate the conduct of this class of employees of private institutions. The Act prescribes for the opening and closing hours, daily and weekly hours of work, regulates the employment of children and young persons, provides for the health and safety of the employees, deals with their pay and allowances and lays down the conditions under which they can be discharged. I cannot, therefore, say that the separate treatment meted out to the employers coming under the definition of the Act is an arbitrary classification. The legislature having regard to all the aforesaid facts and the nature of the institutions, the arbitrary control exercised by the employers and the relief required by the employees, thought fit to make special provisions for this class of institutions and employers of those institutions. I cannot say that the classification has no reasonable basis, either in respect of the subject matter of the legislation or the purpose for which it was enacted.

(14) In this connection the learned counsel had taken me through the various sections of the Act, particularly S. 6. It is true that the provisions defining "establishment" & "commercial" establishment" are not artistically and precisely drafted and give ample scope for argument. It was said that the Government under the definition may declare any institution as an establishment under the Act. But the said clause can only be construed to mean that the Government can only declare similar institutions as establishments. Under S. 6, the Provincial Government, by notification, may exempt certain establishments or persons from the operation of the Act and it was said that that conferred an arbitrary power on the Government and therefore is void. I am not concerned in this case with the validity or otherwise of S. 6 for nothing turns upon it in considering the validity of S. 41 of the Act. They are not so related to each other that one cannot exist without the other.

(15) Learned counsel then contended that the order in question made by the Commissioner for Workmen's Compensation is arbitrary. The employee was given notice to the effect that on account of retrenchment his services are dispensed with. Before the appellate authority, it was contended for the employee that though there were many clerks who are admittedy junior to him, the establishment arbitrarily determined his services, whereas it was argued on behalf of the Bank that his services were dispensed with as he was an unqualified person. But the Commissioner pointed out that under the rules the Bank had reserved power to grant exemption in deserving cases and had exempted the respondent and appointed him as Clerk some five years ago and therefore, it was not reasonable to discharge him on the ground of want of qualification which they had waived. On the facts he came to the conclusion that the discharge of the employee was not for a reasonable cause. The Commissioner had jurisdiction to decide under S. 41 whether the discharge of an employee was for reasonable cause or not, and having taken into consideration the contentions advanced by either side, he came to the conclusion in favour of the employee. His finding is not liable to be questioned.

(16) Nor am I satisfied with the contention that S. 41 offends the provisions of Art. 14 of the Constitution on the ground that it confers an arbitrary power on the authority prescribed. No such arbitrary power has been conferred under S. 41. An appeal lies to the prescribed authority and the prescribed authority has to decide on the merits whether the conclusion arrived at by the employer is correct or not. He is bound to dispose of the appeal judicially and as an appellate tribunal. He is bound to give his reasons, as he has done so in this case, why in his opinion the order of the employer is wrong. The power conferred upon the authority is, therefore, a quasi-judicial power which in the nature of things cannot be exercised arbitrarily.

(17) For the aforesaid reasons, I hold that the order of the Additional Commissioner is valid and not liable to be quashed. The application is, therefore, dismissed with costs. Advocate's fee Rs. 100.

A/R.G.D. Application dismissed.

A. I. R. 1953 MADRAS 332 (Vol. 40, C. N. 111)

SOMASUNDARAM J.

In re Behara Lachanna Patnaick one of the partners of Behara Lachanna Patnaick and Sons and Kallepalli Chiranjeevi, Petitioner.

Criminal Revn. Case No. 1100 of 1951 and Criminal Revn. Petn. 1078 of 1951, D/- 14-3-1952.

Sales Tax — Madras General Sales Tax Act (9 of 1939), S. 15(b) — Tax levied on firm — Non-payment — Firm which is liable to be prosecuted and not partners in their individual capacity. (Para 3)

C. V. Dhikshitalu, for Petitioner; Public Prosecutor, on behalf of the State.

REFERENCES: Courtwise/Chronological/ Paras

('47) 1947-2 Mad L. J. 255: (AIR 1948 Mad 104 (1): 49 Cri LJ 53) 3

('51) 1951-1 Mad LJ 511: (AIR 1951 Mad 886 (1): 52 Cri LJ 1040). 3

ORDER: This is a revision by accused 1 in C. C. No. 121 of 1950 on the file of the Court of the Sub-Divisional Magistrate of Srikakulam.

(2) The prosecution is for an offence under S. 15 (b), Madras General Sales-tax Act. Accused 1, 2 & another who is the son of accused 1 are partners of a firm called Behara Latchanna Patnaick and Sons and Kallepalli Chiranjeevi. The firm was doing business for a very long time & the notice of assessment for the year 1946-47 was served on them on 12-7-1949. Notice was served on Satyanarayana, the son of B. L. Patnaick. Then accused 1 & his son Satyanarayana who themselves constituted a separate firm presented a petition to the Commercial Tax Officer, Vizagapatam admitting the liability and paying half the amount assessed and stated therein that the firm was dissolved on 1-10-1948 and asked for the notice to be issued for the half share of the other partner to accused 2 in the case. For failure to pay the taxes assessed a complaint was laid against accused 1 and 2 and they were convicted for non-payment of the tax.

(3) Mr. Dhikshitalu appearing for the petitioner contends that it is not the firm that has been prosecuted but that two of the partners of the firm are individually prosecuted for non-payment of the tax and such a prosecution cannot lie against them individually. In support of his contention he has relied upon the ruling of Subba Rao J. in — 'Public Prosecutor v. Jacob Nadar', 1951-1-Mad L. J. 511. In that case there were two partners but one of them alone was prosecuted for non-payment of the tax. Subba Rao J. observed that though Jacob

might be made liable if the proper procedure had been followed as a partner of the firm on that question he did not express his final opinion — Jacob was not liable as the firm was the person who made the default and who should have been prosecuted. Earlier he observed:

"As the defaulter in this case is the firm, the firm should have been prosecuted for contravening the provisions of S. 15".

He also referred to the judgment of Chandrasekhara Aiyar J. in — 'Akula Paddayya Naidu', In re', 1947-2-Mad L. J. 255 on which strong reliance is placed by the learned Public Prosecutor. In the case of Akula Paddayya, 'In re', (1947) 2 Mad. L. J. 255 there were two partners and both of them were prosecuted. Subba Rao J. referring to this case has observed:

"As both the partners were made accused, the learned judge presumably treated the firm as accused and convicted both the partners who constituted the firm".

He further added that in the case before him he could not treat the firm as the accused as one of the accused only was prosecuted in his personal capacity. These observations will apply with equal force to the facts of this case. Behara Latchanna Patnaick and Sons constituted one firm & this firm along with Kellepalli Chiranjeevi constituted another firm which is now assessed and on which tax is levied. To prosecute this firm there are undoubtedly three partners namely accused 1 in this case, his son Satyanarayana who is not an accused before the Court and the other partner, Kallepalli Charanjeevi (accused 2.) If all the three partners had been made accused, then it could well be contended that the firm had been prosecuted. But the omission of one of the partners renders it difficult to say that the firm as such is prosecuted though every partner individually is liable to pay the tax.

On the facts of this case, I must hold that it is not the firm Behara Latchanna Patnaick & Sons and Sri Kallepalli Chiranjeevi that is prosecuted but only two of the partners of the firm namely accused 1 and 2, are prosecuted in their individual capacity. Such a prosecution cannot lie within the ruling of Subba Rao J. in — 'Public Prosecutor v. Jacob Nadar', 1951-1-Mad L. J. 511. I must therefore set aside the conviction and sentence of the petitioner herein who is accused 1. Accused 2 has not preferred any revision. Under Ss. 435 and 439, Criminal P. C., I take notice of the case of accused 2 also. To make the judgment consistent, I must set aside the conviction and sentence of accused 2 also in this case though he has not preferred any revision. Both the accused are acquitted. The fine if paid, will be refunded.

(4) Since in this case the firm has not been prosecuted and the conviction is being set aside because the two accused are prosecuted individually, this acquittal will not stand in the way of a fresh complaint being laid against the firm B. L. Patnaick and Sons and K. Chiranjeevi and against all the three partners of the firm as such and they being prosecuted for non-payment of the tax. It will not be open to either of these accused or even the other partner who is not joined as an accused to raise any plea under S. 403, Criminal P. C.

B/V.R.B. Conviction and sentence set aside.

A. I. R. 1953 MADRAS 333 (Vol. 40, C. N. 112)

SOMASUNDARAM J.

Ramaswami Udayar, Petitioner v. Raju Udayar, Complainant.

Criminal Revn. Case No. 331 of 1951 and Criminal Revn. Petn. No. 330 of 1951, D/- 13-3-1952.

Penal Code (1860), S. 498 — Woman leaving her husband of her own accord and living with accused as husband and wife — Accused willing to take her — This is "taking" within meaning of S. 498.

If whilst the wife is living with her husband, a man knowingly goes away with her in such a way as to deprive the husband of his control over her, with the intent stated in S. 498, that is a taking from the husband within the meaning of the section. Thus, where a woman is unwilling to live with her husband, may be even for good reasons, and she goes away and lives with another person who is willing to take her as his wife, the other person should be held to have "taken" her within the meaning of S. 498. This section is intended to protect the husband, and not intended for the benefit of the wife. 2 Mad HCR 331 and 4 Mad HCR 20, Foll.; Case law Reviewed. (Paras 15, 16)

Anno: Penal Code, S. 498 N. 1.

G. Gopalaswami, for Petitioner; Asst. Public Prosecutor, for the State.

REFERENCES: Courtwise/Chronological/ Paras

('15) 37 All 624: (AIR 1915 All 390: 16 Cri LJ 663) 5, 7
('49) AIR 1949 All 23: (50 Cri LJ 82) 5, 9
('43) AIR 1943 Bom 179: (44 Cri LJ 584) 5, 8
(1865) 2 WR Cr 35 5, 6
('50) AIR 1950 Cal 406: (51 Cri LJ 1486) 14
(1864-65) 2 MHCR 331: 1 Weir 569 10, 15
('68) 4 Mad HCR 20 10, 15
('28) 54 Mad LJ 456: (AIR 1928 Mad 585: 29 Cri LJ 635) 12
('49) 1949 Mad WN 278: (AIR 1950 Mad 13: 51 Cri LJ 228) 13

ORDER: The petitioner in this case was convicted by the Stationary Sub-Magistrate, Vridhachalam, for an offence under S. 498, I. P. C. and sentenced to a fine of Rs. 200, and this was confirmed in appeal by the Sub-Divisional Magistrate, Ulundurpet.

(2) The facts are these. P. W. 1, the complainant in this case married C. W. 1 on 1-7-1946. They seem to have lived amicably for about three years. On 30-7-1949, C. W. 1's father and her aunt, that is her father's sister, both came to the village of P. W. 1 and took C. W. 1 to Vridhachalam for the Adipuram festival, promising to send her back in two or three days. But she never came back. Enquiries instituted by P. W. 1 revealed that she was living with the accused in a village called Eranji in Kallakurichi taluk. P. W. 1 thereupon instituted a complaint against the wife (C. W. 1), her father and the accused for an offence under S. 498, I.P.C. and for an offence under S. 379, I.P.C. alleging that the jewels were taken away. The Magistrate referred the matter under S. 202, Cr. P. C. and the police report was that no case under S. 379, I.P.C. has been made out, though a case under S. 498, I.P.C. has been made out. The Magistrate took the case on file against the accused only

and the accused was tried and convicted as aforesaid.

(3) A number of witnesses were examined. But it is enough to refer only to the evidence of four witnesses, viz., P. Ws. 3, 4, 5 and 7 who are the material witnesses in respect of this offence. P. W. 5 is a jutka driver. His evidence is that on the day of the Adipuram festival, which was on 30-7-1949, he saw C. W. 1 and the accused at the Rajeswari Bus stand and he took them both to the railway station, and that C. W. 1 hesitated to get into the jutka expressing concern about the future consequences, if her husband came to know of it. But the accused prevailed upon her and both got into the jutka and went to the Vridhachalam station. But they missed the train and the party wanted to go to the next village called Mangalampet to stay there for the night. He took them and left them there. Before going to the station, the jutka in which these two people were travelling got stuck up in front of the house of P. W. 7, the village headman of Vridhachalam, who then saw both C. W. 1 and the accused sitting close by in such a manner as to arouse suspicion. He knew both C. W. 1 as well as the accused and it was he who gave ultimately information to the husband P. W. 1, when he was making enquiries about his wife. P. W. 4 is the village headman of Agaram. He saw both C. W. 1 and the accused at Mangalampet. He knew C. W. 1 as the wife of P. W. 1 and he identified the accused as the person seen with her that night. P. W. 3 is a school teacher at Eranji. He speaks to the fact that the accused and C. W. 1 were seen in the shed opposite to his house. This is the main evidence on which the accused is convicted of having taken C. W. 1 from her husband P. W. 1.

It is necessary to mention here two important documents, Exs. P 1 and P 2. Ex. P 1 is the notice issued by C. W. 1 to her husband in which she has stated that on account of ill-treatment meted out to her by him, she has left him and that he may take steps for divorce. She has stated therein that so far she was concerned, she considered her marriage as cancelled. She also accuses him of having taken her jewels worth thousand rupees and states that she does not propose to live with him any more. Ex. P 2 is a deed of release executed by her on 24-11-1949 and it was registered on the 25th. In that deed she states that her marriage with him was without her consent, and that as she was not able to live amicably with him, she went in search of the accused and that she was living with him. She further states that she does not claim any maintenance as she has taken away the jewels in lieu of maintenance.

(3a) An attempt was made to show that this document, Ex. P 2, was extracted from her by coercion with the aid of the police. But this has been given the lie by the Sub-Registrar, who was examined as a court-witness. He speaks to the fact that there was no police or any one at the time she came to register the document, that she herself registered it willingly and that P. W. 1 was not even present at the time.

(4) The evidence therefore establishes the fact that the woman left her husband on 30th July for the apparent purpose of attending the Adipuram festival, but that on that day she got into a jutka with the accused and went to Mangalampet and ultimately to the village of the accused, and she was living with him. Assuming for a moment that the evidence of P. W. 5 may be exaggerated a little with regard to the persuasion, the fact remains, as spoken to by P. W. 7, against whom nothing could be said, that both of them were travelling in a jutka on the day of the Adipuram festival.

(5) The question is whether, in these circumstances, the accused can be said to have taken C. W. 1 from her husband. It is contended by Mr. Gopalaswami that this is a case in which the woman left her husband of her own free will without any blandishments or allurements held out by the accused and that she has voluntarily come to live with the accused, and the accused therefore cannot be said to have taken C. W. 1 from her husband. He further contends that unless it is proved that the accused had done something, which induced C. W. 1 to come away with him, he cannot be found guilty of the offence under S. 498, I.P.C. and that in this case there is nothing to indicate that he did anything at all. In support of his contention he relies upon the following decisions: viz., — 'Queen v. Pochun Chung', 2 WR Cr 35; — 'Emperor v. Iwaz Ali', 37 All 624; — 'Mahadeo Rama v. Emperor', AIR 1943 Bom 179 and — 'Bhopan v. Chhotey', AIR 1949 All 23.

(6) In — 'Queen v. Pochun Chung', 2 WR Cr 35, the learned Judges were considering a case both under Ss. 497 and 498, I.P.C. The learned Judges seem to think that a person having been convicted under S. 497, I.P.C. need not be convicted also under S. 498, I.P.C. Glover J. observes that S. 498 provides for "enticing" for the purpose of illicit intercourse and that, even if proved, the charge is included in the more serious crime of S. 497, and dealing with this the learned Judge adds: "I say 'even if proved', because the woman herself declares that, being deserted by her husband, she went to the prisoner's house of her own accord." The learned Judges refer to the desertion of her husband, the desire of the prisoner to marry the woman, and the very loose way in which the marriages are conducted amongst persons of the prisoner's caste. But they do not seem to consider the question of "taking". Perhaps that was not raised and argued. The decision cannot therefore be an authority for what amounts to "taking" within the meaning of S. 498, I. P. C.

(7) The case in — 'Emperor v. Iwaz Ali', 37 All 624 is one under Ss. 366 and 372, I.P.C. The facts were: A low caste girl left her lawful guardian of her own free will and subsequently met the accused Ewas Ali and lived with him for some time. Later he made her over to certain persons. The learned Judge observes:

> "In the present case the girl had voluntarily left the keeping of her guardian with intention to remain out of that keeping, and the accused Ewaz Ali, probably with full knowledge of the circumstances, gave her a home and finally transferred her to keeping of Hira Lal, etc."

The learned Judge quotes observation for another judgment that

> "on the admitted facts the leaving and the removal out of the keeping of the lawful guardian was the act of the girl herself long before she met the accused."

This judgment proceeds on the footing that, if the girl by her own act leaves out of the keeping of the guardian and comes into the custody of another, there will be no enticement. I will show presently that the girl's consent is immaterial. It is not open to a minor in law to abandon her guardian. I do not agree with the view expressed in this judgment that when the minor leaves the guardian of her own accord and when she comes into the custody of some other person, that will not amount to taking out of the lawful guardian at all.

(8) In — 'Mahadeo Rama v. Emperor', AIR 1943 Bom 179 it was held that to bring S. 498 into operation, there must be some influence operating on the woman, or co-operating with her inclination at the time the final step is taken, which causes a severance of the woman from her husband for the purpose of causing such step to be taken. The learned Judges no doubt observe that

> "it is not enough to say that the wife could not have left her husband, unless she had somewhere else to go, and that it must be assumed, therefore, that the accused offered her a home, if she would leave her husband."

With great respect to the learned Judges, I should say that the influence which operated on the woman to leave her home was undoubtedly the assurance that she will be given protection, if she comes to this man's house. That must have co-operated with her inclination to leave the house. It is unnecessary, in my opinion, as I will show by the other decisions, that the accused must hold out any overt act from which influence can be inferred.

(9) 'Bhopan v. Chhotey', AIR 1949 All 23 is a case where the question of detention under S. 498 was considered. It was held that once the free will of woman is established, any help or assistance rendered by the accused cannot be regarded to constitute detention. Providing maintenance, affording shelter and rendering assistance in various ways are no doubt matters, which are relevant as evidence of allurement and inducement, but they are by no means conclusive. The problem that has to be ultimately determined in every case always remains, whether the woman was a free agent or whether she was being influenced by the accused. With great respect to the learned Judge, I must say, as pointed out earlier, that her consent or attitude in the matter is absolutely immaterial. A woman's free will, or her being a free agent, or walking out of her house of her own accord are absolutely irrelevant and immaterial for the offence under S. 498.

(10) As against the above decisions, we have decisions of our High Court and they are — 'Queen v. Kumaraswami', 2 Mad HCR 331: 1 Weir 569 and — 'In re Sundara Dass Tevan', 4 Mad HCR 20, the latter of which is followed in 7 Mad Jurist 133. In — 'Queen v. Kumaraswami', 2 Mad HCR 331 the facts were: the prisoner and one Ramaswami, who were neighbours of the prosecutor, met his wife Agilandam in the street, she having left her husband's house to fetch water. The three went together by railway to Vellore and Arcot, where the prisoner and Agilandam remained about 12 days and where sexual intercourse took place between them. But Ramaswami swore and the jury found as a fact that Agilandam asked the prisoner to allow her to go with him, that all the solicitation proceeded from her and that the prisoner for sometime refused to yield to her request. Dealing with the above facts, Scotland C. J. says:

> "I do not think that the facts found of the woman having been the tempter and the prisoner in the first instant reluctant to yield to her solicitations can render the case different from one in which the advances and solicitation are on the part of the man and the woman complies and willingly leaves her husband and cohabits with the man. All that can be said is that her consent is given under circumstances of greater profligacy in the one case than in the other. In this case, therefore, it seems to me the real point for consideration is simply whether the wife's willingness and consent, evidenced by her solicitation of the prisoner and the circumstances under which she left her husband and remained absent from him, afford any defence to the prisoner.
>
> Now the section and the preceding S. 497 (a) were evidently intended for the protection of husbands who alone can institute prosecutions for offences under them. It is the taking or enticing of the wife from the husband or the person having the care of her on behalf of the husband for the illicit purpose that constitutes the offence. If whilst the wife is living with her husband a man knowingly goes away with her in such a way as to deprive the husband of his control over her with the intent stated in the section, that, I think, is a taking from the husband within the meaning of the section. The wife's complicity in the transaction is no more material on a charge under this section than it is on a charge of adultery."

This decision is approved and followed in — 'In re Sundaradass Tevan', 4 Mad HCR 20 where the learned Judges were really dealing with detention.

(11) John D. Mayne in his book on Criminal Law of India, 4th Edn. dealing with this section says that

> "the same would be the result if she left her husband's house and went of her own accord to the accused's house and he allowed her to live with him as his wife. Such allowing would be treated as constructive taking, as she would not have been emboldened to leave her husband's house and remove herself from his control but for the asylum offered by the accused."

He extracts this from certain observations in 7 Mad. Jurist 133.

(12) In — 'Abdul Sathar v. Emperor', 54 Mad LJ 456, Srinivasa Aiyangar J. held that where the evidence disclosed that, but for something which the accused consented to do and did ultimately, a minor girl would not have left her husband's house, or would not have been able to leave her husband's house, there was sufficient taking in law for the purposes of S. 363, I. P. C.

(13) In — 'Akkirayu Sanyasi, In re', 1949 Mad WN 278, Govinda Menon J. has held that it would amount to taking in the following circumstances. Though the parties belonged to a village in Vizagapatam district, the petitioner and the woman were seen, three months later, in a village in the West Godavari district, and she was living with him in a distant

place even at the time when the petition was filed. From these facts, the only inference, according to the learned Judge, is that it was as a result of some action taken by the petitioner that the woman went with him.

(14) In — Debaprosad v. The King', AIR 1950 Cal 406, it was held that the mere fact that a minor leaves the protection of her guardian does not put her out of the guardian's keeping and that, if, however, it is proved that a minor had abandoned her guardian with no intention of returning back she cannot, thereafter, be deemed to continue in the keeping of the guardian. With great respect, I must say that the earlier observation that

> "the mere fact that a minor leaves the protection of her guardian does not put her out of the guardian's keeping"

is the correct position and that any amount of her abandonment of her guardian will not keep her away in law from continuing to be in the keeping of the guardian.

(15) It is clear from the Madras decision, particularly in — 'Queen v. Kumaraswami', 2 Mad HCR 331, that if whilst the wife is living with her husband, a man knowingly goes away with her in such a way as to deprive the husband of his control over her with the intent stated in the section, that is a taking from the husband within the meaning of the section. With great respect to the decisions of the other High Courts, I should think the law is correctly stated in the above decision, and that decision is referred to and approved in — 'In re Sundaradas Tevan', 4 Mad HCR 20 and — 'Queen v. Kumaraswami', 2 Mad HCR 331, is a Bench decision, and I feel bound by it. I may also express that my view is in accordance with the view expressed therein.

(16) Mr. Gopalaswami contends that a more liberal interpretation must be put upon that section. That is, in a case where a woman is unwilling to live with her husband, may be even for good reasons, and she comes and lives with another person as husband & wife(?), the other person should not be held to have "taken" the wife within the meaning of S. 498, I. P. C. In my view, this section is intended, as already stated, to protect the husband, and not intended for the benefit of the wife. The section does not admit of such an interpretation; nor, in my view, the interests of society require it.

(17) On the facts of the case, I am satisfied that however much the wife was disinclined to live with the husband, it is certainly a case in which the woman left with the accused, because he was willing to take her and the offence, in my opinion, has been made out. The conviction is, therefore, correct. The sentence, in the circumstances, is not excessive and is confirmed and the petition is dismissed.

B/R.G.D. Revision dismissed.

A. I. R. 1953 MADRAS 336 (Vol. 40, C. N. 113)

SATYANARAYANA RAO AND RAJAGOPALAN JJ.

P. Vincent and others, Coimbatore (by manager Mr. Paul Vincent), Applicant v. Commr. of Income-tax, Madras, Respondent.

Case Referred No. 5 of 1950 D/-13-3-1952.

(a) Income-tax Act (1922), S. 26A — Deed of family arrangement — Deed proceeding on assumption that all parties became co-owners — Appointment of common manager for fixed period — Choice to co-owners to divide at the end of period in accordance with shares fixed — Deed held was not partnership deed.

A deed of family arrangement proceeded on the assumption that the parties became co-owners of all the properties, movable and immovable, and the business. They provided for the management of the properties for a period of seven years by appointing a common manager. At the end of the period, it was provided that there should be a taking of accounts and if there was no intention to continue joint they could divide in accordance with the shares provided in the deed:

'Held', that the deed in no sense could be treated as constituting a partnership. (Para 2)

Anno: Income-tax Act, S. 26A N. 1.

(b) Income-tax Act (1922), S. 26A — Deed of partnership signed by minor as major — Minor may be treated as having been admitted to benefits of partnership — Partnership can be registered.

A minor signing as major a deed of partnership cannot bind himself by that contract but that does not mean that the partnership between the remaining adult members is thereby also made invalid. As according to the definition of "partner" in the Income-tax Act even a minor is treated as a partner for the purpose of the Act, the adults may be treated as having entered into a valid partnership and the minor as having been admitted to the benefits of the partnership. As he is also a partner there is no valid objection for registering the partnership under S. 26A. (Para 3)

Anno: Income-tax Act, S. 26A N. 1.

M. Subbaraya Aiyar, for Applicant; C. S. Rama Rao Sahib, for Respondent.

REFERENCE ..... /Para

('52) R. C. Nos. 1 & 2 of 1950: (AIR 1953 Mad 315) 3

SATYANARAYANA RAO J.: Under S. 66 (1), Income-tax Act the Appellate Tribunal referred to this Court two questions for decision. They are:

> "1. Whether on the facts and in the circumstances of the case the assessee is entitled to claim registration as a firm under S. 26A, Income-tax Act on the basis of the partnership deed, dated 21-8-1942, and/or on the deed of family arrangement, dated 7-8-1942 and/or the deed, dated 24-3-1948?
> 2. Whether on the facts and in the circumstances of the cases, the provisions of S. 9 (3) of the Act are attracted to the income from property.

We may at once point out that question 2 arises only out of the assessment and does not arise out of the order under S. 26A of the Act. The reference that was sought for was only against the order under S. 26A and not against the assessment order. Therefore question 2 should not have been referred by the Appellate Tribunal to this Court. The argument was therefore confined before us to question 1 alone. It is that question which we have to answer as arising out of the appellate order of the Tribunal.

(2) One S. Vincent executed a Will on 4-2-1941 and died on 22-4-1942, leaving behind him four sons, two daughters and a widow. Immediately after his death there were disputes regarding the Will between the members of the family and the disputes were ultimately settled by a deed of family arrangement of 7-8-1942. Under this arrangement it was agreed between the members that the entire properties and the business left by the deceased S. Vincent should be managed by the eldest son P. Vincent, and after his, on behalf of all the members of the family, by the then surviving eldest son. The managing member was given complete control over the business belonging to the members for a period of seven years from the date of the deed. At the end of the period, it was provided that the parties should scrutinise the accounts and draw a true and accurate list of all the assets and liabilities and if thereafter they did not wish to continue the business, the properties should be divided so as to give a one-sixth share to each of the four sons and the widow and a one-twelfth to each of the two daughters.

Within fourteen days after this deed, they entered into a deed of partnership in respect of the business. The four sons, the two daughters and the widow were treated as the partners, and their shares were one-sixth each to the four sons and the widow and one-twelfth to each daughter. There is a provision in the partnership deed whereunder notwithstanding the death of anyone of the partners the partnership should not be dissolved. At the date of the family arrangement one of the sons, Danaraj Vincent, was a minor and was represented by the eldest son as guardian. But in the partnership deed however Danaraj Vincent signed as a major. Notwithstanding the execution of the partnership deed in 1942 no attempt was made by the assessees to get the deed registered under S. 26A, Income-tax Act. For the first time an application to register the firm was made on 11-3-1946 during the assessment year 1945-46. The registration of this firm as a partnership was rejected by the Income-tax authorities and also by the Appellate Tribunal and at the instance of the assessee this reference was made to this Court. During the pendency of these proceedings, on 1-11-1947, Danaraj, who had by then attained majority, released his interest in the business under a release deed and on 24-3-1948 there was a ratification executed between the parties whereunder Danaraj ratified the previous arrangements from the date of the family arrangement till the date of his relinquishment on 1-11-1947 when he retired from the partnership. These documents which came into existence on a date subsequent to the date of the application were not and could not be taken into consideration and in that we think that the revenue authorities were correct. The assessee contended that there was a valid partnership both under the deed of family arrangement of 7-8-1942 and also under the partnership deed of 21-8-1942. It is rather difficult to construe the deed of family arrangement as constituting a partnership as it proceeds on the assumption that the parties became co-owners of all the properties, movable and immovable, and the businesses and they provided for the management of the properties for a period of seven years by appointing a common manager. At the end of the period it was provided that there should be a taking of accounts and if there is no intention to continue joint they could divide in accordance with the shares provided in the deed. The deed in no sense can be treated as constituting the co-sharers, partners.

(3) The deed of partnership was considered invalid as Danaraj signed the documents as a major while in fact he was a minor. The view taken was that because a minor could not be made a partner and as the deed purported to make Danaraj a partner the whole of that deed was void and of no legal effect. The other aspect, whether the deed could not be so construed as to imply that the parties intended thereby to admit Danaraj to the benefits of the partnership was also rejected on the ground that the two could not be separated from the document i.e., the intention to constitute a partnership could not be severed and from that an inference to admit the minor as a partner could not be made. We are however unable to accept this view. If the minor signed as major, he could not bind himself by that contract. That does not mean that the partnership between the remaining members was thereby also made invalid. In the judgment in — 'Jakka Devayya & Sons v. Commr. of Income-tax, Madras', RC Nos. 1 and 2 of 1950 (Mad.) which we delivered today we gave reasons for construing a document of a similar nature as constituting a minor as a person admitted to the benefits of a partnership, and as according to the definition of "partner" in the Income-tax Act even a minor is treated as a partner for the purpose of the Act, the six adults may be treated as having entered into a valid partnership and the minor as having been admitted to the benefits of the partnership. As he is also a partner according to the definition of the Income-tax Act there is no valid objection for registering the partnership under S. 26A, Income-tax Act. As already stated, the subsequent deed of 24-3-1948 could not be considered in these proceedings and it was rightly rejected. We have already given reasons for not construing the settlement deed of 7-8-1942, as constituting a partnership. There is however a valid partnership deed under the deed of 21-8-1942 and the partnership should have been registered under S. 26A of the Act. The answer therefore to the question referred to us is in the affirmative and in favour of the assessee. As the assessee has succeeded he is entitled to his costs which we fix at Rs. 250.

B/G.M.J. Answer in the affirmative.

A.I.R. 1953 MADRAS 337 (Vol. 40, C. N. 114)

RAMASWAMI J.

Public Prosecutor v. K. C. Ayyappan Pillai and others, Accused-Respondents.

Criminal Revn. Cases Nos. 88 to 111 of 1952 and Criminal Revn. Petns. Nos. 79 to 102 of 1952, D/- 9-9-1952.

(a) Sales Tax — Madras General Sales Tax Act (9 of 1939), S. 15(b) — Specification of defaulted tax in the order of conviction.

Under S. 15 (b), the defaulted tax should be specified in the order of the Magistrate and made recoverable as if it were a fine and the Magistrate cannot split up this tax and give relief in regard to a portion of the year. (Para 4)

(b) Constitution of India, Arts. 20 and 265 — Conviction under S. 15 (b), Madras General Sales Tax Act — (Sales Tax — Madras General Sales Tax Act (9 of 1939), S. 15 (b).

The Sales Tax Act existed at the time of the commission of the offence and also at the time of the conviction for the offence in the year 1951. (Para 7)

Any change in the mode of execution is not bad for its being 'ex post facto'; a statute merely regulating procedure and leaving untouched all the substantial protection with which existing law surrounds a person accused of crime is not within the constitutional inhibition of 'ex post facto' laws; even a statute which changes the punishment that may be imposed for a crime theretofore committed would be 'ex post facto' only if it prescribes or permits the imposition of a greater sentence, and not when it reduces the punishment. New provision in S. 15 (b) of the Madras General Sales Tax Act amounts to nothing more than an alteration of procedure which does not make the act which was not an offence to be an offence or imposes a greater penalty than what was the case before. The recovery of the tax as if it were a fine does not impose a greater penalty than the two modes of recovery as an arrear of land revenue or by a suit as on a debt. Therefore Art. 20 does not apply and on this footing the application of Art. 265 does not arise: Case law discussed. (Paras 7, 9)

Public Prosecutor in person; G. Vasanta Pai, T. Krishna Rao and Ramaprasada Rao, for John & Row, for Respondents.

REFERENCES: Courtwise/Chronological/ Paras

('39) AIR 1939 All 510: (1939 All WR 261) 8
('81) 3 Mad 124 8
('36) AIR 1936 Mad 602: (59 Mad 872) 9
('37) AIR 1937 Mad 217: (ILR (1937) Mad 498 FB) 8
('38) AIR 1938 Mad 360: (ILR (1938) Mad 744 FB) 9
('39) AIR 1939 Mad 877: (ILR (1940) Mad 50) 8
('33) AIR 1933 Pat 65: (141 Ind Cas 792) 8
('38) AIR 1938 Pat 192: (175 Ind Cas 86) 8
('42) AIR 1942 Pat 87: (196 Ind Cas 228) 8
('37) AIR 1937 Rang 380: (172 Ind Cas 422) 9
('35) AIR 1935 Sind 232: (159 Ind Cas 972) 9
('36) AIR 1936 Sind 184: (165 Ind Cas 369) 8
('38) AIR 1938 Sind 48: (173 Ind Cas 678) 8
110 ALR 1303 7
118 ALR 719 7
167 ALR 833 7
(1890) 137 US 483: (34 Law Ed 734) 7
(1898) 170 US 343: (42 Law Ed 1061) 7
(1905) 196 US 319: (49 Law Ed 494) 7

ORDER: Crl. R. C. Nos. 88 to 97, 99 to 105 and 108 of 1952: These are 18 connected criminal revision cases filed by the State against the convictions and sentences of the learned Sub-Divisional Magistrate, Fort Cochin, in C. C. No. 122 of 1951 etc.

(2) The following tabular statement gives the details of these Sales-tax cases from which these revisions are preferred:

Sl. No.	Crl. R. C. No.	C. C. No.	Tax Rs.	A.	P.	Year of Assessment.	Conviction and Sentence.
1.	88/52	122/51	579	5	10	1946—47	Rs. 200 fine
2.	89/52	107/51	501	6	0	1945—46	Rs. 50 ,, on admission
3.	90/52	104/51	931	13	4	,,	Rs. 300 fine
4.	91/52	98/51	144	0	0	,,	Rs. 30 ,, on admission
5.	92/52	96/51	367	4	0	,,	Rs. 100 fine
6.	93/52	92/51	1750	0	0	1946—47	Rs. 150 ,,
7.	94/52	90/51	1612	12	2	,,	Rs. 400 ,,
8.	95/52	84/51	2639	13	6	,,	Rs. 300 ,,
9.	96/52	72/51	1507	14	5	1947—48	Rs. 80 ,, balance of tax Rs. 827-15-9 directed to be paid.
			679	14	8		
			827	15	9		
10.	97/52	68/51	896	7	9	,,	Rs. 100 fine
11.	99/52	162/51	346	2	4	1945—46	Rs. 50 ,, on admission
12.	100/52	157/51	1746	6	0	1947—48	Rs. 140 ,, balance of tax Rs. 526-7-6 to be paid.
			1219	14	6		
			526	7	6		
13.	101/52	156/51	1273	1	8	1946—47	Rs. 130 fine.
14.	102/52	155/51	582	4	0	1945—46	Rs. 60 fine. on admision
15.	103/52	153/51	953	0	0	1947—48	Rs. 70 fine. Balance of tax Rs. 325 0-0 to be paid.
			628	0	0		
			325	0	0		
16.	104/52	152/51	1232	0	8	1946—47	Rs. 120 fine on admission.
17.	105/52	151/51	764	7	4	1945—46	Rs. 80 fine ,,
18.	108/52	127/51	5653	2	6	,,	Rs. 600 fine ,,

(3) There is no dispute in all these 18 cases about the correct calculation of the turnover adopted by the Deputy Commercial Tax Officer or the assessment or the service of the demand notices or the non-payment of the taxes within the time fixed. The learned Public Prosecutor has preferred these criminal revision cases on the ground that the learned Sub Divisional Magistrate in 14 of these cases has not provided in the order for the payment of the sales tax in respect of which the particular respondent was found guilty and convicted under S. 15 (b) of the Madras General Sales-tax Act and that in three cases he has made the respondent liable to pay the tax only for the second half of 1947-48 in C. C. No. 72/51 and for the last three months of 1947-48 in C. C. No. 153 of 1951 and for the last three months of 1947-48 in C. C. No. 157 of 1951 and that this direction for payment of the tax for the last quarter only is not in conformity with law and that the lower Court ought to have directed in the order the payment of the entire tax in respect of which default was committed and for which the respective respondent was found guilty and sentenced under S. 15 (b) of the Madras General Sales-tax Act.

(4) There can be no doubt that under S. 10 of the said Act, the tax assessed has got to be

paid in such manner and in such instalments, if any, and within such time as may be specified in the notice of assessment and that if there is failure to pay within the time allowed any tax assessed on the assessee under the Act and he is prosecuted for an offence under S. 15, that assessee on conviction is liable to pay a fine and in case of a conviction under clause (b) of S. 15 the Magistrate shall specify in the order the tax which the person convicted has failed to pay and the tax so specified shall be recoverable as if it were a fine. Therefore, the contentions of the learned Public Prosecutor that in all these cases under S. 15 (b) the defaulted tax should be specified in the order of the Magistrate and made recoverable as if it were a fine and that the Magistrate cannot split up this tax and give relief in regard to a portion of the year, are correct.

(5) The learned advocates for respondents contend that the Magistrate was justified in the course which he has adopted, because under the law as it stood when these offences were committed the present provision that in cases of convictions under S. 15 (b) the Magistrate having to specify in the order the tax which the person convicted has failed to pay and the tax so specified being made recoverable as if it were a fine did not exist, and that to pass such an order would offend Arts. 20 and 265 of the Constitution of India.

(6) I have carefully considered the application of both these Articles and find that there is no substance in this contention.

(7) So far as Art. 20 is concerned, which prohibits retroactive criminal laws or 'ex post facto' laws, the scope of that Article is nothing more than that no person shall be convicted of any offence under any law not in force at the time of the commission of the offence and secondly, that no person shall be subject to a penalty greater than that which might have been inflicted under the law in force at the time of the commission of the offence. The Sales-tax Act existed at the time of the commission of the offence and also at the time of the conviction for the offence. Then turning to the second condition, it is stated that when the tax is made recoverable as a fine, it imposes a penalty greater than that which might have been inflicted before the Act was amended. In advancing this argument, it is overlooked that any change in the mode of execution is not bad for its being 'ex post facto': see — 'Holden v. State of Minnesota', (1890) 137 US 483 and — 'Rooney v. State of North Dakota', (1905) 196 US 319. A statute merely regulating procedure and leaving untouched all the substantial protection with which existing law surrounds a person accused of crime is not within the constitutional inhibition of 'ex post facto' laws: — 'Thompson v. State of Utah', (1898)-170 US 343; — 'Winston v. State', 118 ALR 719. Even a statute which changes the punishment that may be imposed for a crime theretofore committed would be 'ex post facto' only if it prescribes or permits the imposition of a greater sentence, which is not the case here, and not when it reduces the punishment, as is the case here. — 'People Ex Rel Pincus v. Adams', 110 ALR 1303 and — 'Sekt v. Justices Court', 167 ALR 833.

It will be noticed that before the amendment any person who wilfully acted in contravention of any of the provisions of this Act shall on conviction be liable to a fine of Rs. 1000 and where the breach is a continuing breach, to a further fine which may extend to Rs. 50 for every day after the first, during which the breach continues. This has been omitted in the amended section. Therefore, this new provision amounts to nothing more than an alteration of procedure which does not make the act which was not an offence to be an offence or imposes a greater penalty than what was the case before. Before the Act was amended, under S. 10 when the tax assessed was not paid and there was default the amount could be recovered as if it were an arrear of land revenue just as now it has been made as if it were a fine. The recovery by the procedure prescribed in the Madras Revenue Recovery Act is one of the modes of realising the tax.

(8) But this is not the only mode. The Crown can even sue as on a debt within a period of six years — (Art. 120 of the Limitation Act), see — 'Inderchand v. Secretary of State', AIR 1942 Pat 87, — get a decree and realise the debt by attachment of property as an ordinary debt. Suit for taxes is governed by Art. 120 of the Limitation Act. See — 'Larkana Municipality v. Kaloomal Pamoomal', AIR 1933 Sind 48; — 'Masand Motiram v. Shikarpur Municipality', AIR 1936 Sind 184; — 'Mathura Prasad v. Special Officer, Gaya Municipality', AIR 1938 Pat 192; — 'Dip Narain v. Addl. Dist. Magistrate', AIR 1933 Pat 65; — 'President of Guntur Municipal Commission v. Padmaraju', 3 Mad 124; — 'Rajah of Vizianagaram v. Thammanna', AIR 1937 Mad 217 (FB); — 'Attakoya v. Kunhikoya', AIR 1939 Mad 877; and — 'Badrunnissa v. Municipal Board, Agra', AIR 1939 All 510.

(9) Thirdly, the tax can after 1-1-1948 be recovered also as fine by a Magistrate, on conviction under S. 15 (b) or S. 15 (d) of the Act. The recovery of the tax as if it were a fine does not impose a greater penalty than the other two modes. Even though tax collectable as arrear of land revenue may not be a first charge, the general principle of law preferring the Crown's debt to that of the subject when both stand on the same footing, nevertheless applies: — 'Peoples Bank v. Secretary of State', AIR 1935 Sind 232. Thus, the Crown has priority over other unsecured creditors and when the property of an assessee is attached in execution of a simple money decree and money is deposited in court, since the attachment by a decree-holder creates no right in property, the Crown can step in and recover any tax due to the Govt. without suit or attachment. See — 'Secretary of State v. Ma Nyein Me', AIR 1937 Rang 380; — 'Varadachari v. Secretary of State', AIR 1936 Mad 602 and — 'Manickam v. Income-tax Officer, Madura', AIR 1938 Mad 360 (FB). In the case of the collection of the tax as land revenue, the mode is indicated in the Madras Revenue Recovery Act II of 1864. Under S. 5 of the Madras Revenue Recovery Act the arrear of revenue with interest and costs can be recovered by the sale of the defaulter's moveable or immoveable property or by execution against the person of the defaulter.

The procedure regarding moveable property is governed by distraint as set out in Ss. 8 to 21 and sale of immoveable property, by Ss. 25 to 35 regulating attachment, and by Ss. 36 to 47 regulating sale; and in regard to the procedure for arrest this is governed by Ss. 48

and 49. I do not see how the recovery of the tax as if it were a fine would be a greater penalty because it is open to the court in deserving cases not to prescribe default sentences and the realisation of the fine otherwise than by default sentence of imprisonment is regulated by rule 290-A of the Criminal Rules of Practice, which is certainly far less onerous than the corresponding provisions under the Madras Revenue Recovery Act. In such cases if steps taken in regard to the sale of moveables fail, the fine can even be written off. Therefore, Art. 20 does not apply to this case, and on this footing the application of Art. 265 does not arise.

(10) On this conclusion, the contentions of the Public Prosecutor are found to be correct and the orders of the lower Court as they stand cannot be allowed to stand. The orders of the lower court are modified to the extent that in addition to the fine imposed in all these cases the taxes due by the respective respondent and for which these prosecutions had been launched will stand added and they are made recoverable as if they were fines. Petitions allowed.

(11) Crl. R. C. Nos. 98, 106, 107, 109, 110 and 111 of 1952: As separate appeals against acquittal have been preferred in these cases by the State and are pending, these petitions are dismissed.

A/D.H. Order accordingly.

A.I.R. 1953 MADRAS 340 (Vol. 40, C. N. 115)

SATYANARAYANA RAO AND RAJAGOPALAN JJ.

O. M. Ahmed Sahib, Applicant v. Commr. of Income-tax, Madras, Respondent.

Case Refd. No. 15 of 1950, D/- 13-3-1952.

(a) Income-tax Act (1922), Ss. 24, 34 — Scope of.

The scope of a proceeding under S. 34 is very limited, and is not in the nature of a proceeding for assessing the total income under S. 22 and the other sections of the Act. The relief contemplated by S. 24(2) can be granted only in the course of the assessment of the total income of the assessee, and as the proceeding initiated under S. 34 is not a proceeding intended to assess the total income of the assessee, the duty under S. 24(3) is not cast on the Income-tax Officer, as that provision is not attracted by S. 34. AIR 1950 Mad 647, Rel. on. (Para 2)

Anno: Income-tax Act, S. 24 N. 1; S. 34 N. 1.

(b) Income-tax Act (1922), S. 24(2), (3) — Scope of.

To claim the benefit of S. 24(2) it must be established that there was a loss which was already ascertained but which could not be completely wiped out by setting it off against the profits under a different head under S. 24(1) and that there was a balance which was carried forward to the subsequent year. The balance of loss therefore contemplated under S. 24(2) is an ascertained balance and not an undetermined balance. Where a right is claimed under S. 24 (2), the question, therefore, of ascertaining the loss of a previous year would never arise and cannot arise and therefore there would be no duty where a right under S. 24(2) exists compelling the Income-tax Officer to determine the loss of the previous assessment year. Section 24(3) can only apply, therefore, to a case where in the same assessment year there was loss under one head and profit under another head; but the Income-tax Officer for reasons best known to himself refuses to determine the loss but proceeds with the assessment of the income of the heads under which there is profit. Hence under S. 24(3) the Income-tax Officer is not bound to determine during the assessment year 1943-44 the loss which accrued to the assessee in the accounting year corresponding to the assessment year 1942-43. If the assessee carried on only one business and that business ended in loss, there is no machinery provided under the Act to have that loss determined by the Income-tax authorities. (Paras 3, 4)

Anno: Income-tax Act, S. 24 N. 1, 3.

R. Venkataraman, for Applicant; C. S. Rama Rao Sahib, for Respondent.

REFERENCE ..... /Para

('50) 1950-18 ITR 906: (AIR 1950 Mad 647) 2

SATYANARAYANA RAO J.: The question referred to us for decision under S. 66(1), Income-tax Act by the Income-tax Appellate Tribunal is:

"Whether on the facts of the case, the loss of Rs. 7875 claimed, but which had not been determined in the assessment for the year 1942-43 can be set off in the assessment for the year 1943-44 under S. 24(2), Income-tax Act?"

The assessee is a merchant carrying on business in yarn and cloth. He apparently started his business only in 1941-42 and in the course of the assessment for the year 1943-44 the Income-tax Officer discovered that the assessee was doing business in the assessment year 1942-43 also, though he did not submit a return of income; & therefore he issued a notice to the assessee under S. 34 of the Act read with S. 22(2) on 21st September 1945. The assessee submitted a return of his income, but it was discovered thereafter by the Income-tax Officer that there was no income at all during that period. During the assessment year 1943-44 the assessee claimed that his loss in the previous assessment year 1942-43 was Rs. 7875 and that he was entitled to set if off against the profits of the year 1943-44 under S. 24(2), Income-tax Act. This claim was rejected by the revenue authorities on the ground that as the loss was not determined in the previous assessment year the assessee could not claim the benefit of S. 24(2) of the Act.

(2) On behalf of the assessee two contentions were raised on the strength of the provision in S. 24(3), which states;

"When in the course of the assessment of the total income of any assessee, it is established that a loss of profits or gains has taken place, which he is entitled to have set off under the provisions of this section, the Income-tax Officer shall notify to the assessee by order in writing the amount of the loss as computed by him for the purpose of this section."

The first contention was that in the proceedings under S. 34, the Income-tax Officer was bound, under S. 24(3) of the Act to ascertain the amount of the loss, and his failure to discharge the statutory duty cannot be now taken advantage of by the department to disentitle the assessee to claim the benefit of the provision in S. 24(2) of the Act. This argument is answered by the

decision in the — 'Anglo French Textile Co. Ltd. v. Commissioner of Income-tax', Madras, 1950-18 ITR 906 (Mad) where it was pointed out that the relief contemplated by S. 24(2) could be granted only in the course of the assessment of the total income of the assessee, and as the proceeding initiated under S. 34 was not a proceeding intended to assess the total income of the assessee, the duty under S. 24(3) is not cast on the Income-tax Officer, as that provision is not attracted by S. 34 of the Act. Counsel for the assessee attempted to draw a distinction between that case and the present on the ground, that in that case there was a nil return, whereas in the present case there was no assessment at all and there was no return. But we think that this distinction does not make any difference in the application of the principle. The scope of a proceeding under S. 34, as pointed out in that decision which follows earlier decisions, is very limited, & is not in the nature of a proceeding for assessing the total income under S. 22 and the other sections of the Act.

(3) The next contention urged on behalf of the assessee was that in any event, in this assessment year 1943-44 the Income-tax Officer should have, for the purpose of giving the benefit to the assessee of the provision in S. 24(2), determined the loss which the assessee had suffered during the previous year; and for this he relied again on S. 24(3). His contention was that the language does not restrict the duty of the Income-tax Officer to determine the loss only of the particular assessment year which was being considered, but he was bound to determine the amount of the loss of even the previous year with a view to give the benefit to the assessee of S. 24(2). At first sight the argument might appear to be attractive as there is no express restriction in the sub-section limiting the duty of the Income-tax Officer to the determination of the loss of the particular assessment year with which he was dealing because it says "it is established that a loss of profits or gains has taken place" and does not say whether the loss took place in the assessment year under consideration or in the previous year. Therefore it was argued that whenever a right to set off is claimed under the provisions of S. 24, the Income-tax Officer was bound to ascertain the amount of loss under S. 24(3).

It must, however, be pointed out that the duty is cast only if the assessee is entitled to have the loss set off under the provisions of this section, i.e., S. 24. The provisions under this section which were introduced for the first time by the Amending Act of 1939 which entitled an assessee to claim relief in respect of loss are twofold. Under S. 24(1), if an assessee sustained a loss of profits or gains in any year under any of the various heads enumerated in S. 6, but made profits in the same year under any of the other heads of that section, he could claim that the loss should be set off against the profits. But that is restricted only to the loss and profit which accrued during the particular assessment year, and is confined only for setting off loss accrued on one head as against the profit earned under another head. If after so setting off there is still a balance of loss that loss could be carried forward to the successive year under S. 24(2) of the Act subject to the limitations therein imposed. Under this sub-cl. (2) to S. 24 that portion of the loss which could not be completely wiped out by setting it off against the profits under S. 24(1), the balance of loss carried forward, could be set off in the succeeding year against the profits and gains of the assessee from the same business carried on by him in the succeeding year and he could carry it forward to the following year also up to a limit of six years as stated in the section. But the peculiarity under this sub-clause is that while under cl. (1) the loss under one head could be set off against the profits under anotner head, the balance of loss carried forward under S. 24(2) could be set off only against the profits of the particular business in which the loss had previously accrued and not against the profits under other heads.

To claim therefore the benefit of S. 24(2) it must be established that there was a loss which was already ascertained but which could not be completely wiped out by setting it off against the profits under a different head under S. 24(1) and that there was a balance which was carried forward to the subsequent year. The balance of loss, therefore contemplated under S. 24(2) is an ascertained balance and not an undetermined balance. Where a right is claimed under S. 24(2), the question, therefore, of ascertaining the loss of a previous year would never arise and cannot arise and therefore there would be no duty where a right under S. 24(2) exists compelling the Income-tax Officer to determine the loss of the previous assessment year. S. 24(3) can only apply, therefore, to a case where in the same assessment year there was loss under one head and profit under another head; but the Income-tax Officer for reasons best known to himself refuses to determine the loss but proceeds with the assessment of the income of the heads under which there is profit. S. 24(3), in our opinion, does not help the assessee in his claim that he is entitled to the benefit of S. 24(2) and to compel the Income-tax Officer to determine the loss of the previous assessment year 1942-43. The policy underlying the provisions of the Income-tax Act is that generally there is no case where during a given assessment year the revenue authorities are called upon to determine either the loss or the income of the previous year except to the limited extent recognised under S. 34 of the Act. It is, therefore, difficult to accept the contention that under S. 24(3), the Income-tax Officer was bound to determine during the assessment year 1943-44 the loss which accrued to the assessee in the accounting year corresponding to the assessment year 1942-43.

(4) If the assessee carried on only one business and that business ended in loss, there is no machinery provided under the Act to have that loss determined by the Income-tax authorities. There is no provision compelling the Income-tax authorities to do it. It is unnecessary to consider in this case the further question that might arise whether if the assessee carried on only one business falling under one head of S. 6 and there was a loss but there was no profit under any different head in that year, he could claim the benefit of S. 24(1) or S. 24(2) of the Act. No doubt the argument that the right to carry forward the loss under S. 24(2) could be claimed only if there were different heads of income for the assessee and there was a loss in one or more heads which could be set off against the profits of a different head or heads under S. 24(1) and if the loss exceeded the profits in the year leaving a balance, then alone it could be carried forward under S. 24(2), seems plausible. But it is unnecessary to express a final opinion on this question. It is no doubt true, as pointed out by the Appellate Tribunal, there is a lacuna in the Act in not making it compulsory upon the Income-tax authorities to assess the loss of an assessee in a particular year when he has no assessable income to enable

him to carry it forward and claim to set off in the succeeding year. But it is a matter for the Legislature to consider whether they would adopt a policy of giving relief to assessees in such cases but we are not concerned with it.

(5) The question referred to us must therefore be answered in the negative and against the assessee. As the assessee has failed, he must pay the costs of the Commissioner which we fix at Rs. 250.

B/D.H. Answer in the negative.

A.I.R. 1953 MADRAS 342 (Vol. 40, C. N. 116)

RAJAMANNAR C. J.
AND VENKATARAMA AYYAR J.

Management of Rajamani Transport Ltd., Petitioner v. Workers employed in the Rajamani Transports Ltd., represented by the Tiruchi Dist. Motor Workers' Union, Tiruchirapalli and others, Respondents.

Writ Petn. No. 594 of 1951, D/- 18-3-1952.

Industrial Disputes — Wages — Basic wages — Fixation of — Matters to be taken into account — Capacity of particular industry to pay, relevancy of.

Whether or not a particular employer is able to make profits has no bearing on the question as to what is the proper wage for the different classes of workers in the business carried on by the company. A comparison of the rates obtaining in similar businesses in the locality is extremely useful in arriving at a proper basic wage. If after paying such wages the company is unable to make any profit that may be a consideration for the company deciding to wind up. But the apprehension that the company may have to close the business cannot affect the question what is the proper scale of pay having regard to relevant factors like the nature of the work done, the capacity of the particular class of industry to pay and other similar factors. (1923) 67 Law Ed 1103, Dist.; (1937) 81 Law Ed 703 and (1923) 67 Law Ed 785, Ref. (Para 2)

K. Veeraswami and G. Ramanujam, for Petitioner; V. V. Raghavan, for Government Pleader, for the State; S. Viswanathan, for first Respondent.

REFERENCES: Courtwar/Chronological/ Paras
(1923) 67 Law Ed 785: (261 US 525) 3, 4
(1923) 67 Law Ed 1103: (262 US 522) 4
(1937) 81 Law Ed 703: (300 US 379) 4

RAJAMANNAR C. J.:— The petitioner is a private limited company incorporated under the Indian Companies Act and is engaged in the business of providing bus transport in Madura, Ramnad, Tiruchirapalli and Tanjore districts. By G. O. Ms. No. 4096 (Development) dated 9-10-1950 the Government referred to the Industrial Tribunal for adjudication the dispute between the workers and the management of the petitioner company. The items of dispute comprised scales of wages, dearness allowance, etc. The Industrial Tribunal at Mathurai fixed basic wages for the different categories of workers like drivers, conductors, checking inspectors, etc., on the basis of wages which were obtaining in other transport companies. There was an appeal by the petitioner to the Labour Appellate Tribunal. That Tribunal confirmed the award of the Industrial Tribunal. The above application is to quash the orders of the two Tribunals.

(2) The contention of the petitioner company is that the award of the Industrial Tribunal has resulted in an increase in the rate of wages by 33 to 100 per cent and the financial position of the company was such that it could not bear such rates and therefore the award violates the guarantee of equality before the law contained in Art. 14 of the Constitution and also that the rights to property are curtailed. It was also urged that the Tribunal should have taken into account the loss sustained by the petitioner employer in fixing the wages. The Appellate Tribunal refused to accept this contention and observed:

"But the fact remains that the financial position of the company has not much bearing on the question as to what should be the basic wages of the workers therein. The workers must get minimum wages as are being paid in comparable undertakings in the local area and if the company cannot afford to do it it has no right to exist."

The Appellate Tribunal found that there was no evidence before them to show that any comparable unit was making payments at lesser rates. They therefore saw no reason for interfering with the scales fixed by the Tribunal. We are in entire agreement with the reasoning of the Appellate Tribunal. Whether or not a particular employer is able to make profits has no bearing on the question as to what is the proper wage for the different classes of workers in the business carried on by the company. We think that a comparison of the rates obtaining in similar businesses in the locality is extremely useful in arriving at a proper basic wage. If after paying such wages the company is unable to make any profit that may be a consideration for the company deciding to wind up. But the apprehension that the company may have to close the business cannot affect the question what is the proper scale of pay having regard to relevant factors like the nature of the work done, the capacity of the particular class of industry to pay and other similar factors.

(3) Learned counsel for the petitioner relied upon certain decisions of the Supreme Court of the United States but we are unable to derive any assistance from these cases. They do not materially bear on the question before us. In —'Adkins v. Children's Hospital of Columbia', (1923) 67 Law Ed. 785, it was held that an Act of the Congress giving a Board power to fix for women a minimum wage sufficient in its opinion to supply the necessary cost of living and maintain the women in good health and protect their morals is repugnant to the provisions of the Federal Constitution against deprivation of liberty or property without due process of law. Sutherland J. who delivered the opinion of the Court based it on the fact that the impugned statute required the employer to pay wages at particular rates which were not fixed on the basis of the extent of the benefit obtained from the service but that it was fixed on the extraneous circumstance that the employee needs to get a prescribed sum of money to insure her subsistence, health and morals. The learned Judge observed:

"The moral requirement, implicit in every contract of emloyment, viz., that the amount to be paid and the service to be rendered shall bear to each other some relation of just equivalence, is completely ignored. The necessities of the employee are alone considered and these arise outside of the employment."

We do not see how this decision really helps the petitioner. The scales of wages in the case before us have not been fixed on the basis of the money required for the worker to enable him to

lead a healthy and decent and moral life. The scales were adopted from scales in other undertakings similar to that in question.

(4) But this case in —'Adkins v. Children's Hospital of Columbia, (1923) 67 Law Ed. 785, is itself no longer law in the United States. In —'West Coast Hotel Co v. Parrish', (1937) 81 Law Ed. 703, this was expressly overruled by a majority of the Judges of the Supreme Court. In that case it was held that a statute authorising the fixing of reasonable minimum wages for women and minors by state authority was not repugnant to the due process clause of the Federal Constitution. Reference was also made to the well-known case in —'Wolff Packing Co v. Court of Industrial Relations', (1923) 67 Law Ed. 1103, but there is nothing in that decision which has even the remotest bearing on the points arising in the case before us. We are not concerned in this country with different classes of business in so far as they are or not businesses clothed with a public interest. Nor are we concerned with the freedom of contract expressly or impliedly guaranteed to the citizens. The case in —'Wolff Packing Co. v. Court of Industrial Relations', (1923) 67 Law Ed. 1103, proceeded on the basis that the right of employer and employee to contract with respect to wages is part of the liberty protected by the 14th Amendment to the Federal Constitution.

(5) As we have no hesitation in holding that the Industrial Tribunal has not taken any irrelevant fact into consideration in fixing the wages, the application must be dismissed. There will be no order as to costs.

B/K.S. Application dismissed

A.I.R. 1953 MADRAS 343 (Vol. 40, C. N. 117)

SATYANARAYANA RAO AND RAJAGOPALAN JJ.

Sri Gajalakshmi Ginning Factory Ltd., Palladam, Applicant v. The Commissioner of Income-tax, Madras, Respondent.

Case Referred No. 54 of 1950, D/- 15-4-1952.

(a) Income-tax Act (1922), S. 31(3) — Powers of Appellate Assistant Commissioner.

No distinction can be drawn between cases where the Assistant Commissioner was dealing with an appeal which was remanded and an appeal which was heard by him in the first instance. The power conferred upon the Appellate Assistant Commissioner by S. 31(3) is undoubtedly wider and is not restricted to the subject matter of the appeal. Even though no appeal was preferred by the Commissioner in respect of that portion of the order of assessment of the Income-tax Officer which contained an adverse decision against the Department, in disposing of an appeal by the aggrieved assessee, though the appeal was confined in its subject matter to a portion of the order, it would be open to the Appellate Assistant Commissioner to deal with the whole of the assessment order of the Income-tax Officer, even to enhance the assessment. Of course, it would not be open to the Appellate Assistant Commissioner to introduce into the assessment new sources, as his power of enhancement should be restricted only to the income which was the subject matter of consideration for purposes of assessment by the Income-tax Officer. AIR 1938 Lah 741, Rel. on. (Para 5)

Anno: Income-tax Act, S. 31 N. 2.

(b) Income-tax Act (1922), Ss. 2(4) and 10 — Business — Purchase of land and sale after long interval.

The assessee company purchased in 1932 a ginning factory with extensive lands appurtenant to the factory and also a plot which was somewhat removed from the factory. On this plot there were some fruit stalls. Out of the vacant site some land was parcelled out into small plots in accordance with the requirements of the town planning scheme of the municipality and the plots were sold thereafter in public auction. During the accounting year by sale of some plots the assessee realised a sum of Rs. 9397 and a further sum of Rs. 3800 from the sale of the fruit shop buildings making a total of Rs. 13197:

Held that amount of Rs. 3800 could in no sense be said to be a revenue receipt as opposed to a capital receipt. There was no element of any business in the matter of the sale of those sites. The sum of Rs. 9397 must also be treated as a capital receipt and not a revenue receipt. If a person buys land with no intention of selling it and after a long interval finds it convenient to sell the land by parcelling it out into different plots and also by laying out roads and providing other amenities with a view to get more price, it cannot be said that the activity which he carried on has any element of trade, commerce or business and it cannot be said, therefore, that it is an activity in the nature of a trade: (1909) 5 Tax Cas 424 and 1944-12 ITR 472 (Lah), Rel. on. (Paras 6, 7)

Anno: Income-tax Act, S. 2 N. 6; S. 10 N. 1.

(c) Income-tax Act (1922), S. 33(4) — Power to remand.

The power under S. 33(4) undoubtedly includes the power to remand. AIR 1948 Mad 170, Foll. (Para 5)

Anno: Income-tax Act, S. 33 N. 1.

S. Swaminathan, for Applicant; C. S. Rama Rao Sahib, for Respondent.

REFERENCES: Courtwise/Chronological/ Paras

('38) 1938-6 ITR 370: (AIR 1938 Lah 741) 5
('44) 1944-12 ITR 472 (Lah) 7
('47) 1947-15 ITR 425: (AIR 1948 Mad 170) 3, 5
(1909) 5 Tax Cas 424 7

SATYANARAYANA RAO J.: Two questions have been referred to this Court for decision by the Income-tax Appellate Tribunal under S. 66 (1) of the Act. They are:

1. Whether on the facts and in the circumstances of the case the inclusion and assessment of the sum of Rs. 9397 representing the sale proceeds of plots of land, by the Appellate Assistant Commissioner after remand and upheld by the Appellate Tribunal, when this amount had not formed the subject matter of the appeal in respect of assessment year 1944-45 either before the Appellate Assistant Commissioner or the Appellate Tribunal in the first instance, is legal?

2. Whether on the facts and in the circumstances of the case the assessment of the sum of Rs. 13197 realised by the sale of vacant plots and fruit shop buildings under the head "business" is lawful?

(2) The assessee is Sri Gajalakshmi Ginning Factory Ltd., Palladam, hereinafter called the "company". The company purchased in 1932 a ginning factory with extensive lands appurtenant to the factory and also a plot which was somewhat removed from the factory and was in the heart of the town of Tirupur. On this plot there were some fruit stalls. The whole lot was purchased for a sum of Rs. 33000. The extent of the land appurtenant to the building was about 11 acres 33 cents. The site of the fruit stalls was 9 cents. Before the termination of the accounting year 1942 the building, the machinery and the factory were sold together with some of the land appurtenant to it for a sum of Rs. 40000. The profit which accrued from out of that transaction was subjected to income-tax without objection during the assessment year 1942-43. Out of the vacant site of 7 acres, two acres were reserved by the assessee for erecting a cinema theatre, and the remaining 5 acres of land was parcelled out into 81 small plots in accordance with the requirements of the town planning scheme of the municipality and the plots were sold thereafter in public auction; and by January 1943, 61 plots were sold which fetched a profit of Rs 2036. Out of this amount the Income-tax Officer assessed the company to pay income-tax on a sum of Rs. 400. But this decision was reversed by the Appellate Assistant Commissioner on appeal who held that the sum of Rs. 2036 was a capital receipt.

(3) We are now concerned with the subsequent accounting year ending 31st January 1944. During this period, by the sale of the remaining plots the assessee realised a sum of Rs. 9397 and a further sum of Rs. 3800 from the sale of the fruit shop buildings making a total of Rs. 13197. During this assessment year now (1944-45) the sum of Rs. 9397 was treated as a capital receipt by the Income-tax Officer. He assessed the sum of Rs. 3300 under the head "business" under the erroneous impression that this amount represented the sale proceeds of the factory building on which depreciation was allowed. Against the order of the Income-tax Officer, the assessee preferred an appeal to the Appellate Assistant Commissioner. The Appellate Assistant Commissioner by his order of 31st July 1945 upheld the order of the Income-tax Officer, but reduced the amount to Rs. 2800. There was a further appeal by the assessee to the Appellate Tribunal, and the Tribunal was not clear about the facts and therefore, remanded the matter to the Appellate Assistant Commissioner for a decision in accordance with law after considering all the facts of the case. Under the law, the Appellate Tribunal had authority to remand a case, as was decided by this Court in — 'Pulleswara Rao v. Commr. of Income-tax, Madras', 1947-15 ITR 425 (Mad). After remand, the Appellate Asst. Commissioner after considering the facts, came to the conclusion that the sum of Rs. 3800 and the sum of Rs. 9397 i.e., in all a sum of Rs. 13197 was assessable to a tax as income of business earned by the assessee. In other words he enhanced the assessment which was made by the Income-tax Officer.

(4) The second order of the Appellate Assistant Commissioner was again taken on appeal to the Tribunal and the assessee objected to the order on two grounds. In the first place, it was contended that the whole of the amount of Rs. 13197 was only a capital receipt and not a business income assessable to tax under the Act. In the second place, the sum of Rs. 9397 which was never the subject matter of appeal before the Appellate Assistant Commissioner should not have been added to the assessable income by the Appellate Assistant Commissioner after remand as he was precluded from doing so because that amount was not the subject-matter of appeal before him. The decision on both these questions was adverse to the assessee; and at the instance of the assessee, a reference was made by the Appellate Tribunal of the two questions formulated above.

(5) The first question referred to us raises the point relating to the jurisdiction of the Appellate Assistant Commissioner under S. 31 of the Act. In the present case, the appeal in the first instance to the Appellate Assistant Commissioner was confined only to the sum of Rs. 3800 and there could possibly be no appeal against the order of the Income-tax Officer treating the sum of Rs. 9000 and odd as a capital receipt, for, under S. 30 of the Act, the right of appeal against the order of assessment is conferred only upon the assessee and not upon the Commissioner of Income-tax. The actual subject matter of the appeal before the Appellate Assistant Commissioner was only the sum of Rs. 3800. After the matter was decided by him there was further appeal to the Appellate Tribunal under S. 33 of the Act. It must be noted that the right of appeal to the Appellate Tribunal is conferred under S. 33 also upon the Commissioner, unlike the provision in S. 30 of the Act. The Appellate Tribunal in the exercise of its power under S. 33 (4) of the Act remanded the case to the Appellate Assistant Commissioner. The use of the word "thereon" in the sub-s. (4) of S. 33 has been construed as indicating that the power of the Appellate Tribunal was restricted to deal with the actual subject matter of the appeal, for, it was open to both the assessee and the Commissioner to prefer appeals to the Tribunal to the extent to which they were aggrieved by the order of the Appellate Assistant Commissioner. The power under S. 33 (4) of the Act undoubtedly includes the power to remand. See — 'Pulleswara Rao v. Commr. of Income-tax, Madras', 1947-15 ITR 425 (Mad). But the position is different so far as the power of the Appellate Assistant Commissioner is concerned.

Whether the Appellate Assistant Commissioner was hearing an appeal against the order of assessment in the first instance or was hearing an appeal which was remanded by the Appellate Tribunal, he has finally to dispose of the appeal in the manner indicated in S. 31 of the Act; and under sub-s. (3) of Sec. 31, he is empowered in disposing of an appeal against an order of assessment either to confirm the order, to reduce, enhance or annul the assessment. The power, therefore, conferred upon the Appellate Assistant Commissioner by this clause is undoubtedly wider and is not restricted to the subject matter of the appeal. Even though no appeal was preferred by the Commissioner in respect of that portion of the order of assessment of the Income-tax Officer which contained an adverse decision against the Department, in disposing of an appeal by the aggrieved assessee, though the appeal was confined in its subject matter to a portion of the order, it would be open to the Appellate Assistant Commissioner to deal with the whole of the assessment order of the Income-tax Offi-

cer, even to enhance the assessment. It was held that when once an appeal was preferred by an assessee, it would not be open to the assessee to withdraw the appeal so as to prevent the Appellate Assistant Commissioner from enhancing the assessment under S. 31 (3) (a) of the Act. Vide — 'Commr. of Income-tax, Punjab v. Sha Nawaz Khan', 1938-6 ITR 370 (Lah). Of course, it would not be open to the Appellate Assistant Commissioner to introduce into the assessment new sources, as his power of enhancement should be restricted only to the income which was the subject matter of consideration for purposes of assessment by the Income-tax Officer.

In view of this scheme underlying the provisions of the Act, it is difficult to accept the contention strenuously urged on behalf of the assessee, that the Appellate Assistant Commissioner, while dealing with the appeal after remand, was not entitled to enhance the assessment so as to include the sum of Rs. 9397 also in the assessable income on the ground that it was not a capital receipt but was a revenue receipt. That decision may be right or wrong. But that is a matter for consideration on the merits. It seems to us difficult to draw a distinction between cases where the Assistant Commissioner was dealing with an appeal which was remanded and an appeal which was heard by him in the first instance. The only power which he could exercise in disposing of an appeal whether received by him after remand or directly against the order of the Income-tax Officer is the one conferred upon him by S. 31 of the Act, and it is not subject to any restrictions arising out of the subject matter of the appeal. The position, however, in the civil cases, i.e. appeals arising under the Civil Procedure Code is different. For, there the aggrieved party, whether he is the plaintiff or the defendant, has got the right to appeal against that portion of the decree which is adverse to him and by which he was aggrieved, and the appellate Court can deal only with such subject matter as was properly brought before it and not otherwise.

If the respondent did not file an appeal in respect of that portion of the decree which was adverse to him, it is open to him to file a Memorandum of Cross objections in case his opponent chooses to prefer an appeal against that portion of the decree which was adverse to him. Without a Memorandum of cross objections, the matter to the extent to which the decision was against the respondent, could not be brought up before the Appellate Court, subject, however, to this exception viz., that it would be open to the respondent without filing Memorandum of cross objections to support the judgment of the lower Court on the grounds other than those on which it was based by the trial Court. The procedure to be followed and the powers to be exercised by the appellate Court are entirely different under the Civil Procedure Code from that which obtains under the Income-tax Act. As stated already, while the assessee is entitled to prefer an appeal against the order of assessment by which he was aggrieved, no such right was given to the Commissioner. The powers of the Appellate Assistant Commissioner which he is entitled to exercise are wider under S. 31 of the Act than those which could be exercised by an Appellate Court under the Civil Procedure Code. The analogy, therefore, of what obtains in appeals under the Civil Procedure Code does not apply to the case of the appeals against the assessment orders of the Income-tax Officer to the Appellate Assistant Commissioner. The answer, therefore, to the first of the two questions must be in the affirmative and against the assessee.

(6) There remains the second question. The sum of Rs. 13197 referred to in that question consists of two amounts, an amount of Rs. 9397 which represents the sale proceeds of the plots of land which were appurtenant to the factory, and a sum of Rs. 3800 which represents the sale proceeds of the site with the buildings in which there were certain fruit shops. So far as the latter amount is concerned, there cannot possibly be any difficulty in answering the question, in favour of the assessee, as that amount can in no sense be said to be a revenue receipt as opposed to a capital receipt. There is no element of any business in the matter of the sale of those sites, and it is difficult to follow the legal basis on which a contrary conclusion was reached by the Appellate Assistant Commissioner and by the Appellate Tribunal.

(7) The sum of Rs. 9397, in our opinion, must also be treated as a capital receipt and not a revenue receipt. It was claimed by the Department that this amount really represents profits earned by the assessee by carrying on business or at any rate an adventure in the nature of a trade; and in support of this view, a number of decisions, English and Indian, were cited, in which on a given set of facts one view or the other was held. It is, however, not possible from an examination of these decisions to evolve a satisfactory definition or draw the line of demarcation between a capital receipt and a revenue receipt. As is often the case, each case must be decided on its own facts and no hard and fast rule can be laid down. That is the only principle that emerges on an analysis of the decisions cited at the Bar. When it is claimed that an income is an income earned by carrying on a business, one has naturally to look into the definition of "business" contained in the Act (vide S. 2(4)) where it is defined as including any trade, commerce or manufacture or any adventure or concern in the nature of trade, commerce or manufacture. It consists, therefore, really of two parts. The activities of a person constitute either trade, commerce or manufacture or it may be an adventure or concern not exactly amounting to trade, commerce or manufacture, but may be something analogous or in the nature of a trade, commerce or manufacture. Now then, what is trade? Trade has been explained in the Concise Oxford Dictionary as "business, especially mechanical or mercantile, employment opposed to profession carried on as means of livelihood or profit". The meaning of 'commerce' as given by the same Dictionary is 'exchange of merchandise, especially on large scale'. In ordinary parlance, trade and commerce carry with them the idea of purchase and sale with a view to make profit. If a person buys goods with a view to sell them for profit, it is an ordinary case of trade.

If the transactions are in a large scale it is called commerce. Nobody can define the volume of business which would convert a trade into commerce. But everybody understands the distinction between the two with sufficient vagueness. It cannot be said that the sale of the plots by the assessee is trade or

commerce in the ordinary sense of the term. Indeed, it was not claimed by the Department at any stage of these proceedings that the person did in fact carry on trade in sites for the purpose of earning profit. But what was claimed was that the transactions of the assessee in selling these plots were an adventure in the nature of a trade, and therefore it falls within the definition of 'business' and the profit he made is profit which accrued from a business. If a person buys lands with a view to sell them and thereafter carries on certain operations so as to bring greater profit and facilities the sale of the plots, it can be said, if it is a single transaction, that his activity is adventure in the nature of trade, for, the essence of a trade, buying and selling for profit, is present in that activity. But if a person buys land with no intention of selling it and after a long interval finds it convenient to sell the land by parcelling it out into different plots and also by laying out roads and providing other amenities with a view to get more price, it cannot be said that the activity which he carried on has any element of trade, commerce or business and it cannot be said, therefore, that it is an activity in the nature of a trade. He was merely selling and did not at the time of buying start with the intention of buying and selling with a view to make profit. The intention must be that even at the time when the property was acquired it was so acquired for the purpose of sale with a view to make profit. In other words, the object of the acquirer was to deal in that commodity, if one may use that expression, as he deals with the goods in the course of an ordinary trade. In the absence of any such intention gatherable from the circumstances of the case, it is difficult, if not impossible, to hold that the activity he carried on was something analogous to a trade and therefore, the profit he made was not a capital receipt but a revenue receipt.

It is not necessary to deal with any of the decisions cited at the Bar, except to make a passing reference to the case in — 'Hudson's Bay Co. v. Stevens', (1909) 5 Tax. Cas. 424, where at page 437 Farewell L. J. gave the illustration which is nearer to the present case. There, the learned Lord observed:

"Again, a landowner may lay out part of his estate with roads and sewers and sell it in lots for building, but he does this as 'owner', not as a land 'speculator'" (the italics (here ' ') are ours).

The contrast is, therefore, between an owner selling the property for the purpose of converting his investment into money and a speculator purchasing property with a view to sell and make profit out of it. If it is the latter, it may be an adventure in the nature of a trade and the income would not be a capital receipt but an income earned by exercise of a trade or something in the nature of a trade and would be assessable to tax.

The case in — 'Kahanchand and Kishanchand v. Commr. of Income-tax, Punjab', 1944-12 I T R 472 (Lah) to which our attention was drawn by Mr. Rama Rao Sahib, the learned counsel for the Commissioner of Income-tax, refers to two transactions, one of which was held to be an investment of surplus capital and the profits arising from the sales were casual and non-recurring and therefore, not taxable, while in the other case which related to 158 kanals of land the purchase was from the beginning a speculative purchase and the brothers intended to sell the land to their best advantage. It was held that it was not an investment of surplus capital but a purchase made with the sole and exclusive object of selling it at a profit when a suitable opportunity had occurred. This case itself brings out the distinction between, and explains under what circumstances the profits received by the sale of land would be a capital receipt and when it would be a revenue receipt. It is unnecessary, therefore, to refer to the other decisions on the point. In our opinion, the sum of Rs. 9397 also should be treated as a capital receipt. It, therefore, follows that the sum of Rs. 13197 is exempt from tax and the second question must be answered in the negative and in favour of the assessee.

(8) As the assessee has substantially succeeded, he is entitled to costs, which we fix at Rs. 250.

B/D.H. Answers accordingly.

A.I.R. 1953 MADRAS 346 (Vol. 40, C. N. 118)

RAJAMANNAR C. J. AND VENKATARAMA AIYAR J.

The Council of the Institute of Chartered Accountants of India, Forwarding Authority v. K. V. Narasimham, Chartered Accountant, Vellore, Respondent.

Referred Case No. 58 of 1951, D/- 4-4-1952.

Chartered Accountants Act (1949), Sch., Cl. (c) — Contravention — (Auditor's Certificate Rules (1932), R. 44) — (Chartered Accountants Act (1949) — Regulations under — Regn. 38).

The respondent was carrying on business as a Chartered Accountant. One of the members of his regular office establishment was one Raghavachariar who was a B. Com. entitled to practise before the Income-tax Tribunals under S. 61, Income-tax Act; and he had generally been attending to the work of the respondent before those Tribunals. He filed the requisite authorisations from the assessees to appear before the Tribunals; he signed financial statements for them and he conducted their cases. He was paid a monthly salary by the respondent. On 9-9-1948 Raghavachariar was taken by the respondent as an articled clerk and he continued thereafter, as before, to conduct cases before the Income-tax Tribunals and draw monthly salary from the respondent.

Held (i) that on the facts of the case it could not be said that the respondent had acted in contravention of cl. (c); the authorisations to appear for the assessees before the Income-tax Tribunals were signed by Raghavachariar and not by the respondent, but that was for the purpose of conforming to the requirements of S. 61, Income-tax Act and was a matter of form. The assessees were the clients of the respondent; and Raghavachariar was only an employee looking to the respondent for the payment of his fees.

(Paras 3, 4)

(ii) There was no violation of R. 44, Auditor's Certificate Rules, 1932 and Regn. 38 under Act 38 of 1949 because the work of the respondent as an auditor included, the work before the Income-tax Tribu-

nals and it was, therefore, business which was within the scope of the duties of Raghavachariar as an articled clerk. The fact that Raghavachariar received remuneration for it in the form of monthly salary did not affect the question.

(Para 6)

R. Ramamurthi Aiyar, for the Forwarding Authority; V. Rajagopalachariar and A. Nagarajan, for Respondent.

VENKATARAMA AIYAR J.: The respondent is carrying on business as a Chartered Accountant with his headquarters at Vellore. One of the members of his regular office establishment is one Raghavachariar who is his own brother. This Raghavachariar is a B. Com. and is entitled to practise before the Income-tax Tribunals under S. 61, Income-tax Act; and he is the person who has generally been attending to the work of the respondent before those Tribunals. He files the requisite authorisations from the assessees to appear before the Tribunals; signs financial statements for them and he conducts their cases. He is paid a monthly salary by the respondent which starting with Rs. 75 per mensem had been raised from time to time & had stood at Rs. 500 per mensem in 1950. It is also found that the work before the Income-tax Tribunals forms a substantial portion of the business of the respondent. The charge of the Disciplinary Committee against the respondent is that while he receives the full fees from the assessees for the work before the Tribunals, he actually entrusts that work generally to Raghavachariar, pays him monthly salary as aforesaid and takes the balance of fees for himself. This, it is said, is a violation of the rule of conduct laid down in cl. (c) of the schedule to the Act.

(2) On 9-9-1948 Raghavachariar was taken by the respondent as an articled clerk and he continued thereafter, as before, to conduct cases before the Income-tax Tribunals & draw monthly salary from the respondent. The charge against the respondent on this score is that he acted in contravention of R. 44, Auditor's Certificate Rules, 1932 & Regn. 38 under Act 38 of 1949 in permitting the articled clerk to engage in business without obtaining the requisite sanction. These are the two charges framed against the respondent and the Disciplinary Committee has held in its report that both these charges have been made out; and that the respondent is, therefore, not a person fit to continue to be a member of the Institute. The matter comes before us on reference on this report under S. 21, Chartered Accountants Act, 1949.

(3) We have carefully considered the matter and we have come to the conclusion that neither of the two charges is established. On the first charge the Disciplinary Committee holds that on the facts which are not in dispute the action of the respondent falls within cl. (c) of the schedule to the Act which runs as follows:

"A chartered accountant shall be deemed to be guilty of conduct rendering him unfit to be a member of the Institute if he—

(c) accepts or agrees to accept any part of the profits of the professional work of a lawyer, auctioneer, broker or other agent who is not a member of the Institute."

Mr. R. Ramamurthi Aiyar the learned advocate who appeared for the Council referred us to cls. (b) and (c) in the schedule and argued that they embody the principle that a Chartered Accountant should not in any manner share the income with one who is not a Chartered Accountant and that the arrangement between the respondent and Raghavachariar was a violation of this principle. But the true purpose of those provisions is to prohibit the practice of Chartered Accountants paying commission in any form for work which they get from others and receiving commission for work which they send on to other persons such as lawyers, auctioneers and brokers. It is difficult to see how on the facts of this case it can be said that the respondent has acted in contravention of cl. (c). Before that clause can be applied it should be established that Raghavachariar earned fees as a lawyer and the respondent accepted or agreed to accept a portion thereof. Now the facts are that the assessees are the clients of the respondent & not of Raghavachariar. It is the respondent that deals with the assessees, settles the fees with them, receives the same from them & brings them into account & treats them as his own. He, no doubt, entrusts the conduct of the cases generally to his brother but he continues to be answerable to the clients. In fact and in law Raghavachariar did not earn any fees from the assessees and the respondent entered into no arrangement with him for payment by him of any portion of those fees.

(4) It is said that the authorisations to appear for the assessees before the Income-tax Tribunals were signed by Raghavachariar and not by the respondent. But that was for the purpose of conforming to the requirements of S. 61, Income-tax Act and is a matter of form. It may be added that even on these authorisations Raghavachariar described himself as "Income-tax Practitioner and Assistant of Sri K. V. Narasimham, M. A., G. D. A. F. C. A, Chartered Accountant." The real question is whether the assessees are the clients of the respondent of Raghavachariar. It is impossible on the facts stated above to come to any other conclusion than that they were the clients of the respondent; and that Raghavachariar was only an employee looking to the respondent for the payment of his salary and not a lawyer looking to the assessees for the payment of his fees.

(5) Mr. Ramamurthi Iyer argued that the financial statements before the Tribunals are filed by Raghavachariar as income-tax practitioner, that if they are found to violate the principles laid down in the schedule the Council would have no direct control over him and that if Chartered accountants are allowed to carry on business before the Income-tax Tribunals through practitioners over whom the Council has no control they would be in a position to evade the wholesome restrictions imposed upon them by the Statute but this fear appears to us to be unfounded. The respondent admits that the assessees are his clients and that Raghavachariar acts and appears only for him in the proceedings before the Income-tax Tribunals and he will, therefore be responsible in the same manner as a principal for the acts of his agent. We are, therefore, of opinion, that this charge cannot be sustained.

(6) The second charge against the respondent is that after taking Raghavachariar as an articled clerk on 9-9-1948 he allowed him to appear before the Income-tax Tribunals, file authorisations and financial statements and conduct cases as before, that he thus allowed the articled clerk to carry on business and as no permission had been obtained therefor it was a violation of R. 44, Auditor's Certificate Rules, 1932 and Regn. 38 under Act 38 of 1949. Rule 44 is as follows:

"No articled clerk shall, during the time of his service as articled clerk except with the permission of the Central Government, engage in any other business or occupation."

Regulation 38 is in these terms:

"No articled clerk shall, during the period of his service as articled clerk, except with the permission of the Council engage in any other business or occupation."

We think that neither the rule nor the regulation aforesaid has any application to the present case because the business in which Raghavachariar was engaged was part of the business of the respondent and falls within the region of his duties as an articled clerk. The rules only prohibit engaging in "any other business or occupation." that is a business other than that in respect of which he is an articled clerk. The work of the respondent as an auditor includes the work before the Income-tax Tribunals and it was, therefore, business which was within the scope of the duties of Raghavachariar as an articled clerk. The fact that Raghavachariar received remuneration for it in the form of monthly salary does not affect the question.

(7) We accordingly hold that this charge also is not made out. The order on this reference will, therefore, be that the respondent is not guilty of any act which renders him unfit to be a member of the institute. There will be no order as to costs.

B/D.H. Order accordingly.

A.I.R. 1953 MADRAS 348 (Vol. 40, C. N. 119)

SUBBA RAO J.

M. K. Chengalroya Chetti, Petitioner v. The Special Deputy Collector for Land Acquisition, Town Planning, Collector's Office, First Line Beach, Madras and another, Respondents.

Writ Petn. No. 517 of 1952, D/- 24-7-1952.

Madras Town Planning Act (VII of 1921), S. 14 — Notification under S. 14 (5) is conclusive of fact that proper notices were given and published.

Under S. 14(6) a notification published under sub-sec. (5) is conclusive evidence that the scheme has been duly made and sanctioned. Personal service and giving the prescribed time are steps in the framing of the scheme. The words of the section are clear and unambiguous and when a question arises whether proper notices were given or not, the notification published under S. 14(5) will be conclusive evidence of that fact: Case law Ref. (Para 5)

M. Natesan, for Petitioner; V. P. Sarathy, for Govt. Pleader and John and Row, for Respondents.

REFERENCES: Courtwise/Chronological/ Paras
('20) 47 Cal 500: (AIR 1920 PC 51) 4
('39) AIR 1939 All 557: (184 Ind Cas 293) 4
('25) AIR 1925 Bom 538: (90 Ind Cas 695) 4
('21) 48 Cal 916: (AIR 1921 Cal 159) 4
('32) 63 Mad LJ 962: (AIR 1932 Mad 55) 7

ORDER: This is an application under Art. 226 of the Constitution of India, for issuing a writ of prohibition restraining the 1st respondent from proceeding with the enquiry under the Land Acquisition Act in respect of R. S. No. 3762/7 in Mylapore Western section area Town Planning scheme. The petitioner is the owner of a bungalow bearing D. No. 79 Mowbray's Road, Alwarpet, Madras. He purchased the site on 4-11-1936 from one C. V. Rajagopalachariar. After having obtained the sanction of the Corporation, he put up the bungalow in accordance with the plan sanctioned by the Corporation. On 14-8-1934, the Provincial Government required the Council of the Corporation, Madras, to prepare, publish and submit for their sanction a draft scheme in respect of Mylapore Western section area Town Planning scheme on or before 1st July 1935. From time to time, the time was extended and finally on 14-10-1946 it was extended to 30-11-1946. Pursuant to the directions given by the Government, the Corporation issued notices to the owners of lands asking them to attend a meeting of the owners of lands and buildings in the area affected by the proposed scheme. On 18-3-1942 a notice was served on one T. Ekambaram for the petitioner. The survey number in respect of which the said notice was given was stated to be 3762/3. The meeting so convened was held on 23-3-1942. A draft scheme formulated at that meeting was published under rule 41 of the Town Planning Rules in the Gazette dated 10-11-1942 and it was also published in the Hindu and Swadesamitram dated 4-11-1942. After the time prescribed for objections expired, the draft scheme was submitted to Government on 19-8-1946. The Government sanctioned the scheme. The notification regarding the acquisition of the lands reserved for acquisition was published in the Fort St. George Gazette dated 26-7-1949 under S. 14(5) of the Town Planning Act. Under the notification, the Corporation proposed to acquire an extent of 4 grounds 1787 sq. ft. belonging to the petitioner, more particularly described in the plan filed in this case. The Land Acquisition Officer was proceeding with the acquisition proceedings. At this stage this application was filed for the aforesaid reliefs.

(2) Learned counsel for the petitioner raised before me the following points:

1. The Corporation did not give him personal notice under Rule 36 of the rules made under the Town Planning Act.

2. The statements prepared and annexed to the notification under Ss. 13 and 14 are inaccurate in material particulars.

3. The defects in the statements indicate that the Corporation acted arbitrarily and did not apply its mind in respect of the property sought to be acquired.

(3) It will be convenient at this stage to read the relevant provisions of the Madras Town Planning Act (Madras Act VII of 1921).

S. 12: Notwithstanding anything contained in Ss. 9 to 11, the Provincial Government may, in respect of any municipality, after making such inquiry as they may deem necessary, by notification in the official gazette, require the council, before a fixed date, to prepare, publish and submit for their sanction a draft scheme as respects any land in regard to which a town planning scheme may be made.

Rule 36: (1) The Municipal Council shall convene meetings of owners of lands and buildings in the area affected by the proposed scheme;

(2) Notice of every such meeting shall, not less than ten days before the date of meeting (a) be published on the notice board of the Municipal Office, and (b) subject to the provisions of sub-rule (3) be sent in the manner prescribed therein to all persons known or believed to have rights in any land or building in the area included in the proposed scheme and to other persons

known or believed to be affected by the scheme.

Rule 50 : The rules contained in Part B, except rules 32 to 34, shall, as far as may be, apply to schemes required to be prepared under S. 12.

S. 13 : Every draft scheme shall contain the following particulars— (a) a plan showing the lines of existing and proposed streets; (b) the ownership of all lands and buildings in the area to which the scheme relates .....

S. 14(1) : If within sixty days from the date of the publication of a draft scheme any person affected by such scheme communicates in writing any objection or suggestion relating thereto, the Council shall consider such objection or suggestion and may modify the scheme as it thinks fit.

(2) The scheme as passed or adopted by the Council together with all written objections and suggestions shall thereupon be submitted to the Provincial Government for sanction and the fact of such submission shall be published in the prescribed manner.

(3) The Provincial Government, may, after considering the objections and suggestions, if any; and making such enquiry as they think fit, sanction the scheme with or without modifications, or may refuse to sanction the scheme or may return the scheme to the Council for reconsideration.

(5) The sanction of the Provincial Government to a scheme under sub-s. (3) shall be published by the notification in the official gazette and such notification shall state at what place and time the scheme will be open to the inspection of the public.

(6) A notification published under sub-s. (5) shall be conclusive evidence that the scheme has been duly made and sanctioned. The scheme shall have effect from the date of publication of such notification, and the execution of the scheme shall be commenced forthwith.

S. 33: Immoveable property required for the purposes of a town-planning scheme shall be deemed to be land needed for a public purpose, within the meaning of the Land Acquisition Act, 1894, and may be acquired:

(a) under the said Act, or

(b) under the said Act as modified in the manner hereinafter provided in this chapter.

S. 34: In cases falling under clause (b) of S. 33, a notification under S. 14 shall, notwithstanding anything contained in the Land Acquisition Act, 1894, operate in respect of any land for the purposes of the scheme as a declaration under S. 6 of the said Act, and no further declaration shall be necessary, but it shall not be incumbent on the Provincial Government, or officer authorised in that behalf, to take immediate steps for the acquisition of such land. Provided that if the land is not acquired within three years from the date of the notification, it shall cease to have effect as a declaration under S. 6 of the Land Acquisition Act, 1894.

S. 35 (2): In such cases, the Collector and the Court shall, in determining the amount of compensation to be awarded for the land acquired, take into consideration:

(a) the market value of the land at the date of publication of the notification under S. 10 or S. 12, as the case may be:

A gist of the aforesaid provisions may be stated thus: The Government asks the Council to prepare a scheme for a particular area. The Council convenes a meeting of all the landowners interested in the proposed scheme for the purpose of formulating one in consultation with the interests of parties. The notice of such a meeting shall be personally served on the owners of the property. The draft scheme and the final scheme will be published to enable the interested parties to raise objections. After all these formalities have been complied with and after every opportunity has been given to all the interested parties to put forward their objections or make their suggestions, the scheme finally evolved will be sent to the Government for sanction. After it is sanctioned by the Government it comes into force. If under the scheme any property will have to be acquired, the said property will be acquired through the machinery of the Land Acquisition Act but no further notice under S. 6 is necessary. A declaration made under S. 14 of the Town Planning Act shall be deemed to be a declaration made under S. 6 of the Land Acquisition Act. The Land Acquisition Officer will assess the market value of the property as on the date when the notification under S. 12 was made. It will therefore be seen that the Town Planning Act which was enacted for the improvement of town provides opportunity at every step for the interested parties to raise their objections and make their suggestions. But if the proceedings drag on for years, which the Act perhaps did not contemplate, the unfortunate result will flow as in this case, namely, that though the property was sought to be acquired recently, the market value of the land on the date of the publication under S. 12, which may have been made many years ago, will be given to the owner.

(4) Learned counsel for the petitioner argues that before the Corporation can acquire the property, they must establish that the various steps laid down for evolving the final scheme have been strictly and literally complied with. Learned counsel says that the provisions of Rule 36 have been flagrantly violated in two respects:

1. The notice alleged to have been given under that rule is less than ten days before the date of the meeting, and

2. No notice was given to his client.

It is true that only five days' notice was given for the meeting. In regard to the second question, the petitioner in his affidavit stated that no personal notice was given to him. The Corporation in its counter affidavit asserted that such a notice was given. For the first time in the reply affidavit the petitioner alleged that though a notice was served upon one Ekambaram who was his maternal uncle's son living in his house, he was only a minor and therefore the said service must be deemed to be not personal service. Learned counsel appearing for the Corporation rightly complained that these allegations should have been made in the affidavit itself to enable him to traverse them in his counter. But on the material placed before me, it is not possible to hold whether Ekambaram is the maternal uncle's son of the petitioner and he was a minor on the date when the notice was served on him. Learned counsel for the Corporation contended that the notification published under S. 14 (5) is conclusive evidence that the scheme

has been duly made and sanctioned and it is not open to the petitioner to allege and establish that it has not been duly made and sanctioned. He relies in support of his argument on S. 14 (6) of the Act which has already been extracted above. Learned counsel for the petitioner cited before me a long 'catena' of decisions in support of his contention that notwithstanding the express provisions of S. 14 (6) of the Act, he is not precluded from proving that the various steps provided for under the Act before the notification was published have not been strictly complied with.

'Trustees for the Improvement of Calcutta v. Chandra Kanta Ghosh', 47 Cal 500 (PC) strongly relied upon by the petitioner does not, in my view, really touch the question to be decided in this case. There the Judicial Committee held on the facts that the Board acted ultra vires. The section which their Lordships were construing stated that the publication of a notification is conclusive evidence that the scheme has been duly framed and sanctioned. At page 506 they observed,

"This provision does not affect the right of the respondent to institute a suit to have it declared that the Board in framing the scheme acted ultra vires, or that the scheme as sanctioned does not authorise the appellants to acquire by compulsion the land in question."

At page 508 they proceed to say:

"To have included land within the area of the scheme, not because it was wanted for purposes of the Act, but in order to exact an exemption fee from the owner, would, in the opinion of their Lordships, have been a misuse of the powers conferred upon the Board."

The only point therefore decided in that case was, when the Board acted ultra vires of their powers, it is open to the affected party to allege and establish that fact. It has no bearing on the question before me.

In — 'Radhaswami Satsang Sabha v. Tarachand', AIR 1939 All 557, the question was whether the declaration under S. 6(3) of the Act was conclusive of the fact that the land was needed for public purposes or for a company. The declaration was that it was required for a public purpose, whereas in fact it was admitted that it was required for a company. Therefore the learned Judges held that it was open to the aggrieved party to establish that fact as the declaration purported to be for one purpose was really intended to be for a different purpose. In — 'Municipal Corporation, Bombay v. Ranchoddas', AIR 1925 Bom 538, the local Government sanctioned an improvement scheme and under that Act a notification was conclusive evidence that the scheme had been duly framed and sanctioned. The learned Judges held that the fact that the said notification was conclusive evidence did not preclude the aggrieved party from filing a suit for a declaration that the Board in framing that scheme acted ultra vires. Learned counsel strongly relied upon — 'Manickchand Mahata v. Corporation of Calcutta', 48 Cal 916 at p. 924 in support of his contention that the principles laid down in the aforesaid decision will also apply to a case where there was only defect in the steps to be pursued before the notification was issued. There was a notification under S. 6, Land Acquisition Act, declaring that a particular property was required for the Corporation but in fact the Corporation was acquiring that land to the benefit of another body, the Calcutta Improvement Trust. Greaves J. said:

"But on broad grounds I do not think that it was ever the policy of the Calcutta Municipal Act that the special powers given to the Corporation for acquiring land for certain purposes named in the Act were to be used to enable another body to acquire land through the medium of the Corporation, however estimable the purpose."

Later on the learned Judge said:

"Again I do not think that the Legislature, when under the Calcutta Improvement Trust Act, it conferred powers of acquisition of land with certain well defined safeguards, ever intended that the Trust should abrogate those safeguards and acquire land in this manner through the medium of the Corporation for the purpose of street widening and street improvements."

It is therefore clear that the Corporation had no power to acquire land for the Trust and therefore it was acting ultra vires its powers. In those circumstances it is obvious that the notification could not preclude the plaintiff from questioning the validity of the acquisition. It is true in the course of the judgment there are some observations which appear to be rather wide, but having regard to the circumstances that decision must be confined only to the facts of that case.

(5) The aforesaid discussion of the case law does not really support the contention of the petitioner. In all the cases cited, the party was allowed to go behind the notification as the authority concerned acted beyond its powers. But in this case under S. 14(6) a notification published under sub-sec. (5) shall be conclusive evidence that the scheme has been duly made and sanctioned. Personal service and giving the prescribed time are steps in the framing of the scheme. The words of the section are clear and unambiguous and I must therefore hold that when a question arises whether proper notices were given or not, the notification published under S. 14(5) will be conclusive evidence of that fact. It is not necessary for me to give my final opinion on the question whether the said sub-section could preclude a party from questioning the validity of the acquisition in cases where the Corporation ignored the provisions of the Act altogether. But that cannot be said here as the Corporation purported to issue the notice, though the dispute is whether the time given is less than the prescribed time and whether the notice so given was, as a matter of fact, duly effected. These are certainly concluded by S. 14(6) of the Act.

(6) Mr. Natesan then relied upon rule 38 which reads as follows:

"The following statements shall also be prepared:

(i) a statement in form No. 7 showing the ownership and extent of lands included in the scheme;

(ii) a statement in form No. 8 showing (a) the proposed new street; and (b) the proposed widenings of existing streets;

(iii) a statement in form No. 9 showing the lands proposed to be acquired; and

(iv) a statement in form No. 10 showing the lands proposed to be reserved under clause (k) of Sec. 4."

He contended that the statements prepared and annexed to the notification contained many defects in regard to the name and other

particulars. It is true that there are some mistakes but there cannot be any dispute about the identity of the land. The survey number was specifically given and the name of the previous owner was given. If really notice had been served on him and if the notification was duly published, it is very difficult to say that these small mistakes would affect the validity of the notification. From the fact that these mistakes were allowed to creep in, I cannot hold that the Corporation acted arbitrarily in issuing the notification.

(7) It was then contended that though the notification under S. 12 was issued in the year 1934, as a matter of fact it was finally extended in the year 1946 and therefore the notification under S. 12 must be deemed to have been published when the final extension was made, and in support of his argument he relied upon the observations of Ramesam J. in the — 'Secretary of State for India in Council v. Narayanaswami Chettiar', 63 Mad LJ 962 at p. 966. The learned Judge observed :

"As the sections are worded the Act contemplates that the Council has to take action within the time mentioned by the Government, but as I said an extension can always be granted by a further notification. If so, the date of the further notification will be the date to be adopted under S. 35(2)(a)."

(8) Cornish J. took a different view. This question really does not fall to be considered in this writ. It is for the Land Acquisition Officer to consider for the purpose of giving the compensation whether the original date of the notification under S. 12 or the date when the time was extended should be the crucial date for the quantum of compensation will depend upon this question. In the result the application fails and is dismissed with costs.

B/R.G.D. Application dismissed.

A.I.R. 1953 MADRAS 351 (Vol. 40, C. N. 120)

SUBBA RAO J.

Dr. K. C. Nambiar, Petitioner v. State of Madras by its Chief Secretary, and others, Respondents.

Civil Misc. Petns. Nos. 9491 of 1950 and 11818 of 1951, D/- 19-8-1952.

(a) Constitution of India, Art. 226 — Parties — Party affected by government order is entitled to be heard — High Court Rules (Madras), R. 3.

It is one thing to say that in a writ of certiorari, the tribunal whose order is sought to be quashed is a necessary party. But it is altogether a different thing to assert that the party affected should not be heard. If the tribunal is a necessary party, the party affected is proper party. Further to meet this situation, rule 6 of the rules to regulate proceedings under Art. 226 of the Constitution has been framed (by the Madras High Court) which enables the Court to give a hearing to the parties affected. Where a writ nisi was issued against government for an order passed by them under S. 13, Madras Buildings (Lease and Rent) Control Act 1949 but the Government did not want to support the order themselves but allow the landlord in whose favour the order was passed to support the order, the landlord is entitled to be made a party and to be heard. (Para 1)

(b) Houses and Rents — Madras Buildings (Lease and Rent) Control Act (25 of 1949), S. 13 — Order under is not a judicial act — (Constitution of India, Art. 226).

The act of the Government in exempting a building under S. 13 from the operation of the Act is not a judicial act. The power conferred on the Government under this section is very wide and does not depend upon any prescribed objective considerations. They are not bound to give reasons. Neither the section nor the rules framed under the Act prescribe a judicial procedure for exercising the power conferred on the Government under the section. It is in the discretion of the Government to exempt a building or not. (Paras 3-5)

Connotation of words "judicial act" indicated. (Paras 6, 7)

(c) Houses and Rents — Madras Building (Lease and Rent) Control Act (25 of 1949), S. 13 — House in occupation of tenant — Government exempting house from operation of Act under S. 13 — No fundamental right of lessee is violated — It cannot be said that S. 13 of the Act imposes unreasonable restrictions on the right of the lessee to use the premises as a lessee — (Constitution of India, Arts. 14 and 19) — W. P. No. 132 of 1951 (Mad), Foll. (Paras 9, 10, 13, 15)

(d) Precedents — Single Judge is bound to follow ruling of Division Bench.

A single Judge is bound by a decision of a Divisional Bench of the same High Court exercising appellate jurisdiction. If there is a conflict of Bench decisions, he should refer the case to a Bench of two Judges who may refer it to a Full Bench. A single Judge cannot differ from a Divisional Bench unless a Full Bench or the Supreme Court overruled that decision specifically or laid down a different law on the same point. But he cannot ignore a Divisional Bench decision, on the ground that some observations of Supreme Court made in a different context might indicate a different line of reasoning. A Divisional Bench must ordinarily respect another Divisional Bench of co-ordinate jurisdiction, but if it differs, the case should be referred to a Full Bench: Case law Ref. (Para 12)

M. K. Nambiar and C. F. Louis, for Petitioner; V. P. Sarathi, for Government Pleader, Subramaniam and Rajagopal, for Respondents.

REFERENCES: Courtwise/Chronological/ Paras

('50) AIR 1950 SC 211: (52 Cri LJ 550) 14
('50) AIR 1950 SC 222: (1950 SCR 621) 7
('52) 1952 SCJ 253: (AIR 1952 SC 196: 1952 Cri LJ 966) 14
('40) ILR (1940) Mad 454: (AIR 1940 Mad 356 FB) 13
('44) ILR (1944) Mad 95: (AIR 1943 Mad 471) 13
('51) W. P. No. 132 of 1951 (Mad) 9
(1944) 2 All ER 293: (113 LJKB 513) 12
(1924) 1 KB 171: (93 LJKB 390) 6
(1931) 2 KB 215: (100 LJKB 760) 7

ORDER: This is an application for issuing a writ of certiorari to call for the records and quash the order of the Government of Madras dated 9-9-1950. The petitioner is a doctor. Premises No. 2/157 Pursawalkam High Road is owned by three

brothers, P. Sourirajulu Naidu, Rangarajulu Naidu and Dhanarajulu Naidu. On 10-10-1938 the petitioner took the said house on lease for the purpose of running a nursing home. Since that time he has been running a nursing home under the name and style of "Nambiar's hospital". On 6-2-1945 Sourirajulu Naidu, since dead, filed an application before the Rent Controller, H. R. C. No. 3939 of 1945 for evicting the petitioner on the ground that he made a default in the payment of rent. But that was dismissed on 13-12-1945. In October 1946, he filed another application, H. R. C. No. 5244 of 1946, seeking to evict him on the ground that the petitioner was in arrears of rent and that he wanted the premises for his personal use. On 5-7-1947 the House Rent Controller dismissed the application. An appeal filed against that order to the Court of Small Causes, Madras, was dismissed. The landlords filed C. M. P. No. 4139 of 1948 for issuing a writ of certiorari to quash the order of the Small Cause Judge, but that was dismissed by a Divisional Bench of this court on 6-10-1948.

Rangarajulu Naidu filed another application, H. R. C. No. 4783 of 1949, for evicting the petitioner, alleging that he required the upstairs for his own occupation. The House Rent Controller ordered that application. The petitioner preferred an appeal against that order to the Court of Small Causes at Madras, which held that the building was a non-residential one and that a second petition on the same facts was barred under S. 10 of the Madras Buildings (Lease and Rent Control) Act, 1949 (hereafter called the Act). That order was made on 10-4-1950. Thereafter the landlords approached the Government with a request to exempt their building from the operation of the provisions of the Act. The Government by their order dated 9-9-1950 exempted the building under S. 13 of the Act. The aforesaid petition was filed for getting the said order quashed. The Government filed a counter affidavit supporting their order, but when the application came up for final disposal, the learned counsel appearing for the Government represented that the Government did not propose to support the order but leave it to the landlords to support the same if they thought fit to do so. The landlords filed an application, C. M. P. No. 11818 to add them as party-respondents.

This application was strongly opposed by the learned counsel for the petitioner. He contended that the writ nisi was issued against the Government and when they did not oppose it, the writ should be made absolute and the landlords had no locus s andi to intervene in the proceedings. He further argued that in a writ of certiorari the tribunal whose order is sought to be quashed is the only necessary party and therefore the landlords need not be made parties to the petition. I cannot agree. If this contention be accepted, the High Court would be issuing writs against the interests of parties without hearing them even though they are anxious to be represented in Court. That procedure would be against all principles of natural justice. No authority has been cited to me which compels me to hold that a party affected has no right to be heard in a writ of certiorari. It is one thing to say that in a writ of certiorari the tribunal whose order is sought to be quashed is a necessary party. But it is altogether a different thing to assert that the party affected should not be heard. If the tribunal is a necessary party, the party affected is proper party. Further to meet this situation, rule 6 of the rules to regulate proceedings under Art. 226 of the Constitution has been framed which enables the court to give a hearing to the parties affected. The said rule reads:

> "At the hearing of the petition, any person who desires to be heard in opposition to the petition and appears to the court to be a proper person to be heard shall be heard, notwithstanding that he has not been served with notice, and subject to such conditions as to costs as the court may deem fit to impose."

The landlords are certainly proper parties to be heard, the order of the Government is in their favour and they are interested to support it.

(2) Nor can the petitioner rely upon the alleged concession made by the Government Pleader. The learned Government Pleader did not concede that the order made by the Government was bad and was, therefore, liable to be quashed. But what he stated was that he was asked not to support the order but leave it to the landlords to do so. For the aforesaid reasons I hold that the landlords are entitled to be made parties. I allow C. M. No. 11818 of 1951 and make them party respondents.

(3-5) Learned Counsel for the landlords contended that the order of the Government in question was not a judicial act and therefore not liable to be quashed in a writ of certiorari. Arguments therefore were addressed on the question whether the order of the Government exempting the building under S. 13 of the Act is a judicial act or an administrative act. S. 13 says:

> "Notwithstanding anything contained in this Act, the provincial Government may, by notification in the Fort St. George Gazette, exempt any building or class of buildings from all or any of the provisions of this Act."

The power conferred on the Government under this section is very wide and does not depend upon any prescribed objective considerations. They are not bound to give reasons. Neither the section nor the rules framed under the Act prescribe a judicial procedure for exercising the power conferred on the Government under the section. It is in the discretion of the Government to exempt a building or not. A comparative study of the provisions of S. 13 with that of other sections of the Act indicates that the Government is not expected to follow a judicial procedure in exempting a building from the operation of the Act, for wherever the legislature intended that judicial procedure should be followed, they said so, either expressly or by necessary implication. Ss. 4, 5, 5-A and 6 relating to the fixing of fair rent and S. 7 for eviction of a tenant prescribe a judicial procedure for making the orders thereunder. I cannot therefore hold that the act of the Government in exempting the building from the operation of the Act is a judicial act.

(6) The connotation of the words "judicial act" has been well-settled. The leading case on the subject is —'Rex v. Electricity Commissioners', (1924) 1-K. B. 171. Atkin L. J. (as he then was) laid down the following test:

> "Wherever any body of persons having legal authority to determine questions affecting the rights of subjects and having the duty to act judicially, act in excess of their legal authority they are subject to the controlling jurisdiction of the King's Bench Division exercised in these writs."

(7) This passage was accepted as laying down the correct law on the subject and was followed in innumerable decisions. Slesser L. J. in — 'the King v. London County Council, (1931) 2 K. B. 215 separated the four conditions laid down by Atkin L. J. and expressed the view that the existence of each was necessary to determine the

nature of the act in question. The Supreme Court of India accepted the analysis of Slesser L. J. in —'the Province of Bombay v. Khushaldas S. Advani', AIR 1950 S. C. 222. Therefore, one of the necessary conditions, the existence whereof will clothe an act with a judicial character, is that the tribunal concerned shall have the duty to act judicially. Elaborating this aspect, Kania C. J. made the following observations at page 226:

"It seems to me that the true position is that when the law under which the authority is making a decision, itself requires a judicial approach, the decision will be quasi-judicial. Prescribed forms of procedure are not necessary to make an inquiry judicial, provided in coming to the decision the well-recognised principles of approach are required to be followed. In my opinion the conditions laid down by Slesser L. J. in his judgment correctly bring out the distinction between a judicial or quasi-judicial decision on the one hand and a ministerial decision on the other."

(8) Can it therefore be said that in the instant case the Act or the rules made thereunder indicate that the Government should follow the well-recognised principles of judicial approach in exercising the power under S. 13 of the Act? I do not find any indications to that effect. Indeed, as I have already stated, an unqualified power of exemption was conferred on the Government, to be exercised by them in their discretion. I therefore hold that the order of the Government exempting the house in question is not a judicial Act.

(9) Even so, it was argued that the order in question affected the fundamental right of the petitioner under Art. 14 of the Constitution of India. But this question was covered by authority of a Bench decision which is binding on me. Rajamannar C. J. and Venkatarama Aiyar J. held in 'W. P. No. 132 of 1951 (Mad)', that the Government in exempting a house have not violated any of the fundamental rights of the petitioner therein. The learned Judges said:

"We are unable to see what fundamental right of the petitioner has been violated. Admittedly, the petitioner has no fundamental right to remain in possession of the building for all time. Whatever rights he now urges in his support are rights conferred by the very Act, and the Government has purported to pass the order only under one of the sections of the same Act.

Art. 14 of the Constitution cannot be invoked in support of the petitioner. There is no violation of the principle of equality before the law. Logically the contention of the petitioner must lead to the position that either every building must be exempted, or no building should be exempted, — an absurd conclusion."

(10) The learned Judges therefore stated in clear and unambiguous terms that no fundamental rights of the petitioner in that case were violated by the order made under S. 13 of the Act. I should have thought that this judgment being that of a Bench was binding on me and no further arguments should be addressed. But elaborate arguments were advanced in support of the contention that in the circumstances of the case I am not bound by the Bench decision. More in respect to the arguments advanced than to clear any doubt that exists, I shall proceed to deal with the point raised.

(11) Salmond on Jurisprudence states that the following classes of decisions are recognised by English law as absolutely authoritative:

(i) Every court is absolutely bound by the decisions of all courts superior to itself. A court of first instance cannot question a decision of the court of appeal, nor can the court of appeal refuse to follow the judgments of the House of Lords.

(ii) The House of Lords is absolutely bound by its own decisions. A decision of this House once given upon a point of law is conclusive upon this House afterwards, and it is impossible to raise that question again as if it was res integra and could be reargued, and so the House to be asked to reverse its own decision.

(iii) The court of appeal is, it would seem, absolutely bound by its own decisions and by those of older courts of co-ordinate authority, for example, the court of Exchequer Chamber.

"In all other cases save these three, it would seem that the authority of precedents is merely conditional. It is to be noticed, however, that the force of a decision depends not merely on the court by which it is given but also on the court in which it is cited. Its authority may be absolute in one court, and merely conditional in another. A decision of the Court of appeal is absolutely binding on a court of first instance, but is only conditionally binding upon the House of Lords".

(12) This passage, if I may say so, accurately represents the procedure followed in British Courts. I do not see how the rules stated above help the petitioner's case. The first principle laid down directly applies to the present case. The Divisional Bench decided the case as an appellate tribunal. Sitting as a court of first instance I am bound by that judgment. Nor does the decision in — 'Young v. Bristol Aeroplane Co. Ltd', (1944) 2-All. E. R. 293 lays down any new principle. Lord Greene M. R. after considering the case law on the subject summarised the law as follows:

"On a careful examination of the whole matter we have come to the clear conclusion that this court is bound to follow previous decisions of its own as well as those of courts of co-ordinate jurisdiction. The only exceptions to this rule (two of them apparent only) are those already mentioned which for convenience we here summarise: (i) the court is entitled and bound to decide which of two conflicting decisions of its own it will follow. (ii) the court is bound to refuse to follow a decision of its own which, though not expressly overruled, cannot, in its opinion, stand with a decision of the House of Lords. (iii) The court is not bound to follow a decision of its own if it is satisfied that the decision was given per in curiam".

(13) Learned Counsel relying upon this passage argued that I should refuse to follow the Bench decision on the ground that the opinion expressed is inconsistent with the observations made by the Supreme Court in connection with a difficult matter. The passage cited applied only to courts of co-ordinate jurisdiction but not to a case of a decision of a Bench in exercise of appellate jurisdiction in its application to a case before a single Judge disposing of it as a court of first instance. These rules may be applied to decisions of two different Benches of this High Court made in exercise of their appellate jurisdiction. The practice obtaining in our court has been incorporated by Leach C. J. in — 'Seshamma v. Narasimharao', I. L. R. (1940) Mad. 454 (FB). At p. 474 the learned Chief Justice observed:

"While a Judge of the High Court sitting alone is not bound on a question of law by the decision of another Judge sitting alone, this principle goes no further. The Division Bench is the final court of appeal in an Indian High Court, unless the case is referred to a Full

Bench, and one Division Bench should regard itself bound by the decision of another Division Bench on a question of law. In England where there is the Court of appeal, Divisional Courts follow the decisions of other Divisional Courts on the grounds of judicial comity ..... if a Division Bench does not accept as correct the decision on a question of law of another Division Bench the only right and proper course to adopt is to refer the matter to a Full Bench, for which the rules of this court provide. If this course is not adopted, the courts subordinate to the High Court are left without guidance. Apart from the impropriety of an appellate Bench refusing to regard itself bound by a previous decision on a question of law of an appellate Bench of equal strength and the difficulty placed in the way of subordinate courts administering justice, there are the additional factors of the loss of money and the waste of judicial time".

This judgment, if I may say so with respect, lays down the salutary rules of practice to be followed. In — 'Manilal v. Venkatachalapathi', I. L. R. (1944) Mad. 95, Leach C. J. again made the following observations at page 97:

"A Judge has, of course, always the right of expressing his own opinion and indicating that he is not in agreement with an authority binding on him, but he is nevertheless in duty bound to follow it, as the Full Bench of this court which decided — 'Seshamma v. Narasimharao', I. L. R. (1940) Mad. 454 had occasion to point. The fact that a Judge thinks that some argument has been overlooked in a judgment binding on him is no reason for refusing to follow it".

I am not therefore prepared on the English authorities cited and on the arguments advanced, to depart from the well-recognised practice and the salutary conventions established in this court. If I did, I would be introducing only confusion and uncertainty and put the subordinate judiciary in a very unenviable position. I would therefore unreservedly follow the procedure obtaining in our court which is supported by principle and found satisfactory in practice. A single Judge is bound by a decision of a Divisional Bench exercising appellate jurisdiction. If there is a conflict of Bench decisions, he should refer the case to a Bench of two Judges who may refer it to a Full Bench. A single Judge cannot differ from a Divisional Bench unless a Full Bench or the Supreme Court overruled that decision specifically or laid down a different law on the same point. But he cannot ignore a Bench decision, as I am asked to do, on the ground that some observations of Supreme Court made in a different context might indicate a different line of reasoning. A Divisional Bench must ordinarily respect another Divisional Bench of co-ordinate jurisdiction; but if it differs, the case should be referred to a Full Bench. This procedure would avoid unnecessary conflict and confusion that otherwise would prevail. I therefore follow the Bench decision and hold that no fundamental rights of the petitioner were violated in this case.

(13a) But it was contended that the Bench decision should be confined only to the point decided and that the learned Judges did not purport to decide whether S. 13 or the order made thereunder affected the fundamental right of the petitioner under Art. 19 (1) (f) of the Constitution of India. But in my view this argument also is not open to the petitioner in view of the Bench decision. In the second paragraph of the judgment, the learned Judges dealt generally with the question whether any fundamental right of the petitioner has been violated & they held that the petitioner has no fundamental right to remain in possession for all time and the rights he claimed were only rights conferred under the Act. In the third paragraph they dealt specifically with the right claimed under Art. 14 of the Constitution. It is therefore not correct to state that the learned Judges did not deal with the petitioner's right under Art. 19 of the Constitution.

(14) As the arguments were advanced at some length, I shall also express my view on the subject. It was contended that under the Act the petitioner has acquired a right to hold the property till he is dispossessed in accordance with the provisions of the Act and that S. 13 conferring an arbitrary power on the Government is not a reasonable restriction on the exercise of his right in the interests of the general public. The relevant provisions of the Constitution read:

"Art. 19 (1): All citizens shall have the right-
(f) to acquire, hold and dispose of property;
(5) Nothing in sub-clauses (d), (e) and (f) of the said clause shall affect the operation of any existing law in so far as it imposes, or prevent the State from making any law imposing, reasonable restrictions on the exercise of any of the rights conferred by the said sub-clauses either in the interest of the general public or for the protection of the interests of any scheduled tribe".

In — 'Dr. N. B. Khare v. State of Delhi', A. I. R. 1950 S. C. 211, the provisions of cl. (5) have been construed by the Supreme Court. Kania C. J. observed at page 213 as follows:

"In my opinion, clause (5) must be given its full meaning. The question which the court has to consider is whether the restrictions put by the impugned legislation on the exercise of the right are reasonable or not. The question whether the provisions of the Act provide reasonable safeguards against the abuse of the power given to the executive authority to administer the law is not relevant for the true interpretation of the clause .... The law providing reasonable restrictions on the exercise of the right conferred by Art. 19 may contain substantive provisions as well as procedural provisions. While the reasonableness of the restrictions has to be considered with regard to the exercise of the right, it does not necessarily exclude from the consideration of the court the question of reasonableness of the procedural part of the law".

In — 'State of Madras v. V. G. Row', 1952 SCJ 253, Patanjali Sastri C. J. accepted the law laid down in Dr. Khare's case and elaborated the same in the following manner:

"This court has occasion in Dr. Khare's case to define the scope of the judicial review under clause (5) of Art. 19 where the phrase 'imposing reasonable restrictions on the exercise of the right' also occurs, and four out of the five Judges participating in the decision expressed the view (the other Judge leaving the question open) that both the substantive & the procedural aspects of the impugned restrictive law should be examined from the point of view of reasonableness; that is to say, the court should consider not only factors such as the duration and the extent of the restrictions, but also the circumstances under which and the manner in which their imposition has been authorised. It is important in this context to bear in mind that the test of reasonableness, wherever prescribed, should be applied to each individual statute impugned, and no abstract standard, or general pattern, of reasonableness can be laid down as applicable to all cases. The

nature of the right alleged to have been infringed, the underlying purpose of the restrictions imposed, the extent and urgency of the evil sought to be remedied thereby, the disproportion of the imposition, the prevailing conditions at the time, should all enter into the judicial verdict."

(15) Applying these principles, can it be said that S. 13 of the Act imposes unreasonable restrictions on the right of the petitioner to use the premises as a lessee. The contention was that S. 13 is an unreasonable restriction on the petitioner's right to hold a property. So stated, the argument appears plausible but ignores the nature of the right, the circumstances under which it was created and the underlying purpose of the restriction imposed. Before the Act became law, the landlords and tenants were governed by the contract and the provisions of the Transfer of Property Act. If it was a monthly tenancy, the tenant could be asked to quit after notice for the prescribed period was given. But the Act evolved a scheme imposing restrictions on the landlord. While the main object of the Act was to prevent the arbitrary eviction of the tenants, it took good care to see that interests of the landlords were protected within reasonable limits. A statutory tenant, the creation of the Act, with certain rights and restrictions cannot accept the rights and complain of the restrictions. No question of unreasonable restriction on his part would arise as the statute itself created that right subject to restrictions. He acquired the right not to be evicted except under certain circumstances and one of those circumstances is when the Government exempts a particular building from all or particular provisions of the Act. His right to the user of the properties therefore is not an absolute one, but is circumscribed by the provisions of the Act itself. In this view I cannot hold that S. 13 imposes any unreasonable restriction on the petitioner's right to use the property leased to him.

(16) It was then contended that the Government exercising their power under S. 13 of the Act acted with mala fides, namely, to circumvent the order of the Civil court dismissing the application of the landlords to evict the petitioner. There is an essential distinction between the scope of the enquiry before the Tribunals constituted by the Act and the ambit of the power of the Government under S. 13 of the Act. The Tribunals are concerned only with the question whether the landlord has made out his case for eviction under the provisions of the Act; but under S. 13 the Government may in their discretion exempt a particular building from the operation of the Act. In exempting the building, their power is not limited by the provisions of the Act. It is therefore incumbent upon the petitioner to establish that the Government have exempted the building with the sole object of circumventing the orders of court.

(17) From the aforesaid facts, it will be seen that the application for eviction of the petitioner was finally dismissed by the Small Cause Court on 10-4-1950. But it appears from the records placed before me that one D. Subramanian filed appln. No. 4455 of 1949 before the House Rent Controller for eviction of his tenant, the second respondent, on the ground that he wanted the premises for his own occupation. In that application there was an order of eviction. But presumably on an application made by the second respondent to the Government bringing to their notice that his petition for eviction of his tenant was dismissed, whereas the application filed by Subramaniam for evicting him was ordered, the Government issued a notification exempting the house of Subramanian from the operation of Ss. 7(3) and 9 of the Act. Subramanian in his turn filed an application to the Government bringing to their notice his difficulties. Respondent 2 approached Govt. for exempting his house from the operation of the Act. Having regard to the situation created, namely, that the two owners of the houses could not live in their own houses, the Government thought that a case had been made out for allowing the owners to have their houses in preference to the tenants. On 9-9-1950, by the same Notification, the G. O. exempting Subramanian's house from the operation of Ss. 7(3) and 9 was revoked and the 2nd respondent's house was exempted from the provisions of the Act. After going through the entire records, I am not satisfied that the petitioner has made out that the Government exempted the 2nd respondent's house to circumvent the orders of civil courts. It is more likely that they exercised their undoubted powers with the 'bona fide' intention of protecting the interests of the landlords who had no other houses to live in. I cannot therefore hold that the Government was actuated by 'mala fides' in issuing the order. In the result the application is dismissed with costs. Respondents 2 to 6. Advocate's fee Rs. 100.

A/R.G.D. Application dismissed.

A. I. R. 1953 MADRAS 355 (Vol. 40, C. N. 121)

RAMASWAMI J.

Public Prosecutor, Petitioner v. Kandaswami Mudali, Respondent.

Criminal Revn. Case No. 118 and Cri. Revn. Petn. No. 117 of 1951 D/- 17-1-1952.

Criminal P. C. (1898), S. 471 — Correct procedure to be followed.

The amended section requires only that the action taken by the Sessions Judge should be reported to the State Government. Secondly the words "detained in safe custody" in S. 471 have been judicially interpreted as not meaning "detained in the custody of friends and relatives." It is obligatory on the Court to order detention in a place and not with a person. The order of the Sessions Judge, Salem has got to be as follows, namely, that the accused having been found guilty but insane the Sessions Judge should direct the detention of the Criminal lunatic in the mental hospital, Madras, and in the meanwhile detain him in the Local Jail at Salem and address the executive District Magistrate for making arrangements for removal to the Mental Hospital, Madras, and finally report the action taken by him to the State Government in the Home Department. On the criminal lunatic being removed to the Mental Hospital it will be open to his relatives to apply to the State Government for the release of the criminal lunatic on conditions. The privilege of deciding whether the accused shall be released or not lies with the State Government and not with Court. AIR 1948 Mad 291 Rel. on. (Paras 3, 6, 7)

Anno. Cr. P. C., S. 471 N. 1, 2, 3.

Public Prosecutor; for the State; C. Deenadayalu, for. Respondent.

REFERENCE..... Para.

('48) 1948 1 Mad LJ 23: (AIR 1948 Mad 291: 49 Cri L J 313) 3

ORDER: This is an application by the learned Public Prosecutor for the correction of an incorrect procedure adopted by the learned Sessions Judge of Salem in S. C. No. 138 of 1950.

(2) The accused Kandaswami Mudali who was tried for an offence under S. 302, Penal Code was found guilty but insane at the time of the commission of the act.

(3) The learned Sessions Judge acquitted him under S. 84, Penal Code and made the following order:

"In order to meet the requirements of S. 471, Criminal P. C. the accused will continue on bail on the same sureties who will retain the accused in their safe custody, and produce him before Court as and when required pending final orders of the Government."

The learned Public Prosecutor rightly points out that the procedure followed by the learned Sessions Judge is incorrect. Before the amendment of S. 471, Criminal P. C., the Court acquitting a person on the ground of insanity had to report the case for the orders of the local Government. But cls. (2) and (3) of the section were repealed by Act 4 of 1912 mainly with the object of relieving the local Government from the necessity of dealing with the case of such persons. The amended section requires only that the action taken by the Sessions Judge should be reported to the State Government. Secondly the words "detained in safe custody" in S. 471, Criminal P. C. have been judicially interpreted as not meaning "detained in the custody of friends and relatives."

As S. 471, Criminal P. C. now stands it is essential that the accused should be detained in a place. The word "detained" denotes curtailment of liberty. It is obligatory on the Court to order detention in a place and not with a person. In a case where a Court in issuing an order under S. 471(1), Criminal P. C. ordered the accused to be detained in the custody of his father-in-law and brother it was held that the order could not be sustained and had to be set aside. See — 'Public Prosecutor v. Nellayappa Pillai', 1948-1 Mad LJ 23.

(4) The correct procedure to be followed is as follows and the operative portion of the order of the Sessions Judge should run thus:

"having found the accused guilty of murder under S. 302, Penal Code but insane at the time of the commission of the act I acquit him and direct him to be detained in the mental hospital and the action taken by me will be reported to the State Government. (The detention should be in the Mental Hospital, Madras, because the State Government has prescribed in G. O. No. 1096 (Public) dated 29-8-1913 the mental hospitals to which particular criminal lunatics of particular district should be sent namely the mental hospitals at Madras, Calicut and Vishakapatinam; and Salem criminal lunatics have to go to the Mental Hospital, Madras)."

(5) The learned Sessions Judge after having made this order should have detained the criminal lunatic in the jail at Salem and addressed the executive District Magistrate of Salem for making arrangements for the removal of the criminal lunatic to the Mental Hospital, Madras. The relevant rules are to be found in Chap. 19 portion B of the Criminal Rules of Practice. The subsequent responsibility for the removal of the criminal lunatic to the mental hospital, Madras, lies with the executive District Magistrate, the Medical Officer of the Jail and the police; and the rules regarding the escort etc., are set out in the standing orders of the Madras police so far as the police are concerned and the civil Medical Code so far as the Medical officers are concerned, and in the Madras Jail and Reformtory Manual, Volume I, so far as the Magistrates are concerned.

(6) Therefore the order of the Sessions Judge has got to be varied as follows, namely, that the accused having been found guilty but insane the Sessions Judge should direct the detention of the criminal lunatic in the mental hospital, Madras, and in the meanwhile detain him in the local jail at Salem and address the executive District Magistrate for making arrangements for removal to the mental hospital, Madras, and finally report the action taken by him to the State Government in the Home Department.

(7) On this criminal lunatic being removed to the Mental Hospital it will be open to his relatives to apply to the State Government for the release of the criminal lunatic on conditions. The privilege of deciding whether the accused shall be released or not lies with the State Government and not with Court. The State Government has prescribed elaborate rules in regard to the release of these criminal lunatics which are found set out in the Lunacy Manual published by Mr. Galletti, I.C.S. in 1906 and printed by the Superintendent, Government Press, Madras.

(8) This criminal revision case of the learned Public Prosecutor is disposed of accordingly.

B/D.H. Order accordingly.

A. I. R. 1953 MADRAS 356 (Vol. 40, C. N. 122)

GOVINDA MENON AND KRISHNASWAMI NAYUDU JJ.

Devaraja Bhatt, Appellant v. V. S. Raja and others, Respondents.

A. A. O. No. 689 of 1951, D/- 13-3-1952.

Houses and Rents — Madras Buildings (Lease and Rent Control) Act (15 of 1946), Ss. 2 (4) and 7 — Ejectment suit brought by Landlord against tenant decreed — Sub-tenant, party to suit, cannot plead protection of his status under Madras Buildings (Lease and Rent Control) Act — (T. P. Act (1882), Ss. 111 and 115).

Under the Madras Buildings (Lease and Rent Control) Act, a sub-tenant as such is not recognised and if a landlord brings a suit in ejectment against his tenant from the Land upon which a building is constructed by the tenant, a sub-tenant let into possession of the building cannot raise any question and submit that he has a status under the Act which should be safeguarded by its provisions. Whatever rights the sub-tenant may have against the tenant cannot affect the rights of the Landlord. So far as the Landlord is concerned, the sub-tenant does not exist at all & any proceedings by which the Landlord has got a decree against the tenant would be binding on the sub-tenant. (Para 5)

Anno: T. P. Act, S. 111 N 1 pt 7; N 23a; S. 115 N 1 pt 2.

P. S. Balakrishna Iyer and P. S. Rama Chandran, for Appellant; D. Ramaswami Iyengar and R. Krishnamurthy, for Respondents.

GOVINDA MENON J.: The proceedings out of which this appeal arises are absolutely devoid of merits and were rightly dismissed by the learned Subordinate Judge.

(2) The appellant who was defendant 3 in O. S. No. 78 of 1946 on the file of the Sub-Court, Coimbatore, and who was a party respondent in A. S. No. 129 of 1948 on appeal therefrom to this Court, now contests that the compromise decree passed by this Court by means of which he was directed to surrender possession of the suit premises is null and void and should be treated as if it did not exist.

(3) Defendant 1 was a lessee under the plaintiff and defendants 3 to 13 were sub-tenants under defendant 1. What was originally let to defendant 1 was a piece of vacant land on which defendant 1 erected buildings at considerable cost. A portion of those premises was let to the defendant 3. In and by virtue of the compromise it was directed that the plaintiffs do purchase the rights of defendant 1 in those buildings and get possession of the buildings. Defendant 3, though a party to the appeal, did not in fact take part in the compromise proceedings. But the learned Judge in the Court below on a construction of the decision of this Court in A. S. No. 129 of 1948 has now held that defendant 3 is bound by the compromise and when the plaintiffs seek to execute the decree he cannot be heard to say that he would not surrender possession of the property.

(4) Mr. P. S. Balakrishna Iyer for the appellant contends that the relationship between defendant 1 and defendant 3 is that of a lessor and lessee of a building which would attract the operation of the Madras Buildings (Lease and Rent Control) Act, under the provisions of which it was not open to defendant 1 to eject defendant 3 in pursuance of a decree of Court. When, therefore, defendant 1 agreed to surrender the building to the plaintiffs on receipt of a sum of money as compensation, it cannot be said that the plaintiffs have obtained any right to eject defendant 3 from these premises in pursuance to the decree of Court. What is further contended is that this Court went beyond its jurisdiction and acted in excess of its authority in holding that the compromise is binding on defendant 3. The reason alleged is that the subject-matter of the appeal could by no stretch of imagination be a dispute between defendant 3 and defendant 1 with the result that any claim which defendant 3 had against defendant 1 could not be adjudicated upon in this suit.

(5) We have carefully read the judgment of Panchapagesa Sastri J. and in our opinion the learned Judge took all the matters into consideration and found that the compromise was 'bona fide' valid and binding on defendant 3. Under the Madras Buildings (Lease and Rent Control) Act, a sub-tenant as such is not recognised and if a landlord brings a suit in ejectment a sub-tenant let into possession cannot raise any question and submit that he has a status under the Act which should be safeguarded by its provisions. But Mr. Balakrishna Aiyar contends that the relationship between defendant 1 and defendant 3 is that of lessor and lessee and if that is so that relationship could not have been the subject of adjudication in the appeal. It may be so if defendant 1 had filed a suit against defendant 3. But whatever rights defendant 3 may have against defendant 1, cannot affect the rights of the plaintiffs. So far as the plaintiffs are concerned, defendant 3 does not exist at all and any proceedings by which they have got a decree against defendant 1 would be binding on defendant 3. We are, therefore, of opinion that the lower Court has rightly held that the decree of the High Court is not a nullity. This appeal is dismissed with costs.

B/V.S.B. Appeal dismissed.

A. I. R. 1953 MADRAS 357 (Vol. 40, C. N. 123)

RAMASWAMI J.

The Corporation of Madras by its Commissioner, Appellant v. Mr. A. D. Charles, the present President and Member of the General Committee of the Madras Club, Respondent.

C. C. C. Appeal No. 56 of 1950, D/- 10-4-1952.

Municipalities — Madras City Municipal Act (4 of 1919), S. 279 — Club providing food to members and guests — No strangers allowed — Club held did not require license.

A club extensively patronised by Europeans, was governed by its own bye-laws and administered by a Committee. Among the amenities provided, there was a provision for food and lodging in the manner stated in the bye-laws and on payment of charges specified by the appropriate authorities of the club. Food was supplied only to members of the Club. They were free, however, to introduce guests, provided they were over 21 years of age and were of accepted social standing. The wife of a member might as his guest, stay or take food in the Club even when he was himself not present, but, otherwise, no guest was served with food except in the company of the member who introduced him. No payment was accepted from the guest. No stranger was served with food in the club. Food was prepared in the Club out of the materials purchased out of the general funds of the Club. The charges paid by member for the supply of food were in turn, credited to the general funds.

Held that the club did not fall under any of the three categories mentioned in S. 279 and that the Corporation could not direct it to take out a license. Moreover, S. 279 was not applicable to clubs. (Para 6)

John and Rao, for Appellant; King and Partridge, for Respondent.

REFERENCE..... Para.

('52) 1952-1 Mad LJ 401: (AIR 1952 Mad 814) 5

JUDGMENT: This is an appeal preferred against the decree and judgment of the learned City Civil Judge of Madras in O. S. 784 of 1949.

(2) The facts are: In the city of Madras there is a well known club known as the Madras club extensively patronised by Europeans, consisting of about 400 members. This club is governed by its own byelaws and administered by a Committee. Among the amenities provided by the club is provision for food and lodging in the manner stated in the bye-laws and on payment of charges specified by the appropriate authorities of the club. Food—breakfast, lunch and dinner — is supplied only to members of the Club. They are free, however, to introduce guests, provided they are

over 21 years of age and are of accepted social standing. The wife of a member may, as his guest, stay or take food in the Club even when he is himself not present, but, otherwise, no guest is served with food except in the company of the member who introduces him. No payment is accepted from the guest; he is merely entertained by the member who is charged for the food served to him and the guest. No stranger is served with food in the club. Food is prepared in the Club out of the materials purchased out of the general funds of the Club. The charges paid by members for the supply of food are, in turn, credited to the general funds.

(3) In these circumstances the Corporation of Madras directed this Club to take out a licence under S. 279, Madras City Municipal Act on the foot that it comes within one of the three categories of institutions contemplated by S. 279.

(4) The learned City Civil Judge came to the conclusion that this Madras Club did not fall within the ambit of S. 279 and therefore need not take out licence and decreed the suit of the club. Hence this appeal by the defeated Madras Corporation.

(5) In appeal I am of the opinion that this Madras club does not fall within the ambit of S. 279, Madras City Municipal Act for the following three good reasons. First of all, the section meticulously describes the types of places which are hit at by the section. Though Clubs constitute a well known and distinct category of institutions, they are not mentioned as one of these types governed by this S. 279. The Legislature cannot be credited with such a blissful ignorance as to ignore these Clubs if it had really intended to make them come within the meaning of S. 279. On the other hand it seems plain as pointed out by the learned City Civil Judge that had the Legislature intended so, it would have added "clubs" to many other names of places found in S. 279(1) and that it seemed plain that the legislature did not consider that clubs stood in need of the inspection, supervision and services, on the part of the Corporation, which the issue of a licence under S. 279 involves and entails.

Secondly, this Madras Club cannot be brought within the meaning of the first type of institutions viz, lodging house or eating house. The terms "lodging house" and "eating house" normally connote places to which the members of the public have a right of admission and in which they have no interest otherwise than as mere lodgers or boarders. I have already described the bye-laws and amenities provided by this Club and it would be outrageous to describe this Madras club as only a variety of lodging house or eating house. Therefore, the learned City Civil Judge has pointed out that the matter did not require an elaborate discussion though in fact he has discussed the English cases on this subject which support his conclusion. But really speaking the discussion of these English cases is not very relevant except to throw additional light on this matter because we are guided by the language of S. 279 and as I have just now mentioned by no stretch of imagination the Madras club can be described either as a lodging house or a eating house. Therefore, we have to find whether this club would come within the second category of institutions viz, any place where the public are admitted for repose.

The rules of the Madras club excluding all excepting the members of the Club would show that this Club could not be an institution where the public can go and have repose. The third category of institution mentioned in S. 279 is a place where food is sold or prepared for sale. No doubt if the expressions are construed by themselves, they can be stretched to fanciful lengths and will take in to mention one illustration even Vaishnavite temples. On the other hand we must remember that the constructions that should be placed on this third category must be 'ejusdem generis' to be of the same variety as the other two categories enumerated above. In order to support this conclusion that it was a place where food was sold or prepared for sale, the argument which was advanced in the lower court was that the tax officers are assessing the Madras Club to sales-tax. But this argument does not now support the position taken by the Corporation in view of the recent decision of Mack J. in — 'Cosmopolitan Club Madras v. Deputy Commercial Tax Officer', 1952-1-Mad LJ 401 wherein my learned brother held that the levy of sales tax has no scope.

(6) To sum up this discussion first of all whereas many types of institutions are enumerated as coming within S. 279, clubs are not mentioned at all & which cannot be due to any oversight whatsoever but due to a deliberate reason by the Legislature and secondly, the Madras club does not fall within any one of the three categories of institutions enumerated in S. 279.

(7) In the result, the learned City Civil Judge was justified in holding that the Corporation could not ask this Madras club to take out a licence and rightly decreed the suit for the plaintiff club.

(8) I affirm the findings of the learned City Civil Judge and confirming his decree and judgment dismiss this appeal with costs.

B/R.G.D. Appeal dismissed.

A. I. R. 1953 MADRAS 358 (Vol. 40, C. N. 124)

SATYANARAYANA RAO AND RAJAGOPALAN JJ.

Commissioner of Income-tax, Madras, Applicant v. Ratanshi Bhavanji, Adoni, Respondent.

Case Ref. No. 35 of 1950, D/- 19-3-1952.

Income-tax Act (1922), S. 24(1) and (2) — "Set off against his income, profits or gains" — Meaning of — Share income from unregistered firm cannot be set off against loss sustained in speculation business.

Section 24(1) speaks of "set off against his income, profits or gains." These words can only apply to income which has not already suffered tax but income in respect of which tax could be levied and collected. The word used is "income" and not "total income". It is against such an income, profits or gains that set-off is allowed. Hence, for the purpose of determining the loss to be carried forward under S. 24(2) the loss sustained by the assessee in a speculation business cannot be set off against the taxed share income received by the assessee as a partner of an unregistered firm. (Paras 4, 5)

Anno: I. T. Act, S. 24 N. 3.

C. S. Rama Rao Sahib, for Applicant; K. Srinivasan, for Respondent.

SATYANARAYANA RAO J.: An interesting question has been referred to us for decision under S. 66(1), Income-tax Act, by the Income-tax Appellate Tribunal. The question for decision is:

"Whether on the facts and in the circumstances of the case, the taxed share income of Rs. 22,440 from the unregistered firm of

Messrs. Dharmashi Bros., could be set off against the loss of Rs. 52,569 sustained by the respondent Hindu undivided family in speculation business for the purpose of determining the loss to be carried forward under S. 24(2)."

The assessee is the kartha of a Hindu undivided family. The kartha was also a partner in an unregistered firm known as Messrs. Dharmashi Brothers. During the assessment year, the assessee received as his share of the profit of the unregistered firm a sum of Rs. 22,440 on which tax was collected from the unregistered firm. His account of the total income of the loss as compiled by the Income-tax Officer is as follows:

	Amount Rs. as. p.	Amount Rs. as. p.
Business loss in speculation		52,569 0 0
Loss—		
1. Income from commission agency	538 0 0	
2. Income from money lending	2,570 0 0	
3. Taxed share income from Messers. Dharmashi Bros. ...	22,440 0 0	
	25,548 0 0	
Other sources	94 0 0	25,642 0 0
		26,927 0 0

(2) It would be seen from this statement that the family incurred a loss of Rs. 52569 in speculation. This loss was set off by the Income-tax Officer—which was affirmed by the Appellate Assistant Commissioner against the profits not only of the joint family but also against the taxed share income of the kartha from Messrs. Dharmashi Bros., which was a sum of Rs. 22,440. The balance of Rs. 26,927 was allowed to be carried forward under S. 24 (2) of the Act. The Appellate Tribunal reversed the decision of the revenue department and held that the loss could not be set off against the taxed share income from the unregistered firm received by the assessee during the year. At the instance of the Income-tax Commissioner this reference was made to this Court. The question is whether the view taken by the Appellate Tribunal was right or whether the view of the department should prevail.

(3) The set-off allowed under S. 24(1) of the Act is in respect of the loss sustained under one head against the profits or gains under one or more heads earned during the accounting year. In the case of unregistered firms, under S. 14, if tax has already been paid by a partner of such firm in respect of any portion of his share in the profits and gains computed in the manner laid down in cl. (b) of sub-s. (1) to Section 16, it shall not be liable to be assessed to tax again, the reason being, as the income had already suffered tax it could not be subjected to double taxation. But under S. 16 the amount so exempted from further taxation is not excluded in computing the total income of the assessee. The result is in fixing the tax payable by the assessee and in order to determine the rate, the income exempted from taxation under S. 14 should also be taken into computation. Under S. 17(2), after arriving at the total amount of the income-tax excluding the supertax which should have been payable on the total income, if no part of it is exempted from taxation, the department has to work out the proportion which the unexempted portion of the total income bears to the total income, and bearing that fraction, in mind arrive at the total amount of tax payable by the assessee. In other words, if the total income is Rs. 10,000 and the exempted portion of the income is Rs. 3000, in order to arrive at the tax payable the total amount of the income-tax should be 7/10ths. It is only for this purpose and for this purpose alone the exempted portion of the income of the assessee enters into consideration in the process of assessing the income of the assessee for the purpose of tax under the Act.

(4) The language of S. 24(1) when it speaks of "set off against his income, profits or gains" can only apply to income which has not already suffered tax but income in respect of which tax could be levied and collected. It is against such an income, profits or gains that set-off is allowed. The word used is not "total income" but only 'income" and that is important to bear in mind in order to find out against which income the set-off is allowed. It is not against the total income but only against the income and profits or gains under any other head in that year; that is, in respect of which tax could be collected. The object of the set-off is to reduce the liability of the assessee in respect of the amount of tax payable by him by taking into consideration not only the profits but also the losses; as otherwise it will be inequitable to call upon the assessee to pay the tax on profits earned by him under one head, leaving alone the losses sustained by him under the other heads, even though the losses might exceed the profits or may be equal to the profits or may be lower than the profits.

(5) There is the provision introduced in S. 24 by the Amending Act of 1939 permitting the assessee to carry forward the losses to the next year, if the losses could not be set off in the year completely; but subject to the condition that in the succeeding year the loss could be set off only against the profits and gains of the same business in respect of which loss had previously occurred. If the contention urged on behalf of the Commissioner of Income-tax by Mr. Rama Rao Sahib were to be accepted, the effect of carrying forward the loss after allowing the department to set off the sum of Rs. 22,440 would be to reduce the amount of loss that could be carried forward, and in the succeeding year if the assessee earned profits which exceeded the loss that is carried forward, the result would be in effect to subject the sum of Rs. 22,440 to double taxation for, by allowing a set-off in the accounting year, the loss was reduced, and the effect of reducing the loss was to increase the profits in the succeeding year which would be available for the purpose of tax after setting off the loss that was carried

forward. This in substance is really to subject the sum of Rs. 22,440 to a further tax though it is not actually levied and collected. We think, therefore, that the contention urged on behalf of the Income-tax Commissioner cannot be accepted and the question referred to us for decision must be answered in the negative and against the Commissioner of Income-tax. As the Commissioner has failed he must pay the costs of the assessee to be fixed at Rs. 250.

B/V.S.B. Answered in negative.

A. I. R. 1953 MADRAS 360 (Vol. 40, C. N. 125)

MACK J.

Balarama Reddi, Petitioner, v. Subbarama Reddi and another, Respondents.

Civil Revn. Petns. Nos. 2056 and 2057 of 1951, D/- 10-10-1952.

Limitation Act (1908), Art. 152 — Application to set aside ex parte decree — Conditional order made — Appeal from order — Limitation — (Civil P. C. (1908), O. 9 R. 13).

Where an application is made by the defendant to set aside an 'ex parte' decree passed against him and the Court makes a conditional order directing the decree to be set aside on certain conditions in default of which the application is to be dismissed, such an order is final for the purpose of an appeal allowed under O. 43 R. 1 (d). For an appeal from such an order time begins to run from the date the order is made and not from the date when the Court makes a further order dismissing the application on the failure to perform the condition. AIR 1944 Mad 383,Foll.; AIR 1927 Bom 1 (F.B.) and AIR 1914 All 55 Ref. (Para 6)

Anno. Lim. Act, Art. 152 N 6; C. P. C., O. 9 R. 13 N 29 Pt. 4.

D. Ramaswami Iyengar, P. R. Varadarajan, K. N. Srinivasan, and P. R. Pakir Sankar, for Petitioner; T. M. Krishnaswamy Iyer, for Respondents.

REFERENCES: Courtwise/Chronological/ Paras

('14) 36 All 77: (AIR 1914 All 55) 6
('27) 51 Bom 67: (AIR 1927 Bom 1 F.B.) 6
('17) 1917 Mad W. N. 815: (AIR 1918 Mad 257) 6
('25) AIR 1925 Mad 1182: (88 Ind Cas 196) 5
('45) ILR (1945) Mad 203: (AIR 1944 Mad 383) 5, 6

JUDGMENT: These two petitions raise an interesting point of limitation law for determination in connection with orders passed under O. 9, R. 13, Civil P. C.

(2) The petitioner was a defendant in two suits. The first was by his wife's brother O. S. No. 319 of 1947 for recovery of mesne profits. This was decreed 'ex parte' on 9-1-1948. He filed an application to set the decree aside on 23-1-1948. On this an order was passed on 19-1-1949 directing the decree to be set aside on certain conditions, that Rs. 25 was to be paid by 7-2-1949 and in default the application was to be dismissed. The petition was called on 8-2-1949 and the Court passed a further order "Costs not paid. Dismissed." The petitioner appealed against this order to the District Judge, who on payment of Rs. 41 by the petitioner to the respondent directed the 'ex parte' decree to be set aside. In C. R. P. No. 1843 of 1949 filed by the plaintiff in that suit against that order, Balakrishna Aiyar J. set aside the order of the District Judge observing that there was no finding that the appellant was prevented by sufficient cause from appearing in the trial Court on the relevant date, and inter alia directing a question of limitation, viz., that the appeal to the District Judge was time barred to be heard and disposed of. The learned District Judge dismissed the appeal with costs on the sole ground that the appeal was time barred as the order to be appealed against was the first order dated 19-1-1949 and not the formal order of dismissal on 8-2-1949. If the latter date is taken into consideration, the appeal would be in time.

(3) The same point has arisen in another suit, O. S. No. 139 of 1950 filed by the plaintiff's wife for maintenance in which she claimed Rs. 30 a month. This was decreed 'ex parte' on 26-7-1950. The application to set aside this decree was filed on 21-8-1950, and a conditional order passed on 25-10-1950 allowing it to be set aside on petitioner paying Rs. 35 costs and depositing Rs. 150 by 1-12-1950, with a direction that in default his application was to be dismissed. This application was called on 1-12-1950 when the Court passed the following order:

"Costs alone tendered, but refused. The petitioner wants time to pay Rs. 150. The order works itself out. The petition is therefore dismissed."

(4) Petitioner's appeal to the District Court, C. M. A. No. 4 of 1951 was heard on the same date as his previous appeal C. M. A. No. 20 of 1949 and similarly dismissed as being time barred in a separate judgment.

(5) The point for determination is what is the criterion date for limitation in a case of this kind for purposes of an appeal. Under O. 43 R. 1 (d), an appeal shall lie from an order under R. 13 of O. 9 rejecting an application (in a case open to appeal) for an order to set aside a decree passed 'ex parte'. This is the only provision in law under which these appeals lie. The conditional order passed in these two cases is of a very common type and frequently used on the admission side of this Court. It is regarded as a final order, one favourable to the petitioner, if he complies with the conditions by the appointed date, whereas if he fails to do so, the order works itself out automatically as one of dismissal adverse to the petitioner. In — 'Ramayya v. Lakshmayya', ILR (1945) Mad 203, Mockett and Bell JJ. considered a conditional order of dismissal of this kind and held that it was final and appealable, the further order of dismissal for default of compliance, with the creditors, merely recording the legal position which had arisen from non-fulfilment of the condition precedent. A different view was taken by Madhavan Nair J. sitting by himself in — 'Rajagopalachari v. Narasimha Thathachariar', AIR 1925 Mad 1182, that the first order of the trial Court was merely conditional and that it was only the final order dismissing the application to set aside the 'ex parte' decree, which was appealable under O. 43 R. 1(d). In that case too, the conditional order was to the effect that if the money was not paid by the appointed date,

the petition will stand dismissed with costs. That decision was considered by the learned Judges in — 'Ramayya v. Lakshmayya', ILR (1945) Mad 203 and differentiated on the ground that in that case the parties all treated the conditional order as open, and that on the date of subsequent posting, there was some discussion as to terms. The only fact from which this inference was drawn was the posting of the application to a following date as is apparent from the following observation by Madhavan Nair J. himself:

"In this case all the parties as well as the Court treated the prior order as a conditional order because it appears, as I have already pointed out, from the note on the order passed on the first occasion that the petition was to be posted for 13-9-1923 meaning thereby that no final order has been passed upon it and the learned District Munsif would pass final orders only on that day, and the subsequent history of the application also shows that it was never intended to treat the order as a final one."

I have found great difficulty in differentiating between cases in which conditional orders passed in precisely the same terms can be treated as final and those which cannot be so treated. In the circumstances I prefer, and I am also bound to follow the Bench decision in — 'Ramayya v. Lakshmayya', ILR (1945) Mad 203, which took the view that such a conditional order is final and appealable. It is true that such an order, as the petitioner's learned advocate contends, is in a sense favourable to him. He urges that his application has not been dismissed until he has failed to comply with the conditions, and that only after his application is finally rejected that his right of appeal arises under O. 43 R. 1(d).

(6) Mr. T. M. Krishnaswami Aiyar contends contra that the conditional order is one definitely & finally rejecting the application under O. 9, R. 13, unless a condition is fulfilled by a certain date, and that a petitioner cannot wait without either appealing against the conditional order or complying with the condition, and then reckon time from the date on which the order rejecting his application has worked itself out. A different view appears to have been taken more in harmony with the view of Madhavan Nair J. in — 'Rajagopalachariar v. Thathachariar', AIR 1925 Mad 1182, by Oldfield and Blakewell JJ. in — 'Venkataswami Naidu v. Shanmuga Pillai', 1917 Mad WN 815, a decision also considered in — 'Ramayya v. Lakshmayya', ILR (1945) Mad 203, and differentiated on the ground that the precise terms of the order passed by the lower Court were not set out there. A view in favour of the petitioner has been taken by the Allahabad and Bombay High Courts. A Full Bench of the Bombay High Court in — 'Narayan Putappa v. Vaikunt Subaya', 51 Bom 67 (FB), held that an appeal lay against the second order in such cases. Marten C. J. in his judgment made reference to two types of orders which were usual in the mofussil (a) a preliminary order and (b) a final order, whereas on the original side of the High Court there was only one order that if the applicant did not comply with the condition stated, his application was to be dismissed, and the original ex parte decree to stand. He then went on to make the following observations (at p. 75) with which I am with respect in complete agreement.

"Though pro forma an appeal may lie, still in the vast majority of cases, the appeal will be one of those known as 'hopeless', because the conditions imposed by the lower Court will be reasonable ones and accordingly if they are not fulfilled, the only result will be that the appeal will be dismissed with costs. It can only therefore be in exceptional cases such as those where the lower Court has not exercised its discretion judicially or where quite unreasonable conditions are imposed, that an appeal of this nature can have any chance of success."

In — 'Jagarnath Sahi v. Kamta Prasad', 36 All 77, a Bench of the Allahabad High Court, Ryves and Piggott JJ. also held that an appeal lay from the second order in such cases and, further more that the lower Court had jurisdiction to extend the time for payment of the damages or to pass a fresh conditional order setting aside the decree upon terms, the original order having become inoperative. That was a case in which a suit was ordered to be restored to file on 31-3-1913 subject to the payment of Rs. 15 as damages by the appellant within three days to the plaintiff. The Subordinate Judge, who passed his order, was transferred immediately afterwards and the matter came up before his successor on 4-4-1913, on which date the money was tendered in Court and refused by the plaintiff. The question arose whether the other Subordinate Judge had jurisdiction to extend the time. This is a type of case which is always cropping up. With great respect I am in agreement with the view taken by Mockett and Bell JJ. that the first order in such cases must be regarded as final and appealable. It is tantamount to a rejection of an appeal unless certain conditions are satisfied. It is open to a party affected by such an order to appeal on the ground that the conditions imposed are too onerous, that the ex parte decree should be set aside or the suit restored to file without any terms at all.

I am extremely reluctant to take this view to its logical conclusion pressed upon me by Mr. T. M. Krishnaswami Aiyar, that the Court after passing such an order is absolutely powerless, and hamstrings itself from passing any further order in the application, which may be necessitated by changed conditions or exigencies of various kinds. Under S. 148, Civil P. C. where any period is fixed or granted by the Court for the doing of any act prescribed or allowed by this Code, the Court may, in its discretion, from time to time, enlarge such period, even though the period originally fixed or granted may have expired. The point would arise whether such discretionary orders passed from time to time extending time for compliance with conditions fixed by the original order will be appealable. A solution of the dilemma is by no means easy, and the question has, in no decision, which has been placed before me, been considered from the standpoint of limitation. Order 43, R. 1 (d) contemplates one appeal against the rejection of an application under O. 9, R. 13. A single application cannot be rejected on two different dates to permit of two different criterion dates for limitation. The only practicable and possible view to take appears to be that the conditional order, which is the basis of the rejection of the application, is the only appealable order, if the petitioner is aggrieved by it in any way or finds it impossible to comply with

the conditions as inequitable or onerous, in which case he should appeal against it within the prescribed period from the date of such order. If the Court does pass a further discretionary order varying on his application the conditions of the original order or extending time for performance which will form a fresh basis for a rejection of the application, it would be open to an applicant to file an appeal against such an order. It is clearly not open to a petitioner after such a conditional order is passed against him to do nothing at all as in the present cases by way of compliance or even by moving the Court before the date fixed for compliance to extend the time, and then to claim a right of appeal from the date on which the dismissal of his application for the default is recorded. The observations of Marten C. J. in—'Narayana Putappa v. Vaikunt Subaya', 51 Bom 67 (FB), reproduced supra, are apposite to the present cases in which it cannot be said that the terms imposed for setting aside the ex parte decree were unreasonable or onerous. Bound as I am to follow, the view in — 'Ramayya v. Lakshmayya', ILR (1945) Mad 203 with which as I have indicated with respect, I also agree that such a conditional order is final and appealable, it must follow, although this limitation aspect was not considered in that judgment, that these appeals against the subsequent orders of formal dismissal have been rightly held by the District Judge to be time barred.

(7) The petitions are dismissed, but on them I make no order as to costs.

B/V.S.B. Petitions dismissed.

A. I. R. 1953 MADRAS 362 (Vol. 40, C. N. 126)

RAMASWAMI J.

In re Annamalai Mudaliar, Petitioner.

S. R. No. 3853 of 1952, D/- 3-9-1952.

(a) Madras Co-operative Societies Act (6 of 1932), S. 51(6) (a) — "Final" — Meaning of — High Court's power to interfere.

The clause "that the decision shall be final", in S. 51(6)(a) does not take away the right of the High Court to interfere but only indicates the finality so far as the right of appeal within the department is concerned. (Para 5)

(b) Constitution of India, Art. 227 — Scope.

Article 227 confers upon the High Court a power of supervision over all judicial matters decided by any Court or tribunal within the State. (Para 7)

(c) Constitution of India, Art. 227 — Administrative and judicial control over tribunal.

All agencies whether Courts or not, performing the duty of deciding disputed questions of right between parties on behalf of and under the sanction of the State and in accordance with State-made laws are placed under the administrative and judicial control of the High Court. Thus, the High Court has got revisional jurisdiction under Art. 227 by way of superintendence over the judicial work of a duly constituted tribunal, like the Deputy Registrar under the Co-operative Societies Act. (Paras 8, 9)

(d) Constitution of India, Art. 227 — Superintendence — Scope of.

Superintendence includes power to guide, and encourage Judges of the subordinate Courts, to direct subordinate Courts and tribunals to carry out orders of the High Court; and to direct enquiry with a view to take disciplinary action for flagrant maladministration of justice. Case law summarised. (Para 12)

(e) Constitution of India, Art. 227 — Enabling power of High Court.

The extraordinary powers conferred on the High Court under Art. 227 enable the High Court to ensure that the tribunals are kept within the bounds of their authority and that they do what their duty requires and that they do it in a legal manner. (Para 12)

N. R. Raghavachari, for Petitioner; Govt. Pleader, for the State.

REFERENCES: Courtwise/Chronological/ Paras

('32) AIR 1932 PC 69: (136 Ind Cas 102 PC) 10, 12
('43) 70 Ind App 129: (AIR 1943 PC 164) 6
('49) 62 Mad LW 374: (AIR 1949 PC 156) 7
('35) AIR 1935 All 519: (154 Ind Cas 310) 12
('50) AIR 1950 All 611: (1950 All LJ 519) 7
('50) AIR 1950 All 80: (1949 All LJ 471 FB) 8
('51) AIR 1951 All 667: (52 Cri LJ 982 (2)) 10
('52) AIR 1952 All 505: (1952 All LJ 108) 7
('52) 1952 All LJ 161: (AIR 1952 All 843: 1952 Cri LJ 1520) 10
('52) 1952 All LJ 283: (AIR 1952 All 750) 11
('51) AIR 1951 Assam 106: (52 CriLJ966) (5, 10, 11)
('51) AIR 1951 Assam 96: (ILR (1951) 3 Ass 147) (8, 11)
('31) AIR 1931 Bom 582: (55 Bom 544) 6
('33) 57 Bom 93: (AIR 1933 Bom 1: 34 Cri LJ 199 FB) 6
('37) AIR 1937 Bom 153: (38 Cri LJ 606) 6
('21) AIR 1921 Cal 30: (22 Cri LJ 213 SB) 10
('31) AIR 1931 Cal 553: (58 Cal 1013) 6
('33) 37 Cal WN 201: (AIR 1933 Cal 132: 34 Cri LJ 299) 6, 10
('34) AIR 1934 Cal 758: (61 Cal 1041) 6
('34) AIR 1934 Cal 102: (149 Ind Cas 923) 6
('35) AIR 1935 Cal 102: (155 Ind Cas 1109) 6
('38) ILR (1938) 1 Cal 256: (AIR 1938 Cal 23) 6
('38) ILR (1938) 2 Cal 69: (AIR 1938 Cal 768) 6
('41) ILR (1941) 2 Cal 366: (AIR 1942 Cal 230) 6
('50) 54 Cal WN 626: (AIR 1950 Cal 536) 6
('50) 54 Cal WN 445: (AIR 1950 Cal 379) 7, 11
('51) 55 Cal WN 87: AIR 1951 Cal 258 (SB) 7, 10
('51) 55 Cal WN 81: (AIR 1951 Cal 255 SB) 8
('51) 55 Cal WN 611: (AIR 1951 Cal 554) 8
('51) AIR 1951 Cal 574 10
('51) AIR 1951 Cal 193 (SB) 10, 11
('51) AIR 1951 Cal 100 11
('52) 56 Cal WN 124: (AIR 1952 Cal 526) 5, 8, 10
('52) AIR 1952 Cal 251 10
('52) AIR 1952 Cal 184: (56 Cal WN 325) 10
('52) AIR 1952 Cal 290: (55 Cal WN 287) 10
('52) AIR 1952 Him P & B 24 7, 10, 11

('52) AIR 1952 Him P & Bilaspur 18 10
('51) AIR 1951 Hyd 82: (52 Cri LJ 708) 5, 7, 10
('51) AIR 1951 Hyd 11: (52 Cri LJ 1333 FB) 7
('51) AIR 1951 Hyd 50: (52 Cri LJ 273 FB) 10
('30) AIR 1930 Lah 889: (32 Cri LJ 346) 10
('33) AIR 1933 Lah 327: (146 Ind Cas 258) 6
('33) AIR 1933 Lah 605: (141 Ind Cas 186) 6
('35) AIR 1935 Lah 956: (161 Ind Cas 246) 6
('33) AIR 1933 Lah 259: (144 Ind Cas 515) 6
('37) AIR 1937 Lah 28: (169 Ind Cas 687) 6
('52) AIR 1952 Madh-B 57: (ILR (1952) Madh-B 178 FB) 5
('52) AIR 1952 Madh-B 51 5, 7, 10, 11
('12) 23 Mad L J 531: (38 Mad 41) 5
('23) 44 Mad LJ 1: (AIR 1923 Mad 192) 5
('23) AIR 1923 Mad 500: (73 Ind Cas 131) 10
('25) AIR 1925 Mad 1144: (26 Cri LJ 1161) 10
('35) 68 Mad LJ 162: (AIR 1935 Mad 298 (2)) 5
('38) ILR (1938) Mad 988: (AIR 1938 Mad 634) 6
('50) 63 Mad LW 6: 1949-2 Mad LJ 6: (AIR 1949 PC 239) 7
('51) 1951-1 Mad LJ 709: (AIR 1951 Mad 882) 8
('52) AIR 1952 Orissa 98: (18 Cut LT 196) 10
('22) AIR 1922 Pat 435: (23 Cri LJ 549 FB) 10
('23) AIR 1923 Pat 518: (72 Ind Cas 148) 10
('24) AIR 1924 Pat 434: (74 Ind Cas 140) 10
('25) AIR 1925 Pat 674: (89 Ind Cas 814) 6, 10
('26) AIR 1926 Pat 37: (89 Ind Cas 863) 10
('28) AIR 1928 Pat 111: (105 Ind Cas 131) 10
('52) AIR 1952 Pepsu 82: (3 Pepsu LR 347) 8
('52) AIR 1952 Punj 67 10
('52) AIR 1952 Punj 122 10
('52) AIR 1952 Raj 3 10, 11
('25) 3 Rang 410: (AIR 1926 Rang 33 FB) 10
('51) AIR 1951 Sau 43 11
('40) AIR 1940 Sind 239: (42 Cri LJ 1 FB) 10, 12
('52) AIR 1952 Vindh P 10 7
('52) AIR 1952 Vindh P 4 11

ORDER:— This S. R. is sought to be filed as a Civil Revision Petition against the order dated 15-10-1951, in the nature of an award, passed by the Deputy Registrar of Co-operative Societies, Tiruvannamalai, in C. L. No. 920/50-51.

(2) The High Court Office thereupon took two objections viz., that this Civil Revision petiton has not been filed within 90 days of the date of the order and secondly, that it does not appear that a civil revision petition of this nature can be preferred on the foot of Article 227, Constitution of India.

(3) Taking the first point, there is a delay of 8 days and the learned advocate is directed to file a formal petition for excusing the delay and orders will be passed excusing the delay. This aspect of the case need not detain us further.

(4) The maintainability of this S. R. as a civil revision petition depends upon the decision whether it would be open to the High Court to revise the order. Under S. 51(6)(a) of Madras Act 6 of 1932 any decision passed by the Registrar under cl. (a) of sub-s. (2) or under sub-s. (5) shall be final and shall not be called in question in any civil or revenue Court. Section 57 prescribes a revision to the local Government or to the Registrar from such a decision. In this particular case the petitioner has not pursued the remedy under S. 57 of the Act. Secondly, it is contended by the Government Pleader that Art. 227, Constitution of India is not couched in such wide terms as Art. 226 which enables the High Court to issue to any person or authority, including in appropriate cases any Government, various writs for the enforcement of any of the rights conferred by Part III of the Constitution of India or for any other purpose and that Art. 227 has to be construed as one conferring on the High Court no special authority beyond general superintendence on subjects set out under the various sub-clauses therein. Thirdly, it was contended that the tribunals contemplated therein are those tribunals which though not described as courts strictly speaking, discharge the same or analogous functions as are being discharged by Courts and that the Registrar is not one such tribunal synonymous with court. I shall now deal with these points one by one.

(5) Point 1: The clause inserted "that the decision shall be final", in S. 51(6)(a) of Madras Act 6 of 1932 has been the subject of decisions of Madras High Court. This High Court has held repeatedly that this clause does not take away the right of a Court to interfere but only indicates the finality so far as the right of appeal within the department is concerned; see the Bench decision of the Madras High Court in —'Valli Ammal v. Corporation of Madras', 23 Mad LJ 531. Dealing with the word 'final' in S. 287(3) of the Old City Municipal Act, See —'Narasimha Rao v. The Chairman Municipal Council, Narasaraopet,' 68 Mad LJ 162, —'Ramasami v. Muthuvellappa', 44 Mad LJ 1. The exclusion of the High Court's jurisdiction is 'ultra vires' has been held in — 'Ram Dubey v. Government of Madhya Bharat', AIR 1952 Madh B 57; —'Jagannath v. Mt. Puniya', AIR 1952 Madh B 51; —'Israil Khan v. State', AIR 1951 Assam 106; —'Muhamad Baquar v. State of Hyderabad', AIR 1951 Hyd 82; and —'Haripada Dutta v. Ananta Mandal', 56 Cal WN 124. Point 1 therefore has to be decided in favour of the petitioner viz., that the decision passed by the Registrar shall be final will not in any way prevent the High Court from interfering in revision.

(6) Point 2: The restrictions sought to be imposed upon the scope of Art. 227, Constitution of India as well as confining the superintendence to administrative superintendence have been the subject-matter of a catena of decisions showing that the position taken by the Government Pleader is untenable. In regard to the scope of Art. 227 viz., whether it includes powers of judicial revision as contra-distinguished from administrative supervision alone, we must bear in mind the following facts. Under section 107, Government of India Act, 1915, 'Superintendence' was interpreted to include judicial as well as administrative superintendence, and the High Court was intervening by revision in proper cases, under S. 107, Government of India Act, 1919, in cases where S. 115, Civil P. C. or S. 439, Criminal P. C. did not apply; — 'Sholapur Municipality v. Tuljaram', AIR 1931 Bom 582 and — 'Emperor v. Jamnadas', AIR 1937 Bom. 153 and—'Balakrishna v. Emperor', 57 Bom. 93 (F. B.) — 'Manmatha Nath v. Emperor', 37 Cal. W. N. 201. But sub-s. (2) of S. 224, Government of India Act, 1935, expressly barred this power of judicial interference and Beaumont C. J. in — 'Balakrishna v. Emperor', observed that this taking away of the power of extraordinary revision from the High Court was an unfortunate thing. By reason of sub-s. (2) it was held under the Act of 1935 that S. 224 had no application to legal proceedings and did not confer any fresh revisional jurisdiction and that it only conferred powers of an administrative charac-

ter; — 'Sakkal Sardar v. Issurdas', I. L. R. (1941) 2 Cal. 366; — 'Jahnabi v. Basudeb', 54 Cal. W. N. 626. Therefore it was held in the following leading cases that the High Court could not interfere in revision exercising judicial functions such as the Madras Board of Revenue as in — 'Ryots of Garabandho v. Zemindar of Parlakimedi', 70 Ind. App. 129 (P. C.), or the Deputy Collector making an order under the Rent Act as in — 'Bhagwan Dayal v. Chandu Lal', ILR (1938) 1 Cal. 256 or the decision of the District Judge under S. 36, Legal Practitioners Act as in — 'Re Adiraju Semanna', ILR (1938) Mad 938 or the decision under the Bengal Municipal Act as in — 'Bonbehari v. Makhan Lal', ILR (1938) 2 Cal. 69. Other cases on which it was consistently held that the High Court could exercise its powers of revision only where no revision lay under S. 115, C. P. C. are: — 'Municipality of Sholapur v. Tulja Ram', AIR 1931 Bom. 582; — 'Lalta Devi v. Balkrishna', AIR 1933 Lah. 327 (382); — 'Gokool Chandra v. Motilal Ghose', AIR 1931 Cal. 553; — 'Jowahir Singh v. Fleming Shaw & Co', A. I. R. 1937 Lah. 28; — 'Indubala v. Lakshminarayan', A. I. R. 1935 Cal. 102 (107); — 'Beli Ram v. Lal Shah', A. I. R. 1935 Lah. 956 — 'Soloman v. S. C. Stork', A. I. R. 1934 Cal. 758; — 'Lokenath v. Abani Nath', A. I. R. 1934 Cal. 102; — 'Behari Lal v. Sardarilal', A. I. R. 1933 Lah. 605; — 'Ganesh v. Asanand', A. I R. 1933 Lah 259; — 'Bhimnath v. Jagannath', A. I. R. 1925 Pat 674.

(7) But under the Constitution of India, Art. 227 is a reproduction of S. 224, Government of India Act of 1935 with the following changes; (i) "and tribunals throughout the territories" have been added in cl. (1) after courts; (ii) Sub-s. (2) of S. 224, Government of India Act 1935 has been omitted; (iii) Cl. (4) of Art. 227 has been newly provided; I have already pointed out how sub-s. (2) of S. 224 barred judicial interference by the High Courts. This omission of sub-s. (2) of S. 224 in this Article shows that the Constitution of India has restored to the High Court the power it had under the Government of India Act of 1919: — 'Abdul Rahim v. Abdul Jabbar', 54 Cal. W. N. 445; — 'Mani Ram v. Jhamru', A. I. R. 1952 Him. P. & B. 24 (April); — 'Bimala Prosad v. State of West Bengal', 55 Cal. W. N. 87 (S. B.). Therefore, it is now possible to hold by reason of this omission that the various conditions imposed by S. 115, Civil P. C. for the exercise of revisional jurisdiction as construed by the Privy Council decision in — 'Vekatagiri Iyengar v. H. R. E. Board', Madras', 62 Mad L. W. 374 (P. C.) and — 'Joy Chand v. Kamalaksha', 63 Mad L. W. 6: 1949-2 Mad L. J. 6 (P. C.) have been removed. That this would be the proper construction of the Article receives strong support from the express exemption from the High Court's Superintendence of a Court or tribunal constituted by or under any law relating to Armed forces from which the inference is irresistible that all other tribunals and Courts, both civil and criminal are amenable to the supervisory jurisdiction of the High Court under Art. 227 Constitution of India; Vide — 'Abdul Rahim v. Abdul Jabbar', 54 Cal WN 445; — 'Abdur Rahim v. J. A. Pinto', AIR 1951 Hyd 11 (F B) and — 'Abdul Aziz v. State', AIR 1950 All 611. Thus we arrive at the position that Art. 227 confers upon the High Court a power of supervision over all judicial matters decided by any Court or tribunal within the State; — 'Bimala Prosad v. State of West Bengal', AIR 1951 Cal 258 (S B) —'Muhamad Baquar v. State of Hyderabad', AIR 1951 Hyd 82, — 'Hanuman Prasad v. Ram Autar', AIR 1952 Vindh P. 10; — 'Jagannath v. Mt. Puniya', AIR 1951 Madh B 51 (April); — Municipal Board Allahabad v. District Judge, Allahabad', AIR 1952 All 505.

(8) Point 3. The argument is that Art. 227 covers only cases of tribunals discharging the same or analogous functions as were being discharged by Courts. This argument was advanced in — 'Haripada Dutta v. Ananta Mandal', 56 Cal WN 124 and repelled by Chakravartti and Mookerjee JJ. It was pointed out therein that the word 'Tribunal' in Art. 227 means a person or a body other than a Court set up by the State for deciding rights between contending parties in accordance with the rules having the force of law and doing so not by way of taking executive action but of determining a question. The learned Judges have pointed out how in this view the Commissioner of a Division acting as the appellate authority under the Motor Vehicles Act was held to be a tribunal within Art. 227 in — 'Sabitri Motor Service Ltd. v. Asansol Bus Association', 55 Cal WN 81 and an appellate Court under the Rent Control Act of 1950 was held to be a tribunal in — 'P. C. Guha v. B. A. Basil', 55 Cal WN 611. The learned Judges concluded that the effect of the addition of the word 'Tribunal' to the word 'Court' in Art. 227 and the removal of the bar against revision of judgments in exercise of the power of superintendence, meant that all agencies whether Courts or not, performing the duty of deciding disputed questions of right between parties on behalf of and under the sanction of the State and in accordance with State-made laws are placed under the 'Administrative and judicial control of the High Court.' On this line of reasoning we have other decisions which may be usefully referred to. In — 'Kartar Singh v. Custodian M. E. P. Pepsu', AIR 1952 Pep 82, Teja Singh C. J. and Kesho Ram Passey J. held that the word 'Tribunal' is a general term and it includes a Court of justice or in other words every Court of justice or a Court can be described as a tribunal, but every tribunal is not necessarily a Court, that since the Legislature has used both the words together their intention appears to be that the word 'Tribunal' should have a wider meaning than Court or Court of justice and that probably it would be permissible to think that it is used in the popular sense meaning a person or body of persons having authority to hear and decide disputes so as to bind the disputants. In that case it was held that apart from the administrative and executive functions that the Custodian under the Evacuee Property Act, 1950, has to perform, it was also a part of his duty to work as a tribunal in the sense mentioned above and so in respect of what he did as a tribunal he was amenable to the jurisdiction of the High Court under Art. 227. In — 'Union of Workmen, R. S. N. and I. G. N. & Rly. Co. Ltd. v. River Steam Navigation Co. Ltd.', AIR 1951 Assam 96: Thadani C. J. and Ram Labhaya J. held that a duly constituted Industrial Tribunal is a judicial body and amenable to the jurisdiction of the High Court in revision under Art. 227 in regard to matters arising out of awards passed under the Industrial Disputes Act. It is on the same principle that my Lord the Chief Justice and Panchapakesa Ayyar J. have held in — 'Dr. M. Krishnamoorthi v. State of Madras', 1951-1 Mad LJ 709 that neither the Government nor the disciplinary proceedings Tribunal holding enquiry on charges against Government servants and recommending disciplinary action would fall under Art. 227, Constitution of India; and the Allahabad High Court has held in —'Mathur v. E. I. Ry. Co.', AIR 1950 All 80 (F B) that authority invested with jurisdiction

under the Payment of Wages Act 1936 is not a tribunal. The use of the unqualified word jurisdiction includes all different jurisdictions of the High Court — Civil, Criminal, Admiralty, Testamentary, Matrimonial, etc.

(9) Therefore the S. R. in this case can be preferred as a civil Revision Petition because this High Court has got revisional jurisdiction under Art. 227 by way of superintendence over the judicial work of a duly constituted tribunal, like the Deputy Registrar under the Co-operative Societies Act.

(10) The matter does not rest here because the superintendence conferred on the High Court does not mean any unlimited prerogative to correct all species of hardship; vide — 'Manmatha Nath v. Emperor', 39 Cal W.N. 201; — 'Dalmia Jain Airways Ltd. v. Sukumar Mukherjee', AIR 1951 Cal 193(S.B.). 'Superintendence has been defined and explained in — 'Emperor v. P. C. Tarapore', AIR 1940 Sind 239 (F.B.), — 'Rajkumar Sen v. Ram Sundar', AIR 1932 P. C. 69, — 'Muhamad Baquar v. State of Hyderabad', AIR 1951 Hyd 82 and — 'Israil Khan v. State', AIR 1951 Assam 106. The limits within which the prerogative can be exercised by the High Court have been the subject-matter of several recent decisions and the scope of such exercise has now become fairly delimited. I shall briefly summarise the recent well-known decisions indicating the power to correct and interfere. In construing the scope of the powers under this Art. 227 we can usefully bear in mind the cases under S. 107 because it is now settled opinion that Art. 227 has restored to the High Court the powers exercised under S. 107, Government of India Act, 1915. The following summarised statement will indicate the scope of interference under S. 107.

Denial of right of fair trial: — 'Jagdip v. Harku', AIR 1926 Pat 37; decision hopelessly inadequate —'Bishun Mohan v. Narayan Prasad', AIR 1924 Pat 434. Indefinite postponement of trial: — 'Bhimnath v. Jagannath', AIR 1925 Pat 674; power to be exercised in doing real and substantial justice even in criminal matters: — 'Pigot v. Ali Muhammad', AIR 1921 Cal 30 (S.B.). Misuse of power and non-exercise of judicial discretion: — 'Mohideen v. Bukshi Ram', 3 Rang 410 (F.B.); Order so bad on the face of it as to be in a sense denial of justice: — Mt. Maharup Kuer v. Mahabir Singh', AIR 1928 Pat 111; Gross error on the face of record: — 'Munigadu v. Emperor', AIR 1925 Mad 1144; Absence of reasonable opportunity of defence: — 'Chater Bhuj v. Emperor', AIR 1930 Lah 889; Proceedings so erroneous as to manifestly amount to injustice: — 'Venkata Ranga Bhusanam v. Karella Ramaswami', AIR 1923 Mad 500; No absolute bar to party coming to High Court before exhausting other remedies: — 'Shebalak v. Kamaruddin', AIR 1922 Pat 435 (F.B.); Refusal to frame triable issue: — 'Sheo Prasad v. Sukhu Mehto', AIR 1923 Pat 518.

Then coming to the High Court's powers under Art. 227 it has been laid down that the High Court's powers under Art. 227 are larger than under S. 115 Civil P. C. — 'Aswini Kumar v. Dominion of India', AIR 1952 Cal 251; — 'Mani Ram v. Jhamru', AIR 1952 Him P. & B. 24 and — 'Vurjee Vandass Moolji v. R. H. Singha & Co.', AIR 1952 Cal 290. The fact that other remedies are open will not prevent the High Court from interfering; vide — 'Mani Ram v. Jhamru'. The following precis shows the existence of the powers to correct and interfere in the following cases; Without jurisdiction: —'Dalmia Jain Airways Ltd. v. Sukumar Mukherjee', AIR 1952 Cal 193 (S.B.); Absence, excess or refusal of jurisdiction: — 'Sukhdeo v. Brij Bhushan', AIR 1951 All 667; Ignoring the provisions of law: — 'Madhusudhan v. Shyam Dass', AIR 1952 Raj 3; Acting outside the limits of the Statute: — 'Girish Chandra v. Girish Chandra', AIR 1951 Cal 574; Proceeding against natural justice: — 'Mt. Khela Wati v. Chet Ram', AIR 1952 Punj 67; Consideration unjustified by Act; — 'Ramhari v. Nilmoni', AIR 1952 Cal 184; Finding not supported by evidence: — 'Anand Kumar v. Fateh Singh', AIR 1952 Him P & Bilaspur 18; Injustice: — 'Aswini Kumar v. Dominion of India', Arbitrary dismissal of suit: — 'Mani Ram v. Jhamru', Miscarriage of justice by arbitrary or despotic approach: — 'Jagannath v. Mt. Puniya', AIR 1952 Madh B. 51; Illegal and improper order: — 'Gurdwara Anandpur v. Kartar Singh', AIR 1952 Punj 122; Opposed to law: — 'Samanta Radha Prasanna v. Province of Orissa', AIR 1952 Orissa 98; To secure fair and impartial trial transfer can be made: — 'Muhammad Abdul Raoof v. State of Hyderabad', AIR 1951 Hyd 50 (F.B.).

Article 227 although it does not in terms give a right to interfere with orders is an article which does give a right to High Court to interfere in proper cases and therefore does give rights to the parties to move the High Court to vary or reverse orders i.e. to exercise powers similar to those exercised in appeal and hence must be construed in the same manner as provisions in a statute would be construed which gave a right to parties to challenge a decision by appeal or revision: — 'Bimala Prosad v. State of West Bengal', AIR 1951 Cal 258(S.B.). Where a tribunal has been set up under a special Act, it is the duty of the High Court to see, in the exercise of its power of superintendence, that such tribunal acts within the limits of the Statute creating it, and applies correctly and properly the laws it is authorised to administer: —'Girish Chandra v. Girish Chandra', AIR 1951 Cal 574. If in an arbitration under the Co-operative Societies Act, the conduct of the case and the decision is against all canons of justice, the High Court will set aside the order of the tribunal under Art. 227: —'Mt. Khela Wati v. Chetram', AIR 1952 Punj 67. In the case of the Tribunals, the power of the High Court under Art. 227 at least includes power to require that the facts should be fully investigated and fairly found and when found fairly considered after giving the parties a proper opportunity to explain them: —'Haripada Dutta v. Ananta Mandal', 56 Cal WN 124. Power conferred by Art. 227 is not in any way controlled under Art. 226: —'Ramprasad v. State, 1952 All LJ 161.

(11) The substance of all these decisions can be summed up in three propositions viz. it does not involve a responsibility of the superintending tribunal for the correctness of the decisions of the inferior Courts, either in fact or law. If the inferior Court, after hearing the parties, comes to an erroneous decision on a matter within its jurisdiction, the Court having power of superintendence never interferes. The only mode of questioning the propriety of such a decision is by appeal. Nor can this power be invoked to get round any express provision of the Code of Criminal Procedure or any other law. Secondly, the general superintendence conferred by this constitutional provision over all jurisdictions subject to appeal involves a duty to keep them within the bounds of their authority, to see that they do what their duty requires and that they do it in a legal manner. Therefore, the interference under Art. 227 would naturally be in cases where there is a grave dereliction of duty: —'Shitab Singh v. Suraj Bali', 1952 All LJ 283, or there is a flagrant abuse of fundamental principles of law of natural justice or there is in existence

no other remedy for remedying the wrong: —'Madhusadhan v. Shyam Doss', AIR 1952 Raj 3; —'Basant Lal v. Anandas', AIR 1951 Vindh P. 4; or prevent miscarriage of justice: —'Jagannath v. Mt. Puniya', AIR 1952 Madh B 51; —'Mani Ram v. Jharma', AIR 1951 Him P & B 24; —'Mitra v. Datta Gopal'; —'Union of Workmen of R. S. N & I. G. N. & Rly Co Ltd v. R. S. N. Co Ltd', AIR 1951 Assam 93; —'Abdul Rahim v. Abdul Jabbar', 54 Cal WN 415; Nor is Art. 227 meant for correcting slight errors: —'Dalmia Jain Airways Ltd. v. Sukumar Mukherjee', AIR 1951 Cal 193 (S.B.); —'State of West Bengal v. Durga Devi', AIR 1951 Cal 109, or to interfere in cases of mere failure to appreciate evidence on the part of a final tribunal. —'Bavalal v. Jivanlal', AIR 1951 Sau 43; —'Israil Khan v. The State', AIR 1951 Assam 106.

(12) In short, superintendence includes power to guide, advice and encourage Judges of the subordinate Courts, to direct subordinate Courts and tribunals to carry out its orders; and to direct enquiry with a view to take disciplinary action for flagrant maladministration of justice; see —'Emperor v. P. C. Tarapore', AIR 1940 Sind 239 (F.B.); —'Sant Lal v. Kedar Nath', AIR 1935 All 519, and —'Rajkumar Sen v. Ramsundar', AIR 1932 PC 69. If we bear these propositions in mind and apply these well-established principles to the facts of the case on hand, the extraordinary powers conferred on the High Court under Art. 227 would enable the High Court to ensure that the tribunals are kept within the bounds of their authority and that they do what their duty requires and that they do it in a legal manner.

(13) So this S. R. can be filed as a civil revision petition but its admission depends on the facts of this case subject to the observations made above. The office note is answered accordingly and for consideration of admission post the matter.

A/V.S.B. Ordered accordingly

A. I. R. 1953 MADRAS 366 (Vol. 40, C. N. 127)

SUBBA RAO J.

Rahimansa Rowther and another, Appellants v. The Madras Islamia Educational Institution, Vallam, represented by its Secretary and representative, Mohideen Batcha Rowther, Respondent.

Second Appeal No. 1673 of 1948, D/- 29-1-1952.

(a) Registration Act (1908), Ss. 17(1)(b) and 49 — Instrument creating title — Non-registration — Effect of — Use for collateral purposes — (Evidence Act (1872), S. 91).

One N after retaining certain shops for his maintenance and funeral expenses partitioned the rest of his property amongst his sons. After his death disputes arose amongst his sons and grandsons regarding those shops. The disputes were settled by a panchayat. The disputants, in accordance with the decision of the panchayat, executed an agreement by which they agreed that according to the express wishes of N, K one of the sons himself, should pay the othi amount of Rs. 347 payable ..... in respect of the aforesaid shops and redeem them and take them absolutely":

Held (i) that the agreement purported to confer for the first time title on K and therefore was inadmissible to prove that title in the absence of registration. AIR 1932 PC 55, Disting; (Paras 4, 5)

(ii) that though unregistered it could, however, be relied upon to ascertain the character of the possession of K and his heirs. (Para 6)

Anno: Reg. Act, S. 17 N. 13; S. 49 N. 14; Evi. Act, S. 91 N. 13.

(b) Transfer of Property Act (1882), S. 60 — One co-mortgagor acquiring mortgagee right — Redemption by other — Suit for — Limitation — (Limitation Act (1908), Art. 148).

One of several mortgagors who redeems the mortgage is subrogated to the rights of the mortgagee and therefore the co-mortgagor can redeem the subrogee within the period prescribed under Art. 148, Limitation Act. Case law referred. (Para 7)

Usufructuary mortgages of certain properties were effected on 27th, 28th and 29th March 1867. On 16-11-1891 a partition was effected amongst the sons and grandsons of the mortgagee and in the deed of partition they admitted their possession of the mortgaged properties. In 1931 and 1933 one of the co-mortgagors redeemed the mortgages. On 3-6-1946 the representative of the other mortgagor filed a suit for redemption:

Held that the suit was governed by Art. 148 and that it having been filed well within 60 years from 16-11-1891, the date of acknowledgment, was not barred. (Paras 6, 7, 8)

Anno: T. P. Act, S. 60 N. 46; Lim. Act, Art. 148 N. 18.

K. Venkatarama, for Appellants; R. Gopalaswami Iyengar, for Respondent.

REFERENCES: Courtwise/Chronological/ Paras
('32) 62 Mad LJ 296: (AIR 1932 PC 55) 5
('43) AIR 1943 Bom 191: (208 Ind Cas 285) 7
('40) 19 Pat 938: (AIR 1941 Pat 147) 7

JUDGMENT: This is a second appeal against the decree and judgment of the Court of the Subordinate Judge of Tanjore confirming that of the District Munsif of Tanjore in O. S. No. 134 of 1946, a suit filed by the respondent for redemption of the usufructuary mortgages and for possession of properties pertaining to its 7/10th share. One Natharsa Rowther had four sons and two daughters. They were Kadir Hussain, Kadirasa, Mohideensa, Mohammad Kamil, Miran Bivi and Chinna Pillai Bivi. Natharsa Rowther mortgaged his three shops bearing Nos. 11, 12 and 13 situated in survey number 176/1-A at Vallamvadakku, Sethi village to one Nizam Rowther on 27th, 28th and 29th March 1867 for a sum of Rs. 297. Natharsa's son Mohideensa created a mortgage in regard to the same properties in favour of the said mortgagee for a sum of Rs. 50 on 5-12-1878. After the death of the original mortgagor his four sons became entitled to 2/10th share each and the two daughters 1/10th share each. Noor Bivi daughter of Coiman Pillai Bivi and also daughter-in-law of Kadirsa succeeded to her mother's 1/10th share and also to Kadirsa's 2/10th share and thus became entitled to 3/10th share in the mortgaged properties. Defendants 1 to 10 are her heirs. The other heirs of Natharsa conveyed their interest to the plaintiff and the plaintiff therefore became entitled to the 7/10th share in the said properties.

(2) On 16-11-1891 there was a partition in the mortgagee's family and his sons, Kamal, Mohideensa and Natharsa got one shop each. Mohideensa assigned his shop to Kamalsa. Kamalsa's heirs received their proportionate share of the mort-

gage amount from Noor Bivi and released shops, Nos. 11 and 12. Noor Bivi instituted O. S. No. 98 of 1932 on the file of the District Munsif's Court, Tanjore, for redemption of shop No. 13 and obtained a decree on 28-6-1933 and took delivery of the shop on 18-7-1934. The daughters of Noor Bivi conveyed these shops to defendant, under Ex. D. 9 dated 13-12-1938.

(3) The plaintiff who became the owner of 7/10th share in the mortgaged properties filed the aforesaid suit for redemption and possession of the properties pertaining to its share. Defendants 1 and 10 pleaded that in a partition between the heirs of Natharsa the equity of redemption in the suit properties was allotted to Kadirsa and that, therefore, the other heirs of Natharsa ceased to have any interest in the equity of redemption. They further contended that they acquired right by adverse possession to the suit items. Both the Courts found that defendants failed to establish the exclusive right of Kadirsa to the plaint schedule properties. They also agreed in holding that the defendants did not establish their plea of adverse possession. Defendants 1 and 2 have preferred the above second appeal.

(4) The first question is whether the equity of redemption was allotted to Kadirsa in the alleged partition. In support of such an allotment defendants relied upon Ex. D. 2 dated 16-12-1878. Learned counsel for the respondent contended that this document was not admissible in evidence as it required registration. Ex. D. 2 purports to be an agreement entered into between the surviving sons of Natharsa and his grandsons. As the arguments turned upon the recitals in the document the material portions may be extracted:

"Whereas Natharsa Rowther, our father and grandfather of Sheik Mohammad Rowther after partitioning and giving to us the other properties set apart for the maintenance of himself and his wife and also for funeral expenses the shops situated in the eastern row of the Jevuli shop street, Vallam ..... Whereas father and mother Ismail Bivi were under the protection of the aforesaid Kadirsa Rowther after the partition effected in our family; whereas the said Kadirsa Rowther met the funeral expenses of Ismail Bivi Ammal on her death, whereas in accordance with the wish expressed by Natharsa Rowther while he was alive that his funeral expenses should also be met by Kadirsa Rowther himself and that he should take the three shops absolutely the said Kadirsa Rowther himself met the funeral expenses of the said Natharsa Rowther, whereas disputes arose among us as Mohideensa Rowther effected a second usufructuary mortgage over the middle shop to Nadirsa Rowther, son of Nijam Rowther of Kolikkottai on the 5th of this month for a sum of Rs. 50 claiming the same as belonging to himself and took the amount himself, whereas we have agreed to the settlement made by the panchayatdars that in lieu of the sum of Rs. 50 got by Mohideensa Rowther through the Othi Sheik Muhammad Rowther should get the jewels worth Rs. 45 which belonged to Ismail Bivi and which were with Sheik Muhammad Rowther and about which there was a dispute, that Kadirsa Rowther should give a sum of Rs. 45 to Muhammad Gani Rowther, that Kadirsa Rowther himself should pay the Othi amount of Rs. 347 payable by Natharsa Rowther and Mohideensa Rowther in respect of the aforesaid shops and redeem them and take them absolutely.

Now, therefore, we consent and agree that Kadirsa Rowther should pay a sum of Rs. 297 being the amount due under the usufructuary mortgage executed by Natharsa Rowther in respect of the three shops and the sum of Rs. 50 being the amount due under the mortgage executed by Mohideen Rowther, in all a sum of Rs. 347, redeem the said shops and take them absolutely."

The document was signed by the sons and grandsons of Natharsa Rowther and was attested by several witnesses.

Under this document the heirs of Natharsa Rowther other than Kadirsa carried out the wish of Natharsa Rowther that the said shops should be given to Kadirsa Rowther. After the death of Natharsa Rowther there were disputes between the members of the family. Those disputes were settled through the intervention of Panchayatdars. As part of their decision Kadirsa had taken over the liability of Mohammad Gani and the other members gave the shops to Kadirsa. They fulfilled the wish of Natharsa Rowther by transferring the said items to Kadirsa. Under Ex. D. 2 they purported to confer for the first time title on Kadirsa in respect of the three shops. The document conferred title on Kadirsa and therefore it required registration and not having been registered it is inadmissible in evidence.

(5) But it is contended that Ex. D. 2 did not create interest in the immovable property but had recorded the pre-existing gift. As I have already pointed out, it is clear from the recitals that Ex. D. 2 itself purported to create title though disputes between the members of the family had their origin in a wish expressed by Natharsa Rowther. Learned counsel relied upon the judgment of the Judicial Committee in —'Bageshwari Charan Singh v. Jagarnath Kuari', 62 Mad LJ 296 (P C). There, the owner of an impartible estate made a gift in June 1909 of a portion of the estate in favour of his second wife who thereupon entered into possession. In 1916 the owner of the estate filed a petition with the commissioner in which he related the deed of gift to his wife, expressed a doubt as to whether the deed of gift was valid, and asked the commissioner either to declare that the deed was valid or to give sanction to the execution of a fresh deed of gift. The wife also filed a similar petition. One of the questions raised was whether the petition filed by the wife was admissible in evidence as it was not registered. Their Lordships in connection with that contention made the following observations at page 301:

"The distinction is between a mere recital of a fact and something which in itself creates a title ..... In the present case the statement in the petition of the respondent did not create any right in the Thakur. It merely acknowledged as a fact that such right was his. There was, therefore, no necessity for registration."

Their Lordships, therefore, held that the petition did not create any right in Thakore but only acknowledged his pre-existing right. This judgment, therefore, has no bearing on the admissibility of Ex. D. 2. Here the document itself creates a right in praesenti and, therefore, not having been registered is inadmissible in evidence.

(6) It is then contended that this document though not admissible to establish title of Kadirsa or his heirs could be relied upon for the collateral purpose of showing the nature of possession. It is undoubtedly true that a document inadmissible for want of registration can be relied upon for proving the character of possession. The appellants can, therefore, rely upon this document for

the purpose of showing that after Ismail Bivi redeemed the mortgages, that is from the years 1931 and 33 she claimed to be in possession in her own right. But this circumstance will not be of any practical value to the appellants if the suit for redemption be otherwise in time. A few relevant facts bearing on the question of limitation or adverse possession may now be stated. The usufructuary mortgages were dated 27, 28 and 29th of March 1867. Under Ex. P. 1 dated 16-11-1891, i.e., the partition that was effected between the sons of the mortgagee they admitted their possession of the three shops as usufructuary mortgagees. The Court below held that the said admission operated as acknowledgment within the meaning of S. 19, Limitation Act. That, that admission was an acknowledgment was not disputed before me. One of the co-mortgagors, that is Noor Bivi redeemed mortgages in 1931 and 1933. The representatives of the other mortgagors filed the suit for redemption on 3-6-1946. If they are entitled to redeem the mortgage their suit would be well within time under Art. 148, Limitation Act as that article prescribes the period of limitation as sixty years. As the acknowledgment was dated 16-11-1891 the suit would not be barred before 16-11-1951, and the suit having been filed on 3-6-1946 would, therefore, be within time.

(7) The question, therefore, is whether one of several co-mortgagors could file a suit for redemption against the other co-mortgagors who redeemed the mortgage. The relevant provisions of the Transfer of Property Act read as follows:

S. 91: "Besides the mortgagor any of the following persons may redeem or institute a suit for redemption of the mortgaged property namely, (a) any person (other than the mortgagee of the interest sought to be redeemed) who has any interest in, or charge upon the property mortgaged or in or upon the right to redeem the same;

S. 92: Any of the persons referred to in S. 91 (other than the mortgagor) and any co-mortgagor shall, on redeeming property subject to the mortgage, have, so far as regards redemption, foreclosure or sale of such property, the same rights as the mortgagee whose mortgage he redeems may have against the mortgagor or any other mortgagee."

S. 95: When one of several mortgagors redeems the mortgaged property, he shall, in enforcing his right of subrogation under S. 92 against his co-mortgagors, be entitled to add to the mortgage money recoverable from them such proportion of the expenses properly incurred in such redemption as is attributable to their share in the property."

Under the aforesaid sections it is obvious that the co-mortgagor will be subrogated to the rights of the mortgagee if he redeems the mortgage. To put it in other words he will be substituted for the mortgagee whom he has paid off.

The aforesaid sections have been amended by Act XX of 1929. Before the amendment there was a sharp conflict of judicial opinion in regard to the right of one of several mortgagors if he redeems the entire mortgage. But that conflict was set at rest by the amending Act. The effect of the amendment on the rights of a co-mortgagor has been succinctly and accurately stated by Sir D. F. Mulla in his Transfer of Property Act at page 598 (3rd Edn.)

"All these defects now disappear, and under the combined effect of Ss. 91 and 92 the case of one co-mortgagor redeeming is merely an instance of subrogation. The redeeming mortgagor has not merely a charge, but the mortgage, as to his share in extinguished, and as to the shares of the other mortgagors he stands in the shoes of the mortgagee ..... Where a co-mortgagor redeems the entire mortgage, his right as a mortgagee relates back to the date of the mortgage which he has redeemed for the benefit of priority over subsequent mortgages."

The question of limitation in regard to such a suit fell to be considered in — 'Mukha Narain Singh v. Ramlochan Tiwari', 19 Pat 938. The facts in that case were, defendant 4's predecessors-in-interest executed a usufructuary mortgage in 1866 in favour of the predecessor-in-interest of defendant 3. The due date for payment was May or June 1870. Defendant 1 who is a transferee of a share of the mortgage property redeemed the mortgage in 1905. The plaintiffs who became the owners of the entire equity of redemption filed the suit on 4th September 1933 for redeeming their share of mortgage by proportionate payment of the mortgage debt. It was not in dispute that Art. 148, Limitation Act applied. The question was whether the period of limitation started in 1870 from the due date of payment or in 1905 when defendant 1 redeemed the mortgage. The learned Judges after noticing the conflict of views that existed prior to the Amending Act of 1929 pointed out that by the Amending Act the co-mortgagor who redeemed the mortgage was clearly subrogated to the position of the mortgagee and they expressed their view on the question of limitation at page 944:

"Here also time had begun to run against all the mortgagors from the time when the right to redeem accrued, that is to say, from the due date of the mortgage, and did not cease to run against the plaintiffs merely because the other co-mortgagors redeemed the mortgage."

This judgment is, therefore, authority for the position that one of several mortgagors who redeems the mortgage is subrogated to the rights of the mortgagee and therefore the co-mortgagor can redeem the subrogee within the period prescribed under Art. 148 Limitation Act, that is sixty years from the due date of payment. Broomfield and Lokur JJ. expressed the same view in — 'Raghavendracharya v. Vaman Srinivas', AIR 1943 Bom 191. There also a co-mortgagor redeemed the entire mortgage and the other co-mortgagors filed a suit for redemption against the said co-mortgagor. The question for consideration was whether limitation would run under Art. 148, Limitation Act from the date of redemption or from the date when the debt becomes due under the original mortgage. The learned Judge observed at page 194:

"If the subrogee has the same rights as the mortgagee, the period of limitation for a suit against him must be the same and not different."

They pointed out "that by reason of the amendments to Ss. 92 and 95, T. P. Act, a co-mortgagor who had redeemed the mortgage had all the rights of the mortgagee including the right to interest on being redeemed. I respectfully agree with the view expressed by the Bombay and Patna High Courts as they are consistent with the provisions of Ss. 92 and 95, T. P. Act. Indeed S. 92, T. P. Act clearly states that the co-mortgagor redeeming the mortgage has the same rights as the mortgagee whose mortgage he redeems may have against the mortgagor or any other mortgagee.

(8) I, therefore, hold that the plaintiff's suit for redemption having been filed within the period of sixty years from the date of the

acknowledgment is clearly within time. In the result the judgment of the Court below is correct and this second appeal is dismissed with costs. (Leave refused).

B/M.K.S. Appeal dismissed.

A. I. R. 1953 MADRAS 369 (Vol. 40, C.N. 128)

RAJAMANNAR C. J.
AND VENKATARAMA AYYAR J.

Adusumilli Venkata Gopala Rao and others, Appellants v. Yerreni Kantamma and others, Respondents.

Appeal No. 186 of 1948, D/- 8-2-1952.

(a) Civil P. C. (1908), O. 32 R. 3 — Negligence of guardian.

Where a guardian of minor defendants raises frivolous defences and subsequently is convinced that it is not worthwhile proceeding with those defences, it cannot be said that the guardian is guilty of negligence. Before it can be held that the failure to defend is evidence of gross negligence the Court must be convinced that there were substantial defences to the action and nevertheless, the guardian failed to advance and establish them. (Para 5)

Anno: C.P.C., O. 32 R. 3 N. 12 Pt. 7.

(b) Limitation Act (1908), Ss. 19, 20 — Insolvency petition filed against person — His right to acknowledge debt.

Merely because an insolvency petition had been filed against the father, he does not lose his right to make a part payment towards a debt or to acknowledge a debt so as to enlarge the period of limitation not only against himself but also against his sons. (Para 6)

Anno: Lim. Act, S. 19 N. 33; S. 20 N. 13.

P. Chandriah and M. A. Narasayya Chowdri, for Appellants; A. Sambasiva Rao and T. Venkatadri, for Respondents.

RAJAMANNAR C. J.: The plaintiffs in O. S. No. 1 of 1946 in the Court of the Subordinate Judge of Masulipatam appeal against the decree of the learned Judge dismissing their suit brought for setting aside the decree in O. S. No. 33 of 1936 on the file of the same Court obtained by defendant 1 against them and defendants 2 and 3. The plaintiffs are the sons of defendant 2. Defendant 1 instituted O. S. No. 33 of 1936 above mentioned to recover a sum of Rs. 14893-13-6 due under two promissory notes dated 5th March 1930 executed by defendant 2, i.e., the father of the plaintiffs in her favour for Rs. 8703-3-3 and Rs. 605-9-3 respectively. As the father had been adjudicated insolvent, the Official Receiver was also made a party. The plaintiffs were all minors on the date of the institution of that suit and they were represented by their mother as their guardian. She filed a written statement in which three defences were raised, viz., (1) that the amounts under the promissory notes were borrowed for illegal and immoral purposes, (2) that the promissory notes were barred by limitation so far as the minor sons were concerned because the acknowledgment made thereon by the father was after a petition to adjudicate him an insolvent had been presented and (3) that the rate of interest was usurious. Though she filed the written statement, she did not appear at the time of the trial in person or by advocate and an ex parte decree for the amount as prayed for was passed on 14th August 1937.

The plaintiffs' mother thereafter filed an application for setting aside the ex parte decree. The learned Subordinate Judge by his order dated 4th November 1937 directed that the said ex parte decree be set aside on condition of a deposit of Rs. 200 being made in Court within ten days of the date of the order and on default of such deposit, the application was to stand dismissed with costs. The amount was not deposited and the ex parte decree was not set aside. Soon thereafter, Madras Act 4 of 1938 came into force and immediately after that the mother on behalf of the plaintiffs, applied to the Court for scaling down the debt. Eventually the debt was scaled down with the result that the entire amount payable under the decree was about Rs. 5000. After these proceedings, the plaintiffs commenced the present suit out of which this appeal arises for setting aside the decree on the ground that their guardian had acted in a grossly negligent manner.

(2) In the plaint it was alleged that there was a secret arrangement between defendant 2 and the brother of defendant 1 under which defendant 2 promised to amicably settle the suit debt and other debts and on the faith of such representation, the mother of the plaintiffs was induced to remain ex parte and to suffer the decree. It was further alleged that the conduct of the guardian in not defending the suit was recklessly and grossly negligent.

(3) At the trial the plaintiffs gave up the contention that there was a arrangement between defendant 1's brother and defendant 2. Therefore all that remained was to determine whether there was gross negligence on the part of the guardian of the plaintiffs' mother who represented them as their guardian was guilty of gross negligence and fraud.

(4) The parties did not adduce any oral evidence in the case. The plaintiffs were content to file a copy of the pleadings and other papers in O. S. 33 of 1936. The learned Subordinate Judge found that the plaintiffs on whom certainly the onus lay, had not established that their mother was guilty of gross negligence or fraud in the conduct of the prior suit and dismissed O. S. No. 1 of 1946.

(5) The only question which arises in this appeal is whether on the facts appearing from the documentary evidence, it can be held that the plaintiffs' mother was guilty of any negligence or fraud. Appellants' counsel contended that the fact that certain defences were raised by the guardian coupled with the fact that eventually she did not adduce any evidence or try to establish those defences is itself proof of negligence. We cannot agree. If the guardian raises frivolous defences and subsequently is convinced that it was not worthwhile proceeding with those defences, it cannot be said that the guardian would be guilty of negligence. Before we can hold that the failure to defend is evidence of gross negligence, we must be convinced that there were substantial defences to the action and nevertheless, the guardian failed to advance and establish them. Let us take the defences which were raised by the plaintiffs' guardian in the prior suit.

(6) There is nothing in the plea that the payments made by the father on the promissory note were on 4th March 1933, two days

after the presentation of the insolvency petition. It was admitted that the father was not adjudicated till several months later. Simply because an insolvency petition had been filed against the father, he does not lose his right to make a part payment towards a debt or to acknowledge a debt so as to enlarge the period of limitation not only against himself but also against his sons. As regards the other ground of illegality and immorality, it is obvious that from a mere allegation in a written statement, it cannot be assumed that the plaintiffs had a good case. At the trial of the suit, the plaintiffs did not care to adduce any evidence to show that they had a substantial defence on this ground. There is, therefore, nothing in the evidence to lead us to the conclusion that the plaintiffs had a good case, that the guardian knew that they had but did not take any step to establish the defence.

(7) As regards the last of the defences based on the provisions of the Usurious Loans Act, the matter has become academical because of the application of Madras Act 4 of 1938 to the case. It surely cannot be contended that any relief which the plaintiffs could have obtained under the Usurious Loans Act would have been so large as the relief which they eventually obtained under the provisions of Madras Act 4 of 1938.

(8) In the circumstances we entirely agree with the learned subordinate Judge that the plaintiffs have failed to establish gross negligence or fraud on the part of their mother as guardian in the conduct of the previous suit. The appeal fails and is dismissed with costs of respondent 1.

B/V.S.B. Appeal dismissed.

A. I. R. 1953 MADRAS 370 (Vol. 40, C. N. 129)

RAJAMANNAR C. J. AND VENKATARAMA AYYAR J.

K. R. Radhakrishna Ayyar and another, Appellants v. T. S. Subramania Iyer, Respondent.

Second Appeal No. 284 of 1948, D/- 13-2-1952.

Transfer of Property Act (1882), S. 55 — Sale — Part of consideration left with vendee for discharging prior mortgage — Vendee not discharging mortgage for a long time — Interest accumulating — Vendee paying interest — Mortgage debt reduced under Madras Act 4 of 1938 — Vendor cannot demand refund of balance of amount that would remain after paying off mortgage amount as reduced, when vendee had actually paid more than amount deposited, towards the principal and also interest. AIR 1943 Mad 482, Rel. on. (Para 3)

Anno: T. P. Act, S. 55 N. 14.

M. S. Venkatarama Iyer, for Appellants; G. R. Jagadeesan, for Respondent.

REFERENCE..... /Para.

('43) ILR (1943) Mad 885: (AIR 1943 Mad 482) 3

RAJAMANNAR C. J.: The plaintiffs in O. S. No. 220 of 1946 in the District Munsif Court, Valangiman at Kumbakonam are the appellants in this second appeal. They sold some of their properties to defendant 1 for Rs. 12000 under a sale deed dated 14th October 1921. The properties were at the time subject to a mortgage which the plaintiffs had executed in favour of one Ramadoss Iyer on 4th August 1918 for Rs. 2750. Out of the sale consideration of Rs. 12000 a sum of Rs. 3250 was left with the purchaser, defendant 1 to discharge the amount due under the said mortgage. Defendant 1, however, did not pay any money to the mortgagee forthwith. In or about 1922 the plaintiffs were obliged to pay an amount of Rs. 800 to the mortgagee towards the interest which had accrued due. Subsequently, defendant 1 sold certain of the items which he had purchased from the plaintiff to one Nagammal in 1931 for Rs. 4000 and directed her to pay out of the said amount, Rs. 2500 in part payment of the amount due under the mortgage. Nagammal accordingly paid Rs. 2500 to the mortgagee in 1934. This amount appears to have been appropriated by the mortgagee towards the interest due as per the terms of the mortgage. In 1940 plaintiff 2 executed in favour of the mortgagee an assignment of his share of the vendor's lien for the unpaid purchase money as additional security. Thereafter the mortgagee assigned his mortgage right as well as the right to the additional security to Nagammal herself. She instituted O. S. No. 67 of 1943 on the file of the District Munsif's Court, Valangiman at Kumbakonam to recover the amount due under the mortgage. Both the plaintiffs and defendant 1 were parties to that suit. It was ultimately held in that suit that the amount due and payable under the mortgage was Rs. 1847-8-0 after applying the provisions of S. 8, cl. (2) of Madras Act 4 of 1938. Defendant 1 paid that amount.

(2) The suit out of which this appeal arises was filed to recover from defendant 1 any balance of unpaid purchase money. The basis of the suit was as follows. The amount of Rs. 2500 paid in 1934 must be deemed to have been paid by or on behalf of defendant 1 in discharge of his liability for the interest which had accrued due subsequent to the sale to him and so that amount could not be said to have been paid from and out of the amount of Rs. 3250 left with defendant 1 at the time of the sale. It must, therefore, be held that defendant 1 paid Rs. 1847-8-0 out of the amount of Rs. 3250 left with him and the plaintiffs were entitled to the balance as part of the unpaid purchase money. The learned District Munsif dismissed the suit. He held that defendant 1 should get credit for Rs. 2500 paid in 1934 and as the unexpended balance out of Rs. 3250 left with him was only Rs. 750 the plaintiffs could not obviously have a refund of any amount because the amount declared still due under the mortgage was Rs. 1847-8-0 for principal as on 1-10-1937. There was an appeal to the learned Subordinate Judge of Kumbakonam but that appeal was also dismissed.

(3) It was contended by Mr. M. S. Venkatarama Aiyar on behalf of the plaintiffs appellants that the amount of Rs. 2500 paid in 1934 to the mortgagee must not be taken as having been paid from and out of the amount of Rs. 3250 left with defendant 1 because that amount was paid and appropriated towards the interest which had accrued subsequent to the date of the sale. The purchaser was in law the agent of the plaintiffs in respect of this sum of Rs. 3250 and as agent, defendant 1 should have strictly followed the instructions of the plaintiffs, viz., to pay the amount of Rs. 3250 towards the principal of Rs. 2750 and the interest which was payable on the date of the sale, — so ran his argument. He relied on analogous legal positions such as for example

arise when money is left with a purchaser to discharge an encumbrance and it subsequently turns out that the encumbrance had become unenforceable for some reason or another. He also relied on the well-established proposition of law that if the consideration of a sale was the promise by the purchaser to pay the amount to a third party, and if within a reasonable time the purchaser did not pay the amount to the third party the vendor could sue to recover the amount from the purchaser. In our opinion, the facts of the present case do not attract any of the principles laid down in dealing with the instances aforesaid. Here we have a case of a sum of money left with the purchaser to discharge a mortgage liability. Admittedly, the mortgage liability has been discharged by the purchaser paying a sum not less than the amount left with him. Whatever may be said in a case where the mortgage had been discharged by the purchaser paying to the mortgagee a sum not less than the amount left with him, no question of refund could possibly arise in a case like the present in which the purchaser has parted with money not less than the amount left with him and utilised that amount for the discharge of the mortgage. It is obvious that in this case but for the payment of Rs. 2500 in 1934, the debt could not have been scaled down applying the damdupat rule to Rs. 1847-8-0. It is because of this very reduction that the plaintiff now claims a refund of purchase money. But he could not have been entitled to rely on this fact but for the payment made by and on behalf of the defendant.

In our opinion, this case is directly governed by the decision in — 'Subbarao v. Varadaiah', ILR (1943) Mad 885. In that case, the vendor of certain items of immoveable property left with the purchaser an amount of Rs. 5682-7-0 for the discharge of a mortgage to which the properties were subject at the time of the sale. Subsequent to the sale, a sum of Rs. 1000 was paid by the purchasers to the mortgagee. It was held that the purchasers were entitled to the benefit of the statutory reduction of the mortgage debt under Madras Act 4 of 1938. It was urged on behalf of the vendors that the purchaser should not be given credit for Rs. 1000 which they had paid after the sale because that amount must be taken to have been paid towards the interest accruing due on the mortgage debt subsequent to the sale for which the purchasers were solely responsible by reason of their delay in payment. The learned Judges held that the purchasers were entitled to credit for the sum of Rs. 1,000 paid by them to the mortgagee. They observed :

> "We are, however, inclined to hold that the appellants are entitled to credit for the entire sum of Rs. 1000 paid by them to the mortgagee, for, the appellants are liable to refund only the unexpended balance, if any, of the purchase money in their hands. It is no doubt true that, if the appellants had not paid the sum, it would not have to be paid, as all interest outstanding on the mortgage on 1st October 1937 was wiped out under Act 4 of 1938, but it cannot be said on that account that any payment made by the appellants towards the mortgage debt before that date was not made out of the money left in their hands."

We see no reason to doubt the correctness of this decision on this point. In our opinion, it is fallacious to treat the amount of Rs. 3250 left with the purchaser as a separate fund subject to some kind of trust to be utilised in a particular manner.

The correct legal position in our opinion is this. The sale was free from encumbrances. There was, however, an encumbrance outstanding at the time of the sale. To prevent the purchaser from being damnified the amount then due under the mortgage was allowed to be retained by the purchaser. Thereafter, it is true that as between the vendor and purchaser, it was the purchaser's concern to discharge the mortgage. It may be that if the purchaser failed to discharge the debt and the vendor was damnified by the purchaser's default, the vendor may be entitled to damages. But if the money retained with the purchaser was utilised by him to discharge the mortgage and there is no sum left out of that amount the vendor can have no manner of right to a refund of any money as the balance of unpaid purchase money, simply because there has been a delay in discharging the mortgage and interest had accrued due subsequent to the sale. To give a hypothetical case, if in this case the mortgage was not discharged, say till 1935 by which date further interests had accrued due and a sum much larger than Rs. 3250 was due and payable for principal and interest but nevertheless the mortgagee was prepared to take Rs. 3250 in full quit of his claim, can it be said that the vendor is still entitled to a refund of a portion of that amount because further interest had accrued due subsequent to the date of sale and the sum of Rs. 3250 paid by the purchaser to the mortgagee must have also included the further interest; in our opinion, he is not. In the present case, instead of a voluntary remission by the mortgagee, there has been a statutory reduction of the debt. Even after that reduction, the total amount paid by and on behalf of defendant 1 was far in excess of the amount of Rs. 3250 which had been left with him. The plaintiffs would not, therefore, be entitled to claim a refund of any money as balance of unpaid purchase money.

(4) The second appeal fails and is dismissed with the costs of defendant-respondent.

B/R.G.D. Appeal dismissed.

A. I. R. 1953 MADRAS 371 (Vol. 40, C. N. 130)

RAMASWAMI J.

In re Natarajan and others, Petitioners.

Criminal Revn. Case No. 607 and Cri. Revn. Petn. No. 602 of 1951, D/- 26-2-1952.

(a) Essential Supplies (Temporary Powers) Act (1946), S. 3 (2) — Restrictions on movement of cholam — Effect of Madras G. O. No. 550 (Food), D/- 18-6-1948.

G. O. No. 393 (Food), dated 3-4-1947 is only an additional restriction on the transport of millets and this restriction is not inconsistent with the restriction in para. 2 of G. O. No. 550 which mentions only some restrictions. The latter G. O. does not say there should be no restriction on the transport of cholam. In other words the restriction in the former order regarding transport of cholam and other foodgrains at night in order to prevent the running-in of contraband articles under

cover of night, remained in effect unsuperseded. (Para 3)

(b) Essential Supplies (Temporary Powers) Act (1946), S. 3 (2) — Madras G. O. No. 550 (Food), D/- 18-6-1948 restricting movement of foodgrains — Validity of — G. O. is not invalid on the ground that it empowers District Magistrate to notify roads on which restriction would apply — Government thereby does not abdicate or efface itself or delegate the power delegated to it by Central Government — G. O. only prescribes mode by which Government exercises that power while retaining full control over it. (Para 4)

R. Thirumalaiswami Naidu, for Petitioners; Public Prosecutor, for the State.

ORDER: This is a criminal revision case filed against the order made by the Second Additional First Class Magistrate of Trichinopoly in C. C. No. 47 of 1951 and confirmed in C. A. No. 124 of 1951 by the Sessions Judge of Trichinopoly.

(2) The facts of this case have been fully set out in the judgments of the lower Courts and need not be recapitulated, because there is no dispute concerning the facts before me and two points of law only are taken before me which I shall deal with in the succeeding two paragraphs.

(3) The first point taken is that in regard to this prohibition of transport of foodgrains by night G. O. No. 550 (Food) dated 18th June 1948 has superseded all the previous orders including G. O. No. 393 (Food) dated 3rd April 1947 and that therefore this accused has not committed any offence. But this contention is based upon an imperfect reading of the G. Os. referred to above. Paragraph 2 of G. O. No. 550 (Food) dated 18th June 1948 lays down that,

"no person shall, with effect from the date of this order .... transport cholam ....by road, rail, river.... from any place within the limits of any District in the Province except under a permit."

and paragraph 9 says that,

"all orders including orders delegating powers, made in pursuance.....shall notwithstanding the supersession of the said order, continue in force, so far as they are consistent with the provisions of this Order, and shall be deemed to have been made under the appropriate provisions of this Order."

In other words as pointed out by the learned Sessions Judge, G. O. No. 393 (Food) dated 3-4-1947 is only an additional restriction on the transport of millets and this restriction is not inconsistent with the restriction in para. 2 of G. O. No. 550 which mentions only some restrictions. The G. O. does not say there should be no restriction on the transport of cholam. In other words the restriction regarding transport of cholam and other foodgrains at night in order to prevent the running-in of contraband articles under cover of night, remained in effect unsuperseded. Therefore, this point taken is without any substance.

(4) The second point taken is one with which we have all become familiar, namely, that there has been a delegation of the powers by the State Government of the powers delegated to them by the Central Government and that consequently the prohibition, by the District Magistrate is 'ultra vires'. S. 4, Essential Supplies (Temporary Powers) Act provides that:

"The Central Government may by notified order direct that the power to make orders under S. 3 shall.....be exercisable also by.. ..such Provincial Government or such officer or authority subordinate to a Provincial Government as may be specified in the direction."

G. O. No. 393 (Food) dated 3-4-1947 prohibits any driver or owner or other person in charge of a motor vehicle to drive it with a consignment of foodstuffs between 7 p. m. and 6 a. m. on any road or land situated in a District which is notified by the District Magistrate in the District Gazette. Subsequently the District Magistrate has notified the roads and published the notification along with the roads in the District Gazette. The contention is that in allowing the District Magistrate to specify the roads the Provincial Government re-delegated its powers to an officer and that this re-delegation is illegal and, therefore, the notification has no valid effect. This contention is undoubtedly due to a confusion of thought because in this case the State Government has not delegated its powers to the Collectors and the District Magistrate was not allowed to pass any order by himself but as a servant of Provincial Government was authorised to specify the roads in the District Gazette. I may incidentally point out that G. O. No. 393 (Food) dated 3-4-1947 specifically says that it was passed "with the concurrence of the Government of India" and in effect the delegation to the officer, namely, the District Magistrate was in effect a delegation by the Central Government. But apart from this, as pointed out by me, just now, the Collector was not empowered to lay down the principles of regulating or controlling but only to carry out the working of the principles. Therefore this is not a case of delegation of delegated powers or a case of abdication or effacement of the State Government in the matter of carrying out the powers delegated by the Central Government but a mode of exercising these powers through their subordinates retaining full control of the powers vested in them. The responsibility entrusted to the State Government under this delegation remains intact and there is no abdication of its own delegated powers. It follows from the above considerations that the contention based on the maxim 'delegatus non potest delegare' is not applicable to this case and the second point also must fail.

(5) In view, however, of the confiscation of the cholam and the time, expense and trouble of these petitioners who had to undergo the ordeals of trial, appeal and revision, the period of imprisonment is reduced to the period already undergone; and fine of Rs. 50 each (Rs. 150 in all) and in default to rigorous imprisonment of one month. Time for payment 15 days from the date of the receipt of this order by the lower court.

B/M.K.S. Order accordingly.

A. I. R. 1953 MADRAS 372 (Vol. 40, C. N. 131)

GOVINDA MENON AND MACK JJ.

In re Govindaswami alias Subbiah Kalingarayar, Appellant.

Criminal Appeal No. 864 and Cri. Revn. Case No. 1377 and Taken up No. 19 of 1951, D/- 15-7-1952.

(a) Penal Code (1860), S. 302 — Sentence — Murder — Ordinary penalty is death sentence — Lesser sentence imposed held improper.

The ordinary penalty for murder is the death sentence unless some extenuating circumstance can be found to mitigate the extreme penalty and to justify the Court passing the lesser sentence.

An impression gaining prevalence amongst Sessions Judges that the law of murder has, in recent years, undergone a radical alteration in the matter of sentence and that the death sentence should not ordinarily be awarded unless the circumstances attaching to the murder are of a particularly revolting nature in addition to its being premeditated and cold-blooded is not correct. The law still remains the same.

Held that in the circumstances of the case there were no extenuating circumstances, nor could the youth of the accused or his fear or apprehension that the deceased would make a complaint against him for theft justify the lesser sentence imposed on the accused. (Sentence however was not enhanced). (Para 4)

Anno: I.P.C., S. 302 N. 2.

(b) Criminal P. C. (1898), S. 234 (1) — Accused murdering A and B in the same night one after the other — Houses of A and B divided by a street which formed boundary between two districts — Accused confessing both murders in one statement — Separate charge-sheets laid in two different Sessions Courts — Held, there was no impediment in trying both murders together under S. 234(1) and one Court should have dealt with both murders. (Para 5)

Anno: Cr.P.C., S. 234 N. 5.

M. K. Anandan as amicus curiae, for Appellant; Public Prosecutor, for the State.

MACK J.: This is a strange and somewhat painful case of a youth aged 16 being found guilty of the murder of one Govindan Servai by cutting his neck with an aruval while he was asleep in his house on the night of 18-7-1951. According to the prosecution and the evidence in this case the appellant also similarly cut one Malayappa Konan while he was asleep in his house on the other side of the street. Malayappa Konan hacked in the neck also died instantaneously. The learned Sessions Judge of Tiruchirapalli tried the present case only as regards the murder of Govindan Servai and found him guilty under S. 302, I. P. C. and while of the opinion that his action in cutting an innocent sleeping man in the neck with an aruval was "very heinous" sentenced him to the lesser sentence for reasons which completely fail to convince us. The extenuating circumstance which appears to have been found was that the appellant committed this murder in fear that the deceased was intending to make a report against him at the police station regarding a theft.

(2) The motive evidence in this case may be briefly set out. Appellant was a youth who lived near the house of Govindan Servai and witnessed the latter counting some money he had borrowed from a Chettiar the morning previous to the murder and putting it into a pot. That night Govindan Servai's mother P. W. 1 swore that she saw the appellant stealing the money from a pot and running away with it. She chased him but he made good his escape. Krishnan Servai P. W. 2 the younger brother of deceased also joined in a vain pursuit. The next morning Govindan Servai complained to respectable elders of the village including P. W. 12 and the other deceased Malayappa Konan who sent for the appellant and questioned him. The evidence is to the effect that the panchayat advised Govindan Servai to make a report to the police. It was that night that Govindan Servai and his respectable panchayatdar Malayappa Konan were fatally cut by an aruval while they were asleep. At 3 a. m. that morning the appellant was found by the Station-writer P. W. 5 of Karamakudi police station about 4 or 5 miles from the scene of offence with a blood-stained aruval, M. O. 1 tucked under his armpit. Appellant also made a judicial confession in which he said that he cut first Malayappa Konan and then Govindan Servai while they were asleep in their house with an aruval because his mother and his elder sister taxed him at 10 p. m. that night with stealing this money from Govindan Servai and brought pressure on him to tell the truth to the police informing him that Malayappa Konan was himself a witness to that theft. He described in his confession how he could not get any sleep and that he fell a victim to a temptation first to cut these two persons with a bill hook and then to go and surrender himself at the police station. There can be no doubt on the evidence of this confession and also from the evidence of P. Ws. 1, 2 and 3 that it was the appellant who cut Govindan Servai with an aruval while he was asleep murderously on the neck with the intention of killing him. The conviction by the learned Sessions Judge is correct. On a perusal of the judgment I thought it was a fit case in which notice should issue for enhancement of sentence.

(3) My learned brother is opposed on principle to a criminal Bench enhancing the sentence of transportation which the trial Court has seen fit to impose to the extreme penalty. I fully appreciate his great reluctance to interfere in such a case though personally I am prepared myself to do this most unpleasant duty in a proper case where the death sentence, in our opinion, ought definitely to have been passed. In deference to my learned brother's view I agree that this appeal should be dismissed without any enhancement in the circumstances.

(4) There appears to be an impression gaining prevalence amongst Sessions Judges that the law of murder has, in recent years, undergone a radical alteration in the matter of sentence and that the death sentence should not ordinarily be awarded unless the circumstances attaching to the murder are of a particularly revolting nature in addition to its being premeditated and cold-blooded. The law still remains the same. The ordinary penalty for murder is the death sentence unless some extenuating circumstance can be found to mitigate the extreme penalty and to justify the Court passing the lesser sentence. In this case we are unable to find any extenuating circumstances and even the youth of the accused that he is 16 or 17 years old cannot be taken into consideration as an extenuating circumstance; nor can mere fear or apprehension of a complaint being made against him of theft be so taken into consideration.

(5) There is a further aspect of the case on which we would like to make some observations. These two cases of alleged murder by the same appellant one after the other that same night brought as they were into the same confession should obviously have been tried by one and the same Sessions Judge. The street between the houses of Govindan Servai and Malayappa Konan appears however to have been a boundary between the districts of Tiruchirapalli and Tanjore and one murder was committed in the jurisdiction of the Sessions division of Tiruchirapalli and the other in the jurisdiction of the Sessions division of Tanjore. This appears to have been the only reason why two separate charge sheets were laid

in respect of these murders. The learned Public Prosecutor agrees that there was no impediment to the two murders being tried together under S 234(1), Cr. P. C. and it is indeed obvious that one Court should have dealt with both these murders. He informs us that the other case, when he last received instructions in February this year, was under commitment in a Magistrate's Court in Tanjore. We do not of course propose to say anything here about the merits of the case in which the appellant is charged with the murder of Malayappa Konan. That will take its ordinary course uninfluenced by any observations made by us in this case on its merits.

B. D.R.R. Appeal dismissed.

A. I. R. 1953 MADRAS 374 (Vol. 40, C. N. 132)

SATYANARAYANA RAO AND RAJAGOPALAN JJ.

A. VR. V. Vellayappa Chettiar and another, Applicants v. The Commissioner of Income-tax, Madras, Respondent.

Case Referred No. 39 of 1950, D/- 4-4-1952.

Income-tax Act (1922), S. 10 — Accretion — Capital asset — Utilisation of stock-in-trade.

The assessees were partners in a firm which carried on money-lending business in Ceylon. The firm, being non-resident, was never separately assessed; but the individual income of the partners was considered in the assessment, concerning them. The firm purchased in 1932 vacant sites in Ambolangode and in 1934 and 1936 constructed certain structures which they let out to tenants. The money for the purchase of these vacant sites and also for putting up the structures came out of the money-lending business. They opened a separate account in the money-lending business for this purpose. The rents derived from the tenants to whom the property was let were also credited in the separate account. In 1946 the property was sold for a sum of Rs. 45,000 and the net profit realised by the firm was Rs. 9488 and the share of each partner was Rs. 4744. The property was not purchased in lieu of discharge of debts of the money-lending business but purchased independently from the funds of the partnership. From the beginning the firm treated this as an investment and had no idea of ever selling this property until 1946 when the future of Indian business in Ceylon became uncertain and the firm was obliged to wind up its money-lending business in Ceylon and return back to India.

Held that if, on the facts it was clear that from the beginning they intended this as an investment and not as a stock-in-trade, the mere fact that the income was included in the profits of the business would not convert what was a capital investment and a capital asset into a stock-in trade. The increased return derived by the sale of the property was merely an accretion to the capital asset and not profit earned by the utilisation of stock-in-trade. Hence the sum of Rs. 4744 was not liable to be assessed as a part of the total income of the assessee. (Paras 3, 4)

Anno. Income-tax Act S. 10 N. 13.

K. Srinivasan, for Applicants; C. S. Rama Rao Sahib, for Respondent.

SATYANARAYANA RAO J.: The following question was referred to us for decision by the Income-tax Appellate Tribunal, Madras:

"Whether on the facts and in the circumstances of the case, the amount of Rs. 4744 which was a profit realised on the sale of an asset belonging to the money-lending business of the appellant was liable to be assessed as a part of the total income of the assessee."

We have no difficulty in answering this question in the negative and in favour of the assessees.

(2) The applicants before the Tribunal were partners in a firm which carried on money-lending business under the style of V. VR. VR. Firm, Ambolangode, in Ceylon. The firm, being non-resident, was never separately assessed; but the individual income of the partners was considered in the assessment, concerning them. The firm purchased in 1932 vacant sites in Ambolangode and in 1934 and 1936 constructed certain structures which they let out to tenants. The money for the purchase of these vacant sites and also for putting up the structures came out of the money-lending business. They opened a separate account in the money-lending business for this purpose. The rents derived from the tenants to whom the property was let were also credited in the separate account. In 1946 the property was sold for a sum of Rs. 45,000 and the net profit realised by the firm was Rs. 9488 and the share of each partner was Rs. 4744. The partners claimed that this was a capital receipt and should not be included in the total income of the assessees during the assessment year 1946-47. This claim was rejected by the Income-tax department and also by the appellate Tribunal and hence this reference.

(3) From the statement of facts in the order of the Appellate Tribunal and from the judgment of the Appellate Tribunal in dealing with the assessment it is made clear that this property was not purchased in lieu of discharge of debts of the money-lending business but purchased independently from the funds of the partnership. It is no doubt true that the income was included in the profits of the business, but that does not, in our opinion, make any difference as the property acquired represents the capital invested by the firm, which of course earned some income, which was included in the profits of the business. It was never treated as a part of the stock-in-trade of the money-lending business. Under different circumstances it may be possible to treat the immovable property acquired in the course of money-lending business as part of the stock-in-trade of the business. But from the beginning the firm treated this as an investment and had no idea of ever selling this property until 1946 when the future of Indian business in Ceylon became uncertain and the firm was obliged to wind up its money-lending business in Ceylon and return back to India.

(4) It is contended on behalf of the Income-tax Commissioner by Mr. Rama Rao Sahib that the inclusion of the income in the profits of the business is a clear indication that it was treated as stock-in-trade. The Appellate Tribunal seems to have treated that the burden of proving that it was not a stock-in-trade but was an investment was on the assessees. We are not prepared to view the question from this point of view. If, on the facts, it is

clear that from the beginning they intended this as an investment and not as a stock-in-trade, the mere fact that the income was included in the profits of the business would not convert what was a capital investment and a capital asset into a stock-in-trade. The increased return derived by the sale of the property is merely an accretion to the capital asset and not profit earned by the utilisation of stock-in-trade. The question therefore referred to us, as stated already, must be answered in the negative and in favour of the assessees. As the assessees have succeeded, they are entitled to their costs, which we fix at Rs. 250/-.

B/D.H. Answer in the negative.

A. I. R. 1953 MADRAS 375 (Vol. 40, C. N. 133)

RAGHAVA RAO J.

A. G. Nallaperumal Nattarayar, Petitioner v. Singaravelu Seennandar and Kolandayya Sennandar and others, Respondents.

Civil Revn. Petn. No. 539 of 1948, D/- 11-8-1952.

Provincial Insolvency Act (1920), Ss. 9, 40 — Petition for re-adjudication — Requirements.

When the statute is thoroughly silent as to the kind of requirements under S. 9 which are to be fulfilled in the case of original adjudication where the statute deals with re-adjudication, it is not for the Court by a process of judicial construction to indulge in anything like a legislative enlargement of the Act. Hence, on an application for re-adjudication after the annulment of the original adjudication on account of the failure of a composition scheme which intervened, it is not incumbent upon the petitioning creditors to satisfy the requirements of S. 9. AIR 1947 Mad 238, Disting. (Para 2)

K. P. Ramakrishna Ayyar, for Petitioner; S. Kothandarama Nayanar, for Respondents.

REFERENCES: Courtwise/Chronological/ Paras
('29) 56 Mad LJ 458: (AIR 1929 Mad 157) 3
('47) 1947-1 Mad LJ 4: (AIR 1947 Mad 238) 3, 4

JUDGMENT: Mr. Ramakrishna Aiyar has raised an interesting point in this civil revision petition. I have after hearing the elaborate arguments of Mr. Kothandarama Nayanar on the point in question, come to the definite conclusion that this revision must fail.

(2) The point raised is that on an application for re-adjudication after the annulment of the original adjudication on account of the failure of a composition scheme which intervened, it was incumbent upon the petitioning creditors to satisfy the requirements of Sec. 9, Provincial Insolvency Act. The petition for cancellation of the original adjudication and for re-adjudication was presented to the Court below under S. 40, Provincial Insolvency Act. Mr. Ramakrishna Aiyar urges that the debtor ought not to have been re-adjudicated an insolvent because the persons applying for his re-adjudication did not prove that the debts alleged to be due to them were subsisting. That such debts were not subsisting the learned counsel has attempted to make out by relying on the provisions of S. 78, Provincial Insolvency Act. The creditors ought to have taken, once the original adjudication was annulled, although at the same time as the annulment of the original adjudication, there was also an order vesting the property in a special appointee under S. 37, Provincial Insolvency Act, steps for the recovery of the debts due to them within the period limited by law, subject, of course, to the deduction of the period from the date beginning with the date of adjudication and ending with the date of annulment and if they chose not to file suits, then their debts would naturally get barred by limitation and, if so, those persons would lose their 'locus standi' to ask for re-adjudication.

If this process of reasoning is correct, the conclusion follows, says the learned counsel, that the debtor ought not to have been re-adjudicated insolvent at all in the circumstances of the present case. Mr. Ramakrishna Aiyar has sought to reinforce his argument by a reference to the several provisions of the Act, which go to show that after re-adjudication, the same incidents as are indicated in the case of the original adjudication become applicable to the case. With some reasonable vehemence, the learned counsel maintained that re-adjudication is only one form of adjudication and that the same requirements, as have to be fulfilled in the case of an application for original adjudication have still to be fulfilled in the case of an application for a re-adjudication. I cannot say that the argument did not carry some force with it to my mind as I was hearing the learned counsel, and it also seemed to be that being in the nature of a quasi-criminal proceeding, the petition, whether for adjudication or for re-adjudication must be scanned with very meticulous care with regard to the requirements which have to be fulfilled. But the requirements in question are really to be gleaned from the statute itself, which cannot be added to or detracted from by an arbitrary process of construction. It seems to me that when the statute is thoroughly silent as to the kind of requirements under S. 9, Provincial Insolvency Act, which are to be fulfilled in the case of original adjudication where the statute deals with re-adjudication, it is not for me by a process of judicial construction to indulge in anything like a legislative enlargement of the Act. I feel constrained for the reasons given to repel the argument of the learned counsel for the petitioner.

(3) Mr. Ramakrishna Aiyar has drawn my attention to the decision — 'Akkayya v. Appayya', 1947-1 Mad LJ 4 and states that this is a decision, which the Court below ought to have relied upon but did not rely upon in view that it took that view being covered by the decision — 'Kami Reddi Timmappa v. Devasi Harpal', 56 Mad LJ 458 and which favoured the view that it was taking.

(4) In answer to the argument of Mr. Ramakrishna Aiyar, Mr. Kothandarama Nayanar, the learned counsel for the respondent has endeavoured to satisfy me that, where the annulment of the original adjudication is not one pure and simpliciter, but one coupled with an order vesting the estate in a special appointee under S. 37, Provincial Insolvency Act it makes a difference to the legal position. But the case in — 'Akkayya v. Appayya', 1947-1 Mad LJ 4 was itself a case of appointment of a special trustee under S. 37 of the Act and yet it was held that to the decision of that case, it did not matter. That case how-

ever turned upon an altogether different question and has very little in my opinion to do with the point, which arises for determination at my hands. That was a case of a suit brought on the foot of a debt due to one of the debtors in the insolvency after the annulment of adjudication and the opinion of the learned Judge (Happell J.) was that not merely the period between the date of the annulment and the date of the suit was to be taken into account for the purpose of deduction under S. 78, Provincial Insolvency Act but also the further time between the date of annulment and the date of the complete closure of the insolvency proceedings, which continued to some extent after the appointment of a special trustee under S. 7, Provincial Insolvency Act. No such contention has been urged in the present case.

Mr. Ramakrishna Aiyar has relied upon the decision more for the principle that he is very anxious to spell out of it than for the decision itself which turned upon a clearly different state of facts to what we have here. He says that if the principle or decision is to be applied to the present case the petitioning creditors in the present case who sought to re-adjudicate the debtor as an insolvent must be held to have had their debts barred by reason of their failure to institute suits or take proceedings in order to keep their debts alive and that, therefore, the order of adjudication was incompetent and that the debtor ought not to have been re-adjudicated insolvent on a petition for re-adjudication by such petitioning creditors. As I have said, the decision cited does not bind me with reference to the present case and I am not prepared to read more into it than what it actually contains.

(5) Mr. Ramakrishna Aiyar has also stated that there seems to be power of review in Courts to modify or rescind the original order of adjudication quite apart from S. 35, Provincial Insolvency Act. But when dealing with the topic of re-adjudication, if there are specific provisions in the statute to guide us, I am not prepared to say that you will have to apply other provisions, but assuming that other provisions applied, that is to say the provision for review which you have in the Civil Procedure Code, I have not been shown any reasonable ground for saying that that was the provision under which the Court below was invited to exercise its powers or that this is the provision under which I am equally bound to deal with this matter. As I have already stated, I have no hesitation in dismissing this revision petition as not well founded.

(6) I dismiss it with costs.

B/D.H. Revision dismissed.

A. I. R. 1953 MADRAS 376 (Vol. 40, C. N. 134)

RAMASWAMI J.

In re N. Sankaranarayana, Petitioner.

Criminal Revn. Cases Nos. 43 and 44 and Cri Revn. Petns. Nos. 43 and 44 of 1952, D/- 4-9-1952.

(a) Madras Shops and Establishments Act (36 of 1947), S. 2(6) — Out-agency established by railway department to collect goods and send to railway station — Out-agency is establishment.

The railway department cannot perform all the functions involved in running the railway. It has got to establish agencies for definite purposes. In places where there are no railway stations and goods have got to be collected and sent to the goods-shed the railway department instead of leaving it to private contractors employ out-agencies to canalise the transporting of all these goods to the railway station. These agencies are subject to rules and regulations so that the public are not victimised in regard to the rates charged etc. by them. This does not make the out-agency a part of the establishment of the Central Government. Hence, such an out-agency does not form part of the railway establishment and is an establishment within the meaning of S. 2 (6) of the Act. (Para 11)

(b) Madras Shops and Establishments Act (36 of 1947), S. 51 — Scope of S. 51 — Decision of Labour Commissioner.

Section 51 of the Act is a miscellaneous departmental provision. It only means that the decision is final in so far as appeals in the department are concerned. It does not take away the powers of the Court to decide whether in the particular circumstances of the case the Madras Shops and Establishments Act applied or not. Hence, the decision of the Commissioner of Labour is not a pre-requisite for a Magistrate to find out whether the offence for which an accused has been charged before him has been committed by him or not. (Para 13)

P. S. Balakrishna Aiyar, for Petitioner; Public Prosecutor, for the State.

ORDER: These are two connected revision cases which have been filed against the convictions and sentences of the learned Additional First Class Magistrate, Kollegal, in C. C. Nos. 152 and 153 of 1951.

(2) The facts are: The area occupied by Kollegal in Coimbatore district is served by the Mysore railway. Kollegal itself has no railway station and Maddur is the nearest railway station. Therefore, an out-agency is working in Kollegal for the purpose of booking goods there for being sent to Maddur railway station. This out-agency at Kollegal has been taken by Royal Motor Service, Kollegal, through one Dr. Mahadevan. But it appears that it is managed by the petitioner before us who is stated to be a brother of that Dr. Mahadevan.

(3) This establishment in Kollegal was visited by the Assistant Inspector of Labour, Gobichettipalayam and he found that this out-agency did not maintain a register of wages for the persons employed in it, a register of employment in the prescribed form E or F or a notice in the prescribed form G or a register in the prescribed form H or a register of holidays and leave in the prescribed form K for persons employed under this petitioner in this out-agency. It was further found that this petitioner failed to exhibit the notices containing the extracts of the Madras Shops and Establishments Act, 1947, and the rules, 1948, in English and Tamil and that he failed to maintain and produce them when demanded by the Assistant Inspector of Labour.

(4) In addition the Labour Inspector also found that the timings of work were not in consonance with the provisions of the Madras Shops and Establishments Act and what is

more one particular individual was being employed constantly exceeding the spread over periods.

(5) This Inspector therefore recommended the prosecution of this petitioner under the Madras Shops and Establishments Act to the Commissioner of Labour setting out all these facts. The Commissioner of Labour on coming to the conclusion that this was a case falling within the Madras Shops and Establishments Act and that there had been infractions thereof, sanctioned the prosecution of this petitioner excepting for the hours of work and the employment of that particular individual contrary to the provisions of the Madras Shops and Establishments Act.

(6) The petitioner in the meanwhile has made a reference to the Traffic Manager of the Mysore Railway pointing out that he has been required by the Labour Inspector to observe the rules and regulations as required by the Madras Shops and Establishments Act and that if such regulations were to be observed in his out-agency he would not be able to discharge his functions. Therefore the Traffic Manager having only the hours of work and nothing else in his mind replied that the Madras Shops and Establishments Act did not apply in regard to the timings of work in this out-agency.

(7) The plea of the accused in Court was that he thought that this out-agency formed part of the Mysore railway establishment and did not come within the ambit of the Madras Shops and Establishments Act and that therefore he did not keep the registers and perform the duties prescribed under that Act.

(8) The learned Additional First Class Magistrate overruled these contentions and found the accused guilty as charged and sentenced him to a nominal fine of Rs. 10 in regard to each offence.

(9) In this Court two additional points are also taken viz., in terms of S. 4 (e) of the Act that this out-agency as part of the railway establishment working under the Central Government and therefore does not fall within the ambit of the Madras Shops and Establishments Act and secondly that the Commissioner of Labour under S. 51 of the Act is alone the person who should have decided whether the Act applied or not to this out-agency and that the Magistrate should have made a reference to the Commissioner of Labour and therefore not having done so the Magistrate was not competent to dispose of the matter himself.

(10) In my opinion on the evidence on record the convictions are correct and the points taken are without substance.

(11) The term "establishment" has been defined in the Madras Shops and Establishments Act in S. 2 (6) as to include a commercial establishment and a commercial establishment would certainly include a commercial out-agency of this description. The railway department cannot perform all the functions involved in running the railway. They have got to establish agencies for definite purposes. In places where there are no railway stations and goods have got to be collected and sent to the goods-shed the railway department instead of leaving it to private contractors employ out-agencies to canalise the transporting of all these goods to the railway station. These agencies are subject to rules and regulations so that the public are not victimised in regard to the rates charged etc. by them. This would not make the out-agency any more a part of the establishment of the Central Government than for instance the book-stalls of Messrs. Higginbothams or various catering establishments which are functioning in the railway stations and which are also governed by the uniform rules framed by the railway department and which prescribe the functions they have got to perform and the way in which the public have got to be served. Therefore there is no point in stating that this is a commercial establishment not falling within the definition of S. 2 (6) of the Madras Shops and Establishments Act. In arriving at this conclusion we need not be unduly perturbed by the information given by the Traffic Manager of the Railways, because I have already pointed out that this letter related to working hours and in particular to the spread over of the periods of work of a particular individual to which this Assistant Inspector of Labour seems to have taken exception. Therefore the lower Court was right in holding that this out-agency working in Kollegal and not forming part of the railway establishment is an establishment within the meaning of S. 2(6) of the Act.

(12) Then coming to the point that this matter ought to have been decided by the Labour Commissioner, the Labour Commissioner has as a matter of fact decided it because on a reference made to him for prosecuting this individual all these facts have been set out and the Labour Commissioner has been asked for sanction for prosecution and the Labour Commissioner after going through the records has accorded sanction thereby deciding that the provisions of the various sections of the Act for the contravention of which that individual was about to be charged were provisions which were applicable to this out-agency. Therefore, this point is without any substance.

(13) Besides the Magistrate need not refer to the Labour Commissioner before deciding whether this case attracted the provisions of the Madras Shops and Establishments Act or not. Section 51 of the Act is a miscellaneous departmental provision which states that when there is a dispute about the application of one or more of the provisions of the Act to a particular establishment or particular individual the authority who will have to decide that matter will be Labour Commissioner and that his decision thereon shall be final. It only means that the decision is final in so far as appeals in the department are concerned and not that it takes away the powers of the Court to decide whether in the particular circumstances of the case the Madras Shops and Establishments Act applied or not. I am unable to accept the contention that the decision of the Commissioner of Labour is a prerequisite for a Magistrate to find out whether the offence for which the accused has been charged before him has been committed by him or not. This miscellaneous provision in S. 51 of the Act is merely for the removal of difficulties in deciding certain questions in so far as the department is concerned and would not stand in the way of the Magistrate at all.

(14) Therefore, in these circumstances the convictions of this accused for which he has no other defence excepting the two points which have been set out above, are correct and the sentences which the Magistrate himself

describes as lenient deserve no interference. Both the convictions and sentences are confirmed and these criminal revision cases are dismissed.

(15) If the petitioner feels aggrieved that the application of the Madras Shops and Establishments Act will make it impossible to work these out-agencies and can make out an arguable case the remedy is in his own hands. The State Government may be moved and the State Government if so convinced can exempt these out-agencies from the operation of this Act.

B/V.S.B. Revision dismissed.

A. I. R. 1953 MADRAS 378 (Vol. 40, C. N. 135)

BASHEER AHMED SAYEED J.

B. A. Woodman, Petitioner v. Mrs. Regina Rajan, Respondent.

Civil Revn. Petn. No. 1336 of 1951, D/- 23-1-1952.

(a) Houses and Rents — Madras Buildings (Lease and Rent Control) Act (15 of 1946), Ss. 7 (3A), 9 and 12B (as amended by Madras Act 8 of 1951) — Power of executing Court to consider whether order of eviction is executable in view of S. 7 (3A) — Powers of High Court in revision under S.12B.

Even though the Civil Court, proceeding with the execution of an order of eviction passed by the Rent Controller is not quite competent to go into the question as to whether S. 7 (3A) would apply to the tenant and whether he should get protection under the Act, nevertheless when the application is made contesting that the order passed by the Rent Controller was not competent and was not capable of being executed, it is certainly open to the Civil Court to go into the question and say that an order which was not in accordance with the new section was no more executable. (Para 4)

Even if the Court is not in a position to pronounce on the validity of the order which is sought to be executed by the landlord against the tenant, still where a revision petition has been filed before the High Court it has got very wide powers under S. 12B to call for the records and then satisfy itself as to whether not merely the original order passed by the Rent Controller but also any order passed by any executing Court was just or legal and was in accordance with law. AIR 1951 Mad 1044, Foll.; AIR 1952 Mad 159, Ref. (Para 5)

(b) Houses and Rents — Madras Buildings (Lease and Rent Control) Act (15 of 1946), Ss. 7 (3A) and 20 (as amended by Madras Act (8 of 1951) — Tenant engaged in employment notified by State Government — Order for eviction passed by Rent Controller against tenant — Execution application filed — Pending execution Act 8 of 1951 coming into force — Tenant held was entitled to benefit of S. 7(3A). (Para 6)

M. Chinnappan Nair, for Petitioner; V. Srinivasan and P. M. Srinivasan, for Respondent.

REFERENCES: Courtwise/Chronological/ Paras

('51) 1951-2 Mad LJ 531: (AIR 1952 Mad 159) 6

('51) 1951-2 Mad LJ 477: (AIR 1951 Mad 1044) 6

('51) C. R. P. No. 546 of 1951 (Mad) 6

ORDER: This civil revision petition is against the order of the learned City Civil Judge passed in E. A. No. 1772 of 1951 in E. P. No. 862 of 1951 in L. Dis. No. 4315 H. R. C. 1950.

(2) The petitioner is the tenant against whom an order for eviction was passed by the Rent Controller on 7-9-1950. The order is in the following terms:

"Petitioner by advocate. Respondent in person. By consent respondent is given time for vacating till 7-3-1951. Eviction is ordered."

It transpires a further extension of time for vacating and delivery of possession was given till 26-5-1951. This extension of time was given on 12-4-1951 by the City Civil Court. It was obviously given when the landlady filed an execution application on 21-3-1951. In between the filing of the execution application and the expiry of the extended time for delivery of possession, a new legislation viz. Act 8 of 1951 came into force on 1-5-1951. That Act amended the original Act 15 of 1946 as amended by further Acts. By the amendment of 1951 several new provisions were added to the existing Act.

The relevant provisions which are material to this petition are those relating to Ss. 7 (3A), 12B, 18 and 20. Under S. 7(3A) it was provided that no order for eviction shall be passed under sub-s. (3) (1) against any tenant who is engaged in any employment or class of employment notified by the State Government as an essential service for the purpose of this sub-section, unless the landlord is himself engaged in any employment or class of employment which has been so notified. In this case it is common ground that the petitioner is engaged in an employment notified by the State Government as an essential service, he being employed in the High Court as a sergeant of the High Court.

The next section that is relevant is the one contained in S. 12B which gives the High Court and the District Court power to revise, on the application of any aggrieved party, any order passed or proceedings taken under the Act by the authority, either the Rent Controller or the executing authority. There is an explanation to this section which is also very relevant for the purpose of this petition and that explanation reads:

"The jurisdiction of the High Court or District Court under this section shall extend also to orders passed on proceedings taken at any time within six months before the commencement of the Madras Buildings (Lease and Rent Control) Amending Act, 1951."

The next section which is relevant is S. 18 but I do not think I need extract it here ; but the more important section that is very material is the one enacted as S. 20 which is to the following effect:

"Any rule or order made or deemed or purporting to have been made, any decision or direction given or deemed or purporting to have been given, any notification issued or deemed or purporting to have been issued, any action or proceeding taken or deemed or purporting to have been taken, or anything done or deemed or purporting to have been done.....shall be deemed to be a rule or order made, decision or direction given, notification issued, action or proceeding taken, or thing done, under the corresponding provisions of this Act."

When E. P. No. 862 of 1951 was pending before the executing Court the tenant put in a petition E. A. No. 1772 of 1951 on 16-5-1951 praying that the Court may be pleased to cancel the warrant issued in E. A. No. 862 of 1951 on the ground that no order of eviction should be passed against

him by virtue of the new provision under S. 7 (3A). His contention was that on a proper interpretation of S. 7(1) wherein it was stated that a tenant shall not be evicted whether in execution of a decree or otherwise except in accordance with the provisions of this section and while S. 7(3A) stated that no order for eviction shall be passed under sub-s. (3) against any tenant who has been notified by the State Government to be employed in an essential service, the order was unexecutable as against him and therefore the warrant should be cancelled.

The learned City Civil Judge took the view that S. 7(1) of the Act refers only to eviction in execution of decrees and the decision in the case or order of eviction having been passed prior to the coming into force of Act 8 of 1951 there was no justification for him to cancel the order directing delivery of possession against the tenant. Against that order this revision petition has been preferred by the tenant.

(3) The contention that is now raised before me by the learned counsel for the petitioner is that the order of the learned City Civil Judge is not sustainable by reason of the very provisions which he has failed to consider and whose effect he has simply brushed aside by stating that no reliance can be placed on S. 7(1) of the Act. That section does not merely contemplate eviction in execution of a decree but also contemplate eviction by other means and the word "otherwise" would certainly include orders by the Rent Controller as well. Even under orders passed by the Rent Controller, if eviction is to take place it must be in accordance only with the provisions laid down in S. 7(1) and one of the provisions laid down in the amended S. 7(3A) states that an employee who is notified to be of an 'essential service' cannot be evicted.

The question is whether the City Civil Court, which is only executing an order of the Rent Controller passed long prior to the coming into force of the Act, can take notice of this statutory prohibition against eviction of an employee notified to belong to an essential service and pronounce that the order is not executable against such an employee. It is the contention of the learned counsel for the respondent that the City Civil Court, being simply an executing court, under S. 9 of the Act and being called upon to execute every order made under S.7, or S. 8 and every order passed on appeal under S. 12, or in revision under S. 12B, as if it was a decree passed by the execution Court itself, will not be entitled to go behind the order of the Rent Controller wherein eviction of the tenant has already been ordered. It is the application of this section that is now in dispute.

It has no doubt to be observed in the first instance that this civil revision petition is only against the order of the City Civil Judge passed on the application of the tenant in which the applicant claimed that he was entitled to the benefit of the statutory prohibition that has been enacted under S. 7(3A) and that the execution Court should take notice of it. But actually the learned City Civil Judge has not proceeded on this simple point that as an executing Court it is not possible for him to hear an objection raised by the tenant which according to the learned counsel for the respondent should have been raised before the Rent Controller. The reasoning given by the learned Judge is different from the point that has now been raised by the learned counsel for the respondent before me.

The point stressed by the learned counsel for the petitioner on the other hand is that though the order of the Rent Controller which was passed prior to the coming into force of Act 8 of 1951 might have been valid, still no proceeding could be taken under that order in view of the new S. 7(3A) that has been enacted and that by virtue of that section the order pronounced by the Rent Controller has become unexecutable, and therefore the learned City Civil Judge was not entitled to execute an order which had by law become void or illegal and by reason of that new law which has given the benefit to the tenant, the tenant cannot be asked to deliver vacant possession of the property in question. He further contends that he has acquired a statutory protection by virtue of the new section and therefore the executing Court was bound to consider the validity of the order originally passed and then give the tenant the protection under the new section.

I think there is force in the contention of the petitioner's advocate when he says that the order which had been sought to be executed by the respondent was no more capable of being executed by virtue of the new law which has therefore become a nullity. His further contention is that under S. 24 of the Act any application made, appeal preferred or other proceeding instituted under the Act and pending at the commencement of Act 8 of 1951 shall be disposed of as if Act 8 of 1951 had been in force at the time when such application, appeal or proceeding was made, preferred or instituted. The effect of this section is that the application made by the petitioner should be deemed to have been made under this Act and the proceeding instituted by the respondent for evicting the tenant should also be deemed to have been pending at the time Act 8 of 1951 came into force and the application of the tenant and the landlady will have to be disposed of as if they were made under the Act as was amended by Act 8 of 1951 under which the tenant was given the protection that in so far as he is an employee in an essential service notified by the State Government, the eviction order shall not be executed against him.

(4) It may be that the City Civil Court, proceeding with the execution, was not quite competent to go into this question as to whether S. 7 (3-A) would apply to the tenant and whether he should get protection under that Act. Nevertheless when the application was made contesting that the order passed by the Rent Controller was not competent & was not capable of being executed, it was certainly open to the learned City Civil Judge to go into the question and say that an order which was not in accordance with the new section was no more executable.

(5) Even if the learned City Civil Judge was not in a position to pronounce on the validity of the order which was sought to be executed by the landlady against the tenant still in view of the fact that he failed to do so and a revision petition has been filed before this Court, in my view, on a reasonable construction of S. 12 B, this Court has got very wide powers to call for the records and then satisfy itself as to whether, not merely an original order passed by the Rent Controller but also any order passed by any executing Court was just or legal and was in accordance with law. The language of S. 12B gives ample power to the Court, when once the matter is before it, to call for and examine the records relating to any order passed or proceedings taken under the Act by such authority for the purpose of satisfying itself as to the legality, regularity or propriety of

such order or proceeding and pass such order in reference thereto as it thinks fit.

The present order is certainly one which has arisen in a proceeding which was filed by the landlady against the tenant. On an interpretation of S. 20 of the Amending Act, S. 7 (1), S. 7 (3A) and S. 12 B, it seems to me that it is within the province and competence of this Court to consider the entire matter in its full perspective and then do justice in the matter. In my opinion, in view of the retrospective effect of Act 8 of 1951 and the protection that has been afforded to the tenant by reason of S. 7 (3-A) and by virtue of the powers vested in this Court to satisfy itself as to whether the order of the Rent Controller or the subsequent order of the City Civil Judge in execution were competent or otherwise, I think it will be in the interests of justice that the Rent Controller's order as well as the order of the City Civil Judge should be set aside as not being competent and as being ultra vires of the sections referred to above.

(6) Two decisions have been referred to, one reported in — 'Poonamchand v. Venkataratnam Chetti', 1951-2-Mad. L. J. 531 and the other in — 'Satyanarayana v. Venkatarattamma', 1951-2-Mad. L. J. 477. It is not necessary for me to discuss the reasonings given in these two decisions but in my view the reasoning adopted in—'Satyanarayana v. Venkatarattamma', 1951-2-Mad. L. J. 477 would attract itself to the facts of this case to some extent and the interpretation given therein of S. 20 of the Amending Act 8 of 1951 is applicable to the facts of this case. I respectfully agree with that interpretation. In fact in — 'C. R. P. No. 546 of 1951 (Mad) decided by me I came to the same conclusion as the Bench in — 'Satyanarayana v. Venkatarattamma', 1951-2-Mad. LJ 477 though this decision had not been brought to my notice while I was disposing of that revision petition.

The learned counsel for the respondent attempted to make out that the tenant is trying to wriggle out from the original order passed by the Rent Controller by reason of the new S. 7 (3A). It is no question of wriggling out from the decision of the Rent Controller which at that time should be stated to have been very correctly given, but then by virtue of subsequent proceedings which are said to be pending and by virtue of the operation of S. 20, a statutory right which has become vested in the tenant cannot be denied to him even if it be as contended by the learned counsel for the respondent that it was a consent order. A reading of the order passed by the Rent Controller does not however convince me that it could be said to be a consent order. Eviction is ordered irrespective of consent in that order; but the consent seems to apply only to the question of the time within which delivery of possession had to be made. For, the order seems to be clear that the question of consent has application only to the period of time when delivery of possession has to be given. But the order for eviction is independently of that consent.

A feeble attempt was also made to show that there was an estoppel under S. 115, Evidence Act. I do not think I need dilate on that. A further point raised by the learned counsel for the respondent was that the order of the Rent Controller having been passed on 7-9-1950 and Act 8 of 1951 having come into force on 1-5-1951, the order was not within six months contemplated under S. 12-B in order to entitle its consideration by this court in revision. I do not think there is much point in that contention for by reason of S. 20 of the Amending Act and also S. 18 of the Act the petition for execution as well as the petition for the cancellation of the warrant could be taken as actions under the Act and they are respectively on 21-3-1951 and 16-5-1951, so that the proceeding which can be taken to have been commenced, or pending, at the time when Act 8 of 1951 came into force are still within six months' period referred to in S. 12B.

In this view I think the learned City Civil Judge was not correct in seeking to execute the order by refusing to cancel the warrant issued against the tenant. The tenant, in my opinion, is entitled to the benefit of S. 7 (3A) and both the Rent Controller's order as well as the order of the learned City Civil Judge will not be of any avail against him. The order of the Rent Controller cannot be executed in the face of S. 7 (3A) of the Act.

(7) In the result this petition is allowed with costs throughout.

B/ V.R.B. **Petition allowed.**

A. I. R. 1953 MADRAS 380 (Vol. 40, C. N. 136)

RAJAMANNAR C. J.
AND VENKATARAMA AIYAR J.

V. K. Kumaraswami Chettiar and others, Appellants v. P. A. S. V. Karuppuswami Mooppanar, Respondent.

Letters Patent Appeals Nos. 67 and 68 of 1949, D/- 28-3-1952, against the judgment of the High Court in S. A. Nos. 464 and 465 of 1946, D/- 19-1-1949.

(a) **Sale of Goods Act (1930), Ss. 4 and 12 — Construction of contract for sale of goods — "Despatch August 1943" — Meaning of.**

Where a contract of sale of goods is reduced to writing, the entire contract must be looked into for ascertaining what was agreed to be sold. At the same time, when certain words which are contended to be part of the description do not occur where they might naturally be expected to, as where there is a heading expressly provided for it, it is not unreasonable to require that it should plainly and clearly appear that those words were intended to be words of description.

The parties entered into an agreement under which the seller agreed to sell and deliver ten bales of yarn to the buyer in August 1943. The agreement recited that "the buyer agrees to purchase subject to conditions and terms noted below". Of the four conditions and terms two were: "Description — 20½ x 10 Harvey Mills Yarn; Despatch — August 1943. Cash before delivery. Subject to the terms and conditions above the Mills, Madura godown delivery". In a suit for damages for breach of this agreement the buyer contended that the operation of the despatch condition was not exhausted by being read as signifying delivery by the seller in August and that in addition it could also bear the meaning that the goods must have been despatched by the Mills in August.

Held (1) that the words "Despatch August 1943" in their setting in the agreement referred to the despatch by the seller and not by the Mills; (Para 5)

(2) that even if the words "Despatch August" meant despatch by the Mills in August, still they could not be regarded

as forming part of the description of the goods but that they referred only to the time of delivery by the seller: 143 ER 369; AIR 1925 Mad 1290, Rel. on; (1877) 2 AC 455; (1901) 1 KB 608; 36 Com C 17; (1937) 4 All ER 371; (1921) 3 KB 435, Not Applied. (Para 8)

Anno: S. G. Act, S. 4 N. 5; S. 12 N. 1.

(b) Contract Act (1872), S. 39 — Section 39 applies to executory contract only.

Section 39 applies only when there is something to be performed under the contract, that is, it applies only to an executory contract.

The principle underlying the section that it is open to one party to keep the contract alive can have application only when the contract is executory or where there is still something to be performed under the contract. It can have no application where time for performance has arrived and there has been a breach. When a contract has been broken, it is dead and there is nothing which could thereafter be kept alive. Even if the parties subsequently come to an agreement in respect of the same subject-matter it is in law a new contract. Thus, there is a fundamental difference between a refusal to perform a contract before performance has become due and a failure to perform it after it has become due: AIR 1924 Bom 247; 4 Cal 252; AIR 1944 Pat 3, Rel. on; 1942 AC 356; (1865) 159 ER 650, Expl.; AIR 1943 PC 34, Disting. (Paras 12, 15)

Anno: Contract Act, S. 39 N. 1.

(c) Interpretation of Statutes — Illustrations to section — Illustrations to a section are valuable guides in ascertaining the meaning of a section. **(Para 15)**

Anno: C.P.C., Pre. N. 12.

(d) Contract Act (1872), S. 38 — Performance of executory contract — Exercise of option.

When an option, allowed for the performance of an executory contract and embodied in an agreement of sale, is exercised by one party to the agreement and assented by the other it becomes irrevocable. There is no reason why it should be otherwise when the assent to the exercise of the option is given at the time of the agreement and as part of it. (Para 18)

Anno: Cont. Act, S. 38 N. 1.

V. Meenakshisundaram, for Appellants; N. Rajagopala Iyengar and K. Subramanyam, for Respondent.

REFERENCES: Courtwise/Chronological/ Paras

('16) 43 Cal 493: (AIR 1915 PC 48)	17
('16) 1916-2 AC 575: (AIR 1916 PC 242)	15
('43) 1943-2 Mad LJ 369: (AIR 1943 PC 34)	15, 17
('23) 47 Bom 924: (AIR 1924 Bom 247)	13
('46) AIR 1946 Bom 1: (ILR (1946) Bom 218)	17
('79) 4 Cal 252: (3 Cal LR 287)	15
('27) 8 Lah 501: (AIR 1927 Lah 693)	19
('14) 37 Mad 412: (AIR 1914 Mad 573)	17
('25) 91 Ind Cas 580: (AIR 1925 Mad 1290)	8
('43) 22 Pat 306: (AIR 1944 Pat 3)	16
(1877) 2 AC 455: (46 LJQB 561)	6, 7, 8
(1919) AC 16: (88 LJKB 35)	10
(1942) AC 356: (111 LJKB 241)	14, 17
(1937) 4 All ER 371	6
36 Com C 17	5, 6, 7
(1853) 2 El & Bl 678: (118 ER 922)	10
(1855) 5 El & Bl 714: (119 ER 647)	10, 14
(1863) 14 CB (NS) 65: 143 ER 369	7
(1865) 159 ER 650: 3 H & C 558	19
(1872) 7 Ex 111	10
(1901) 1 KB 608: (70 LJKB 383)	6
(1921) 2 KB 369: (90 LJKB 671)	10
(1921) 3 KB 435: (90 LJKB 1233)	6
(1879) 4 QBD 500: (48 LJQB 65)	19
(1886) 16 QBD 460: (55 LJQB 162)	10

VENKATARAMA AIYAR J.:— These are appeals preferred under the Letters Patent against the judgment of Satyanarayana Rao J. in S. A. Nos. 464 and 465 of 1946 whereby he reversed the judgment of the District Judge of Mathurai in A. S. Nos. 294 and 295 of 1944 which in turn had reversed the judgment of the Subordinate Judge of Mathurai in O. S. No. 100 of 1943 and No. 82 of 1943. The appellants in this Court were the plaintiffs in O. S. No. 100 of 1943, Sub-Court, Mathurai and the suit was for damages for non-acceptance of goods under a contract dated 13-5-1943. The defendant in this suit filed O. S No. 82 of 1943 in the Sub-Court, at Mathurai, against the plaintiffs in O. S. No. 100 of 1943 claiming damages for non-acceptance of goods under contract dated 3-6-1943. Both the suits were heard together and disposed of by a common judgment and so were the appeals in the District Court and in this Court.

(2) The facts material for the purpose of these appeals are these: Both the parties are prominent merchants in Mathurai doing business in yarn. On 13-5-1943 they entered into an agreement, Ex. P. 1. under which the appellants agreed to sell and deliver ten bales of yarn to the respondent in August 1943. As the construction of this contract is one of the main points for determination in these appeals it is necessary to set out its terms in extenso:

CONTRACT FORM

Dated 13-5-1943

Name of the seller : V. K. Ramaswamy Chettiar & Sons, Madurai, M. D. 87

Name of buyer : P. A. S. V. Karuppasami Moopanar & Co. Madurai, M. D No. 29

Sold through broker : C. A. Mathavachari.

The buyer agrees to purchase subject to conditions and terms noted below the following goods & accepts the seller's godown delivery at seller's option between the first and last day of the below mentioned month and to pay the full value for the same before delivery and to accept the goods even if any delay is made for any reason by the sellers in giving delivery.

Description	... ...	$20\frac{1}{2} \times 10$ Harvey Mills Yarn
Quantity	... ...	(10) ten bales each containing 40 bundles of 10 lbs.
Price.	... ...	Rs. 27-12-0 twenty seven, annas twelve only net per bundle.
Despatch	... ...	August 1943. Cash before delivery of the bales. Subject to the terms and conditions above the Mills, Madura godown delivery.

The respondent paid an advance of Rs. 1100 under this contract. Vide Ex. P. 2. On 3-6-1943 there was another agreement between the parties under which the respondent agreed to sell and deliver to the appellants five bales in July 1943 Ex. P. 18. On 2-8-1943 the appellants gave notice to the respondent that ten bales of yarn were ready, that he might pay for and take delivery of them in accordance with the contract dated 13-5-1943, Ex. P. 3. The respondent neither replied to this notice nor did he make any attempt to

pay for the goods and take delivery. On 26(16?)-8-1943 the appellant sent a further notice, Ex. P. 4. Therein it was stated that after the notice, Ex. P. 3, there was an agreement between the parties on 3-8-1943 under which five bales which had to be delivered to the appellants under Ex. P. 18 were adjusted out of the ten bales which had to be delivered by them and that the respondent was to take delivery of the remaining five bales before 20-8-1943. The notice called upon him to take delivery of the goods under this agreement. The respondent replied to this notice by Ex. P. 5 dated 30-8-1943. To understand the attitude taken up by the respondent in this reply it should be stated that on 19-8-1943 the Textile Commissioner, acting under the Yarn Control Order issued under R. 81(2), Defence of India Rules, published a statement fixing the maximum price for yarn and on 31-8-1943 there was a formal statutory notification on the lines of the statement and it was published on 4-8-1943. The ceiling prices fixed under this statement were less than the contract rate under Ex. P. 1. In Ex. P. 5 the respondent denied that there was any such agreement on 3-8-1943 as was alleged in Ex. P. 4. This question is no longer material because in the suit both the parties disclaimed this arrangement and were content to have their rights determined on the basis of the original contracts. Then the notice stated that the plaintiffs had not "August ready bales" with them on 2-8-1943 when they sent Ex. P. 3 a complaint which was made for the first time; and offered to take delivery of the goods at the prices fixed in the statement of the Textile Commissioner. With reference to the five bales purchased by the appellants under Ex. P. 18, the notice stated that as they had failed to take delivery, the goods would be sold by public auction and that the appellants would be liable for damages resulting on such resale.

To appreciate this move of the respondent it must be mentioned that the yarn control statement dated 19-8-1943 operated only on contracts where deliveries remained to be made after 15-8-1943 and the result would be that while Ex. P. 18 would not be hit by it because delivery had to be made in July, Ex. P. 1 would be hit, if the contract was subsisting on 15-8-1943. The scheme of the respondent was obviously to recover from the appellants the full contract price for the five bales under Ex. P. 18 while paying them only the controlled price for the ten bales under Ex. P. 1. After further exchange of notices between the parties, two suits came to be filed on the two contracts. In O. S. No. 82 of 1943 the respondent claimed damages for breach of the contract dated 3-6-1943, Ex. P. 18 and also refund of the advance of Rs. 1100 paid under Ex. P. 1. In O. S. No. 100 of 1943 the appellants claimed damages for breach of the contract dated 13-5-1943, Ex. P. 1. In O. S. No. 82 of 1943 both the Courts below held that the appellants had broken the contract and that they would be liable in damages; and this question is no longer in issue between the parties. As for the claim for return of Rs. 1100 it is bound up with the decision in O. S. No. 100 of 1943 as to who broke the contract, Ex. P. 1 and L. P. A. No. 68 of 1949 relates to this.

(3) In L. P. A. No. 67 of 1949 the question that has to be decided is whether Ex. P. 1. was broken by the appellants or by the respondent. That in turn depends on the question whether the contract was alive on 15-8-1943. If it was, it is conceded by the appellants that it would fall within the mischief of yarn control order notifications; in which case the appellants would be in breach as they refused to deliver the goods on payment of the ceiling price as per the offer of the respondent in Ex. P. 5. It is likewise conceded on behalf of the respondent that if in fact the contract, Ex. P. 1 had been broken on 2-8-1943 and was not alive on 15-8-1943 the breach was on the part of the respondent. The contention of the appellants is that they had made a proper tender of the goods on 2-8-1943 under Ex. P. 3, that the respondent refused to accept the same and thereby committed breach of the contract and that the contract was not subsisting on 15-8-1943. The respondent contends firstly that the goods tendered under Ex. P. 3 were not in accordance with the contract and that there was no proper tender; & secondly that even if there was a proper tender of the goods on 2-8-1943 and the respondent was in default in not accepting them, the appellants did not elect to put an end to the contract but that it was kept alive and was subsisting on 15-8-1943. These are the two questions that arise for determination.

(4) On the first question the contention of the respondent is that he agreed under the contract, Ex. P. 1, to purchase only yarn which was to be despatched from the Madura Mills in August 1943, that the goods actually tendered on 2-8-1943 were not goods despatched by the Mills in August 1943 and that, therefore, they were not in accordance with the contract. If this contention is well-founded, there is no question but that there was no proper tender by the appellants on 2-8-1943. The appellants did not deny that the goods tendered were not despatched by the Madura Mills in Aug. 1943 but their contention was that there was no agreement that the goods to be delivered under Ex. P. 1, should have been goods despatched by the Madura Mills in August 1943. The decision on this question turns on the interpretation to be put on the terms of Ex. P. 1.

(5) The contract is in printed form with particulars noted in handwriting against the headings: Description, quantity, price, despatch. Under the heading "description" what is noted is: 20½ x 10 — Harvey Mills yarn. There are no words here qualifying description such as "despatched from the mills in August". It is argued for the respondent that on a question as to what was the subject-matter of the contract the conclusion must be reached on a reading of the document as a whole and not merely on what is expressly described as "description." In —'Montague L. Meyer v. Osakeyhtio Carelia Timber Co Ltd', 36 Com. C. 17, the contract described the timber sold as "Wood goods, hereinafter specified" and "to be ready for shipment on 15-6-1928". Though the goods tendered were in accordance with the specifications they were not "ready for shipment on 15-6-1928", but only in 1929. It was held that the words "Ready for shipment on 15-6-1928", were words of description and not a mere warranty. We agree that the entire contract must be looked into for ascertaining what was agreed to be sold but at the same time when certain words which are contended to be part of the description do not occur where they might naturally be expected to as where there is a heading expressly provided for it, it is not unreasonable to require that it should plainly and clearly appear that those words were intended to be words of description. The words relied on by the respondent as forming part of the description are set out against the heading "despatch". The words, it will be noted are not "August despatch" — but "despatch August 1943". In its setting the words must refer to despatch by the seller and not by the mills. What is more, there

is no other provision in the contract mentioning when the seller is to deliver. In the opening words which are in print, it is stated that the goods are to be delivered at the option of the seller between the first and last day of the below mentioned month. Apart from the words "Despatch August 1943" there is no other place where the month is mentioned. Therefore the words must refer to delivery by the seller as mentioned in the opening words. If that is so, the words in question mean that the seller has to deliver the goods in August 1943. It is conceded by Mr. N. Rajagopala Aiyangar, the learned advocate for the respondent that those words must bear that meaning. Otherwise, as already stated there are no other words mentioning when the seller is to deliver the goods. But he argues that the operation of the words is not exhausted by being read as signifying delivery by the seller in August and that in addition the words can also bear the meaning that the goods must have been despatched by the Mills in August. That is to say the words serve a double purpose. They at once describe the goods which were the subject-matter of the sale and also prescribe the time when have got to be delivered. But this is clearly opposed to all sound canons of construction. In the language of Mimamsa writers

"सकृदुच्चरितः शब्दः सकृदेवार्थं गमति"

"A word used once yields sense only once". Reliance was placed on cl. 6 of the printed conditions which runs as follows:

> "In case of Vaida or despatch of Indian mills goods, the terms and conditions of the Mills whose goods are sold shall be binding on the buyers".

It is argued that the despatch in this clause must mean despatch by the mills and it should, therefore, bear the same meaning in the body of the contract. But clause 6 is in printed form and is general in its character and it cannot be read so as to conflict with what is set out in the body of the document in handwriting. Moreover even on this construction the objection still remains that the words "despatch August" must be read as referring at the same time both to delivery by the seller and by the mills. With reference to this reasoning it must be stated that the learned Judge appears to have been under the impression that the time for delivery had been fixed in the opening words in Ex. P. 1 for he observes "The time of delivery was also fixed by the first clause as between the first and last day of August 1943." This. it is conceded, is erroneous and deprives the reasoning on which the judgment rests of much of its force.

(6) In this view it becomes unnecessary to consider at any length the authorities cited on either side on the construction of other contracts as to whether the particular words in those contracts were words of description so as to constitute a condition that the goods must conform to that description or whether they were mere descriptive statements which might at best amount to a warranty. Writing on this subject Benjamin remarks:

> "The rules of law on this subject are very subtle and perplexing and the decisions so numerous and in many instances so contradictory and the distinctions so refined that no attempt can here be made to do more than enunciate a few general principles".

(Benjamin on Sale, 8th Edn. p. 554)

One of those principles is that terms as to time or place or mode of shipment are in general, construed as forming part of the description of the goods and treated as conditions. Vide Ss. 6 and 7 of Chapter II at pages 591 to 598. In — 'Bowes v. Shand', (1877) 2 A. C. 455 the contract was for supply of 300 tons of "Madras rice to be shipped at Madras or coast during the months of March and April 1874 per 'Rajah of Cochin'". In fact the goods were shipped in February 1874. The purchaser refused to accept the goods. In an action for damages for non-acceptance it was held that "shipment in March and April" was part of the description of the goods and that the tendered goods were not in accordance with the contract. In — 'Vigers Bros v. Sanderson Bros', (1901) 1-K. B. 608 the contract was for the sale of laths to be "about the specification stated below". The goods were not of the specified length and were rejected by the purchasers. It was held that they were not liable for damages for non-acceptance. This was followed in the case of — 'Montague L. Meyer v. Osakethtio Carelia Timber Co, Ltd, 36 Com. C. 17, already cited where the words "ready for shipment on 15-6-1928" were held to be part of the description of the goods. In — 'Wilson v. Wright', (1937) 4 All. E. R. 371 the contract was for the sale of potatoes to be shipped by "next steamer". They were not sent by the next steamer and it was held that the purchaser was entitled to reject them. In — 'J. Aron & Co. Comptoir Wegmort', (1921) 3 K. B. 435 the contract provided for "shipment by steamer or steamers from U.S.A. ports during October 1919". The goods were actually shipped in November 1919. There was a clause in the agreement that the purchaser was not to reject the goods on account of "difference in value from description "specified". It was held that words "shipment in October" were more than description of goods; that they amounted to a condition and that the purchaser was not precluded by the clause aforesaid from rejecting the goods. It is argued for the respondent that adopting the same rule of construction the words "despatch August" if construed as meaning goods despatched by the mills in August must be held to be words of description and that the tender of goods which are not despatched by the Mills in August would not be in accordance with the contract.

(7) We consider that the principle underlying the decisions cited on behalf of the respondents has no application to the present case. That principle is stated by Benjamin in the following terms:

> "If time appear on a fair consideration of the language and the circumstances to be of the essence of the contract stipulations in regard to it will be held conditions precedent". (Benjamin on Sales, 8th Edn. p. 591).

In — 'Bowes v. Shand', (1877) 2 A. C. 455, in construing the terms as to "shipment in February and March" as words of description Lord Cairns observed as follows:

> "It is quite obvious that merchants making contracts for the purchase of rice, contract which oblige them to pay in a certain manner for the rice purchased, and to be ready with the funds for making that payment, may well be desirous both that the rice should be forthcoming to them not later than a certain time, and also that the rice shall not be forthcoming to them at a time earlier than it suits them to be ready with funds for its payment. Therefore, it may well be that a merchant making a number of rice contracts ranging over several months of the year will be desirous of expressing that the rice shall come forward during such times, and

at such intervals of time, as that it will be convenient for him to make the payments and it may well be that the merchant shall consider that he has obtained that end if he provides for the shipment of rice during a particular month, or during particular months & that he will know that provided he has made that stipulation the rice will not be forthcoming at a time when it will be inconvenient for him to provide the money for the payment".

In —'Montague L. Mayer v. Osakeythtio Carelia Timber Co, Ltd', 36 Com. C. 17 at 24 where the effect of the words "ready for shipment on 15-6-1928" was construed, Greer L. J. stated the law thus:

"It is old law in this country as applied to commercial contracts that the dates, at any rate so far as they are an important part and are incorporated in a description of the goods, are of the essence of the contract and it seems to me that as it has been decided that the date of the shipment of the goods is of the essence of the contract, when the contract deals not merely with the date of shipment but with the date of the readiness for shipment, that the latter date is as much of the essence of the contract as it was held that the date of shipment was in the well known case of — 'Bowes v. Shand', (1877) 2 A. C. 455."

(8) These cases are illustrations of the principle stated by Mr. Benjamin that the time of shipment is regarded as of the essence of the contract. That principle can have no application to the facts of the present case. Here it is the seller that has to deliver the goods to the respondent, and not the mills; and the stipulation as to the time of performance by the seller is mentioned as the month of August with an option to deliver on any date between the first and the 31st. The date of despatch of the goods by the mills to the seller has no bearing on the performance by the seller of his obligation. Nor is it suggested that there is any difference between the goods despatched by the Mills in July and those despatched in August. Indeed it is admitted by P. W. 1 that though the goods agreed to be sold under the contract, Ex. P. 18, between the same parties mentions July despatch the goods tendered were actually acquired on 12-8-1943 and that clearly shows that the despatch by the Mills in any particular month was not regarded as of the essence of the contract. If it had been established that there was any such difference in quality between the goods despatched in July and those despatched in August different considerations might have arisen. In — 'Hopkins v. Hitchcock', (1863) 14 C. B. (N. S.) 65: 143 E. R. 369 the contract was for the sale of iron bars with marks "S. & H. Crown". These goods were manufactured by a firm called Snowden and Hopkins and sold with the marks "S. & H. Crown". Then Snowden retired and firm's name was chaned to Hopkins & Co. and the marks on the goods were altered into "H. & Co". The seller tendered the goods with marks "H and Co. Crown". But they were rejected by the purchasers on the ground that they did not bear "S. & H Crown" and were, therefore, not in accordance with the description. The jury found that the goods were of the same quality and on that it was held that there was a proper tender. Erle C. J. observed at page 371.

"I am quite aware of the extreme importance in all contracts of words descriptive of things sold; they may and frequently do amount to a condition and may be most essential. It is upon the construction of the words of this contract that I rely. I think it is not a contract for iron of a particular brand but for iron of a known quality and that the plaintiff tendered the article for which the defendant contracted".

With this opinion Willes, Byle and Keating JJ. agreed. On the facts, the decision in — 'Hopkins v. Hitchcock', (1863) 143 E. R. 369 would appear to be nearer the present case than the authorities cited on behalf of the respondent. In — 'Subbier v. Venkatachalapathi Aiyar', 91 Ind. Cas. 580 (Mad) the contract was for the sale of goods which the seller was to purchase from the Madura Mills and notice was required to be given to the purchaser on "arrival of the bale or bales". The seller gave notice but at that time he had not the bales. It was contended that there was not a proper tender as the arrival of the bales was part of the description of the goods. In overruling this contention Ramesam J. observed as follows:

"Ex. A cannot be construed as if the words 'arrival of bale or bales' amount to a description of the goods similar to the words 'July or August shipments' in — 'Bowes v. Shand', (1877) 2 A. C. 455".

Even if the words "despatch August" mean despatch by the mills in August, we should be inclined to hold that without more, they cannot be regarded as forming part of the description of the goods but as already stated we think that those words refer only to the time of delivery by the seller and have no reference to the despatch of goods by the mills to the seller. We accordingly hold that there was a proper tender of the goods by the plaintiffs under Ex. P. 3 and that the respondent is in breach in not taking delivery of them.

(9) The question that next arises for decision is whether the contract, Ex. P. 1 was subsisting on 15-8-1943 notwithstanding the refusal by the respondent to take delivery of the goods on 2-8-1943. It is contended by Mr. N. Rajagopala Aiyangar that even if there was a proper tender on 2-8-1943 the mere non-acceptance of the goods by the respondent did not by itself and without more constitute a breach of the agreement; that the refusal to take delivery amounted only to a repudiation giving a right to the seller to put an end to the contract under S. 39, Contract Act; that the plaintiff did not elect to do so with the result that the contract was kept alive for the benefit of both the parties; that accordingly the defendant was entitled to claim delivery as he did on 30-8-1943 and as the appellants then refused to deliver the goods they were the party in breach and not the defendant.

(10) This argument is based on a misconception of the true scope of S. 39, Contract Act, and of the principles on which it is based. Where a contract is to be performed at a future date and before the time for performance arrives one of the parties gives notice to the other party that he is not willing to perform his part of the agreement, then there is what has been called an "anticipatory breach" of the contract by him. This expression was characterised by Lord Wrenbury as unfortunate in — 'Bradley v. Newsom', (1919) AC 16, because strictly speaking there can be no breach in praesenti of an obligation which is to be performed in future. The substance of the matter, however, is that when a party refuses to perform his part of the agreement before the due date, he in effect throws up the contract; and then the question is what the other party might then do. He might either accept the repudiation and treat the contract as broken

then and there and proceed to claim damages or he might, notwithstanding the repudiation by the other party, get ready for performing his part of the contract in due course, offer performance when the time for it arrives and on the refusal by the other party claim damages for breach of the contract by him. In that case he keeps the contract alive for the benefit of both the parties. This was laid down by Cockburn C. J. in the leading case on the subject, — 'Frost v. Knight', (1872) 7 Ex. 111. Vide also — 'Hochster v. De.ator', (1853) 2 El & Bl 678, — 'Avery v. Bowden', (1855) 5 E & B 714, — Johnstone v. Milling', (1886) 16 QBD 460 and — 'Millet v. Van Heek & Co.', (1921) 2 KB 369.

(11) A repudiation before the due date is in the nature of an offer by a party to a concluded contract to vary the terms thereof. If accepted there comes into existence a new contract in supersession of the old one; if not accepted, the original contract continues to remain in force with the rights and obligations of either party unaffected. By its very nature, this situation is possible only when the contract is executory and the time for performance has not arrived. The principle has also been applied to continuing contract performance under which is in progress and has not been completed; the most familiar example being where the goods are to be delivered in instalments spread over several months. In such a case when a party refuses to deliver the future instalments, the other party has the option either to accept the repudiation and put an end to the contract with reference to the future instalments and claim the damages or keep it alive and claim performance when the instalments actually fall due. But where the time for performance has arrived and one party has actually offered to perform his part, then the other party has to perform his portion of the contract; in default the contract is broken and comes to an end. It is a well recognised juristic concept that when a contract is broken it is discharged giving rise to a new obligation which the law imposes on the party in default to pay damages.

> "A breach or default in performance discharges a contract wholly or in part in the sense that it converts it into a right of action for damages or pecuniary compensation."
> (Vide Leake on Contracts, page 671, 8th Edn).

Mr. Anson enumerates five modes by which a contract may be discharged and one of them is breach.

> "It may be broken; upon this a new obligation connects the parties, a right of action possessed by the one against the other" ..... and "if one of two parties to a contract breaks the obligation which the contract imposes, a new obligation will in every case arise, a right of action conferred upon the party injured by the breach." (Vide Anson's Law of Contracts, 8th Edn. p. 304 and p. 318).

(12) Therefore the principle that it is open to one party to keep the contract alive can have application only when the contract is executory or where there is still something to be performed under the contract. It can have no application where time for performance has arrived and there has been a breach. When a contract has been broken it is dead and there is nothing which could thereafter be kept alive. Even if the parties subsequently come to an agreement in respect of the same subject-matter it is in law a new contract. Thus there is a fundamental difference between a refusal to perform a contract before performance has become due and a failure to perform it after it has become due.

(13) In — 'Steel Bros and Co. Ltd. v. Dayal Khatav & Co.', 47 Bom 924, emphasising this distinction Mullah J. observed as follows:

> "A good deal was said on both sides as to the rule of 'anticipatory breach' in its relation to C. I. F. contracts. It is now elementary law that where in a contract for sale of goods a buyer clearly shows his intention not to be bound by it and repudiates the contract it amounts to a breach of the contract (Indian Contract Act, S. 120). In such a case the seller may treat the notice of intention as inoperative, in which case he keeps the contract alive for the benefit of the buyer as well as his own or he may treat the repudiation as wrongful putting an end to the contract and may at once bring his action as on a breach of it. (Indian Contract Act, S. 39). But the repudiation which absolves the seller from the performance of conditions precedent must have been made before the due date for the performance of the contract. This date in the case of C. I. F. contracts is the date on which the documents ought to have been tendered. A repudiation made after that date does not operate as a waiver of the performance of the conditions precedent on the part of the seller."

(14) The decision in favour of the respondent on this part of the case is based on certain observations occurring in the speech of Viscount Simons in — 'Heyman v. Darwins Ltd.', 1942 AC 356. In that case the appellants were appointed selling agents for the respondents for a minimum period of three years under an agreement dated 1-4-1938. Disputes arose between the parties on the working of the agreement. On 7-11-1939 the respondents wrote to the appellants that if they could not agree to the terms they could cancel the agreement. On 21-12-1939 the appellants replied that the letter of the respondents dated 7-11-1939 amounted to a repudiation of the contract and commenced an action for damages. The respondents applied for stay of the action by virtue of an arbitration clause in the agreement. That was ordered. On appeal it was argued on behalf of the appellants that as the contract had been repudiated by the respondents the arbitration clause also fell to the ground. This argument was negatived. The decision by itself does not bear on the question now in issue but the law with reference to anticipatory breach was thus stated:

> "The first head of claim in the writ appears to be advanced on the view that the agreement is automatically terminated if one party repudiates it. That is not so .....If one party so acts or so expresses himself as to show that he does not mean to accept and discharge the obligations of a contract any further, the other party has an option as to the attitude he may take up. He may notwithstanding the so-called repudiation, insist on holding his co-contractor to the bargain and continue to tender due performance on his part: In that event the co-contractor has the opportunity of withdrawing from his false position and even if he does not, may escape ultimate liability because of some supervening event not due to his own fault which excuses or puts an end to further performance; a classic example of this is to be found in — 'Avery v. Bowder', (1855) 5 El & Bl 714. Alternatively the other party may rescind the contract or (as it is sometimes expressed) "accept the repudiation" by so acting as to make plain that in view of the wrongful

action of the party who has repudiated, he claims to treat the contract as at an end, in which case he can sue at once for damages .....But repudiation by one party standing alone does not terminate the contract. It takes two to end it, by repudiation on the one side and acceptance of the repudiation on the other."

It is on these passages that the judgment under appeal rests. But it will be seen that the contract there was for a period of three years and the repudiation was long before the period had expired. Thus it is a case of a premature repudiation of a continuing contract and as already mentioned the principles of anticipatory breach can be and have been applied in such cases so long as there is still something remaining to be performed under the contract. The observations quoted above do not carry the matter further than the limits of the previous authorities which are preferred to in the judgment and do not apply to a case where the time for performance in its entirety has matured, and default has been made.

(15) It is argued by Mr. N. Rajagopala Aiyangar that the rights of the parties must be determined solely with reference to the provisions of the Indian Contract Act; that S. 39 requires that when there is a repudiation or refusal to perform by one party, there must be acceptance of that refusal or repudiation by the other party and an election to put an end to the contract and that until that is done the contract is alive. But the language of S. 39, Contract Act, does not when carefully examined, lend any support to this contention. It runs as follows:

"When a party to a contract has refused to perform, or disabled himself from performing, his promise 'in its entirety the promisee may put an end to the contract, unless he has signified by words or conduct his acquiescence 'in its continuance'. "

It is argued that the words "has refused to perform" the contract would take in not merely repudiation before the due date but also refusal after performance has become due. But these words must be read along with the words "in its entirety" and "the promisee may put an end to the contract unless he has signified his acquiescence in its continuance." These words are not apt to describe the position when a contract has been broken. They can properly apply only when there is something to be performed under the contract. That is made clear by the illustrations which refer to continuing contracts under which there are obligations remaining to be performed. That illustrations to a section are valuable guides in ascertaining the meaning of a section is well settled. In — 'Mahomed Syedol Ariffin v. Yeoh ooi Gark', (1916) 2 AC 575 the Judicial Committee observed as follows:

"Illustrations appended to sections of a statute should be accepted if that can be done as being of relevance and value in construing the text; they should only be rejected as repugnant to the section as the last resort of construction.

Vide—'Muralidhar Chatterjee v. International Film Co. Ltd.', (1943) 2 Mad L J 369 at p. 373 and Maxwell on Interpretation of Statutes, page 46 (9th Edn). In — 'Sultanchand v. Schiller', 4 Cal 252 Garth C. J. explaining the scope of S. 39 observed that "this section only means to indicate what was the law in England and the law here before the Act was passed, namely, that where a party to a contract refuses altogether to perform or is disabled from performing his part of it the other side has a right to rescind it."

(16) In — 'Sultan Ahmed v. Maksad Hussain', 22 Pat 306 it was held by a Bench of the Patna High Court consisting of Fazl Ali C. J. and Sinha J. that S. 39 applied only to executory contracts and not to executed contracts.

(17) Considerable reliance was placed by the respondent on the decision of the Privy Council in — 'Muralidhar Chatterjee v. International Film Co.', (1943) 2 Mad LJ 369. There the appellant had entered into a contract with the respondents for distributing films in various areas and had paid a sum of Rs. 4000 as advance. On 1-12-1936 the appellant wrote a letter complaining that the defendants had committed several breaches of the contract and that he would have no more business dealings with them. After some correspondence the respondents accepted the repudiation by letter dated 21-1-1937. Then the plaintiff filed an action for damages for breach of contract and also for the return of the advance. It was found that the defendants had not broken the contract and on that finding the claim for damage was dismissed. With reference to the claim for return of advance it was contended by the defendants that the plaintiff who was in default could not recover the same; while the plaintiff contended that as the contract had been rescinded by the respondents on 21-1-1937 he was entitled to its return under S. 64, Contract Act. The Privy Council accepted this contention and held that the plaintiff was entitled to recover the advance amount and that the right of the defendants was to make a cross claim for damages against the appellants for breach of contract. The decision as such has no bearing on the point now under discussion but it is argued that the case was dealt with as one falling under S. 39, Contract Act, that the repudiation by the appellant contained in his letter dated 1-12-1936 was held to give a right to the respondents to avoid the contract and the letter dated 21-1-1937 was treated as an acceptance of the repudiation by them. In the same manner, contends Mr. N. Rajagopala Aiyangar, the failure of the respondent to take delivery of the goods on 2-3-1943 gave the appellants only a right to avoid the contract and they not having done that, the contract stood. But the agreement which the Privy Council had to consider in — 'Muralidhar Chatterjee v. International Film Ltd.', (1943) 2 Mad L. J. 369 was a continuing contract involving mutual obligations and is similar to the one which came before the House of Lords in — 'Heyman v. Darwins', (1942) A. C. 356. For the reasons already given, this decision cannot be taken as an authority for the contention that S. 39 applies even when there is a refusal to perform the contract after the time for performance has arrived.

On the other hand the decision in 'A. K. A. S. Jamal v. Moola Dawood Sons & Co.', 43 Cal 493 would clearly appear to negative such a contention. There, the contract was for the sale of certain shares and the date fixed for performance was 30-12-1911. On that date the shares were tendered to the defendants but they did not accept them. Then there was some further correspondence between the parties and ultimately the seller sent a notice on 28-2-1912 claiming damages, and the suit was filed in March 1912. The shares were subsequently sold by the plaintiff at a profit. On a question as to the quantum of damages the defendants claimed that the profits made by the seller subsequently by the sale of the shares should go in reduction of the claim. The Privy Council held that the contract was broken on 30-12-1911 when the plaintiffs tendered

the shares and the defendants refused to accept them; "Upon the breach by the purchaser his contractual right to the shares fell to the ground. There arose a right to damages; that the damages were to be ascertained on the basis of the market rate on 30-12-1911 and that subsequent rise or fall in the value of the shares would neither reduce nor increase the damages payable by the purchaser. If the contention of the respondent that a mere refusal to take delivery is only a repudiation and that it becomes a breach only when it is accepted by the seller is correct then the damages will have to be ascertained not as on the date when the purchaser refused to take delivery but on the later date when the seller chooses to accept it as a breach; and that such would be the logical result of his contention was conceded by the learned Advocate for the respondent. No authority was cited in support of that position. It is opposed to the decision in — 'Jamal v. Moola Dawood Sons & Co.', 43 Cal 493 where damages were fixed as on the date fixed for the performance, 30-12-1911 notwithstanding that there were negotiations going on between the parties and the final notice was given on 26-2-1912.

In — 'Muthiah Manigaran v. Lakku Reddiar', 37 Mad 412 the defendant had agreed to deliver cotton on 12-6-1909 but failed to do so. The plaintiff sent a notice to the defendant calling upon him to deliver the goods in September and again in October 1909. The defendant took no notice of them. The plaintiff claimed damages for non-delivery of goods on the basis of the market rate in October 1909 but it was held that in the absence of an agreement between the parties extending the time for performance the contract was broken on the date fixed for the performance and that the plaintiff was entitled to damages only as on that date. This decision is directly against the respondent, the only difference between that and the present case being that there it was an action by the purchaser for damages for non-delivery whereas here, it is an action by the seller for damages for non-acceptance and it is not contended that on principle there is any difference between the two. This decision was followed in — 'Anandram Mangturam v. Bholaram Tanumal', AIR 1946 Bom 1. There the contract was for the delivery of cloth before the end of February 1943. Only five bales were delivered and there was a failure to deliver the remaining 36 bales. Then there was correspondence between the parties and ultimately the plaintiff sent a notice on 28-7-1943 claiming damages. It was held that there having been no extension of time by agreement of parties, the contract was broken on 28-2-1943, that the damages should be ascertained as on that date and not on 28-7-1943 when the plaintiff claimed damages. This decision again is against the contentions of the respondent. We are accordingly of opinion that a contract must be held to be broken when one of the parties thereto refuses to perform his part on the date fixed for the performance, and no question of keeping it alive thereafter arises.

(18) It is finally contended that even on this view of the law there was no breach by the respondent because there was no date fixed for performance in Ex. P. 1. It will be remembered that the agreement provided that the sellers were to deliver the goods on a date between the 1st and 31st of August at their option and they exercised their option under Ex. P. 3 and called upon the respondent to take delivery on 2-8-1943. It is argued that any election made by the sellers is not final, that they themselves could go back upon it and if so the contract was not at an end on 2-8-1943 and must be held to be subsisting on 30-8-1943. It is difficult to see how it would make a difference in principle whether the contract itself fixed a particular date as the date for performance or whether it gave the option to one of the parties to fix the date for the performance. When once the option is exercised and a date is fixed it is as if the contract itself had fixed that date as the date for performance. It is conceded that when an option is exercised by one party and is assented to by the other it becomes irrevocable and no reason has been shown why it should be otherwise when the assent to the exercise of the option is given at the time of the agreement and as part of it. If the contention of the respondent is to be accepted then the clause conferring an option on the seller to determine when the delivery should be made has no meaning and serves no purpose.

(19) In — 'Gath v. Lees', (1865) 159 E. R. 650: 3 H. & C. 558, the plaintiff agreed to sell cotton "To be delivered at the seller's option in August or September 1864". The plaintiff gave notice that the cotton was ready in August but he failed to deliver according to the notice and tendered the goods in September. The defendant declined to take delivery and contended that the seller having exercised the option the contract became one for delivery in August and that it was broken by failure to deliver the goods in that month. This plea was accepted and the action was dismissed. This decision is directly in favour of the appellants. But the respondent relies on the discussion of this case in — 'Boorowman v. Free', (1879) 4 Q. B. D. 500. In that case the plaintiff agreed to sell "Cargo of mixed American maize" as per bills of lading by date between the 15th of May and 30th of June 1877. A tender made of the cargo by the seller was rejected by the purchaser for reasons which were held to be valid. Then the seller again delivered another cargo within the period mentioned in the contract. This was rejected by the defendant on the ground that the plaintiff was not entitled to make a fresh tender. In an action for damages for non-acceptance the Court held that the plaintiff was entitled to tender the goods in accordance with the contract at any time within the period fixed and the fact that he made an ineffectual tender earlier did not prevent him from making a proper tender in time. The defendant appears to have argued that if the seller was bound by his election when he has the option to fix the time for delivery, as was held in — 'Gath v. Lees', (1865) 159 E. R. 650, he was likewise bound by the tender once made and if that was not proper there was a breach of the contract. Referring to this case Bramwell L. J. remarked:

> "The defendants have relied on — 'Gath v. Lees', (1865) 159 E. R. 650, but the decision is distinguishable. In that case cotton was to be delivered at seller's option in August or September 1864. The seller elected to exercise the option in August and notice that it would be so exercised was accepted by the buyers. The seller had the right to exercise that option; but in this case the plaintiff exercised their option in an improper manner."

Brett L. J., however, observed

> "— 'Gath v. Lees', (1865) 159 E. R. 650 was not decided upon the doctrine of election, but upon the ground that the defendants, having acted upon the notice of the plaintiff, had altered their position for the worse."

But it is not clear from the report of the case in — 'Gath v. Lees', (1865) 159 E. R. 650 that this is the basis of the decision. Mr. Mellish argued on behalf of the seller that

"the plaintiff having the whole of the two months for the delivery of the cotton, does the circumstance of his having given the defendant notice that he was ready to deliver it in August, and having failed to do so, absolve the defendant from his contract? (Martin B: Your construction gives no meaning to the words "at seller's option". Lush on behalf of the purchaser contended "when the plaintiff exercised his option and gives notice that the cotton was ready for delivery on a certain date in August, the contract becomes a contract to deliver in August *(Martin B. — The seller could not give two notices. When the notice was given the buyer was bound to be ready with the money which he might have had difficulty in getting; then is the seller to say 'I will not deliver the cotton according to my notice but will put you off until next month")."

The headnote in the report that the plaintiff having exercised the option was bound to deliver the cotton in August appears to be correct. Cotton L. J. after observing that "if there had been an election within the terms of the contract it would have been binding on the defendants," distinguished — 'Gath v. Lees', (1865) 159 E. R. 650 as a case where the other party had altered his position by acting on the notice of the plaintiff and entering into sub-contracts; and that it was an equitable defence. It was not suggested in — 'Borrowman v. Free', (1879) 4 Q. B. D. 500, that if the notice had not been accepted by the purchaser in —'Gath v. Lees', (1865) 159 E. R. 650 the seller would not have been bound to give delivery in August or that he would have been entitled to tender the goods in September. There was no term giving an option for fixing a date for performance in — 'Borrowman v. Free', (1879) 4 Q. B. D. 500 and no decision was given as to the effect of the exercise of such an option where there was such a term. In Leake on "Law of Contracts" this decision is cited as authority for the position that

"a tender of goods not answering the description is not a final breach of the contract as the seller may still tender other goods answering the contract before the time of completion has elapsed".

Writing on the effect of a term in a contract conferring on either side an option to fix the date of performance, the same learned author writes as follows:

"An election once made is final and irrevocable, according to the maxim quod semel placuit in electionibus amplius displicere non potest."

The decision in — 'Gath v. Lees', (1865) 159 E. R. 650 is one of the authorities cited in support of this proposition. In Benjamin on "Sale" the effect of these two decisions is thus stated:

"It is submitted that in Gath v. Lees', (1865) 159 E. R. 650 the seller, having duly made and communicated his choice, was bound by it, unless the buyer himself had dissented; and that in— 'Borrowman v. Free', (1879) 4 Q.B.D. 500 the buyer's objection would have given the seller a 'locus paenitentiae' even if his first tender had been valid."

It may be added that in the present case we are not concerned with a promisor who having made an ineffectual tender wants to make a proper tender but a promisor who having made a proper tender affirms it and bases his claim for damages on it. No authority has been cited that on these facts it is open to the promisee to insist that the tender is not final. The decision in — 'Borrowman v. Free', (1879) 4 Q. B. D. 500, is no authority for it and the observations of Cotton L. J. quoted above are against it. The decision in — 'Phulchand Fatechand v. Jugal Kishore Gulab Singh', 8 Lah. 501 is similar to the one in — 'Borrowman v. Free', (1879) 4 Q. B. D. 500.

(20) The plaintiff had agreed to deliver the goods by 10-10-1918. On 3-10-1918 he wrote to the defendant to take delivery on certain conditions, which he had no right to impose and so the tender was not proper. On 10-10-1918 a proper and an unconditional tender was made but the defendant declined to accept it. It was contended on his behalf that the plaintiff had broken the contract on 3-10-1918 when he made an improper tender. This objection was overruled and it was held that the improper tender made on 30-10-1918 was no bar to the plaintiff making a proper tender in time. This decision again does not touch the point now under discussion.

(21) In the result both the defences raised by the respondent, namely, that there was no proper tender of goods on 2-8-1943 and that the contract was kept alive on 15-8-1943 must be overruled. The appellant will, therefore, be entitled to damages for breach of the contract, Ex. P. 1, and the advance of Rs. 1100 paid will go in reduction of the same. The appeals are accordingly allowed and the decrees of the District Court of Mathurai in A. S. Nos. 294 and 295 of 1944 are restored with costs throughout. Advocate's fee one set both in the second appeals and in these appeals.

B/V.S.B. Appeals allowed.

*This passage of Martin, B. comes in the argument made by Cohen in reply to the argument of Lush — Ed.

A. I. R. 1953 MADRAS 388 (Vol. 40, C. N. 137)

SOMASUNDARAM J.

Venkatachala Naicken, Petitioner v. The Panchayat Board, Ethapur, Respondent.

Criminal Revn. Case No. 702 and Cri. Revn. Petn. No. 696 of 1951, D/- 17-9-1952.

Madras Village Courts Act, 1888 (1 of 1889), S. 76 — Jurisdiction to compel one accused to produce another — (Criminal P. C. (1898), S. 343).

No Court has any jurisdiction to compel one accused to produce the other accused in the case. Such powers are not given to the Panchayat Court either by the Madras Village Courts Act or by the Code of Criminal Procedure. The accused is, therefore, justified in not answering any question regarding his not producing the other accused.

(Note: "This case is a good instance to show that in this country the Panchayat Courts ought not to be invested with criminal jurisdiction. They seem to be carried away by the local politics and the inimical feelings that they happen to entertain against persons.") (Para 1)

Anno: Cr. P. C., S. 343 N. 3 Pt. 4.

Miss Perween Amiruddin, for Petitioner; G. Gopalaswami, for Respondent; Public Prosecutor, for the State.

ORDER: This is an application to set aside the conviction by the Panchayat Court of

Ethapur which has sentenced the petitioner to a fine of Rs. 5 for what the Panchayat Court calls that he made a hubbub after refusing to answer the question put by the Court and that he asked the other accused also to refuse to answer. It is clear from the judgment of the Sub-Divisional Magistrate of Salem, before whom this accused preferred a revision petition, that, when some of the accused were present on a particular day of the hearing, the Panchayat Court asked the accused to produce the other accused for hearing on the adjourned date, that the accused did not produce the other accused and that he was questioned. It is stated that he would not reply, and in my opinion, the accused was perfectly justified in not answering any question regarding his not producing the other accused. No Court has any jurisdiction to compel one accused to produce the other accused in the case. The Panchayat Court seems to have arrogated to itself powers which are not given to it either by the Village Courts Act or by the Code of Criminal Procedure. The accused appears to have preferred a petition to the Sub-Divisional Magistrate, Salem, for the transfer of this case to the file of some other Panchayat Court. I am satisfied that in this case the members of the Panchayat Court must have been annoyed at the filing of the transfer application and taking advantage of an illegal order, which the Panchayat Court passed by asking the accused to produce the other accused and for non-production, they seemed to have lost their temper and convicted this accused. This case is a good instance to show that in this country the Panchayat Courts ought not to be invested with criminal jurisdiction. They seem to be carried away by the local politics and the inimical feelings that they happen to entertain against persons. The procedure which they have adopted in this case is a flagrant violation of the Village Courts Act and the Code of Criminal Procedure. I am of opinion that these Courts ought not to be invested with the criminal jurisdiction. I am satisfied that the conviction is wholly illegal and it ought to be set aside. It is hereby set aside and the fine, if paid, will be refunded.

B/V.S.B. Conviction set aside.

A. I. R. 1953 MADRAS 389 (Vol. 40, C. N. 138)

PANCHAPAKESA AYYAR J.

Siddi Subba Rao and another, Petitioners v. Pukhraj Kocher Ginning and Pressing Factory Firm carrying on business at Chanda, Central Provinces and another, Respondents.

Civil Revn. Petn. No. 1723 of 1950, D/- 18-1-1952.

Civil P. C. (1908), S. 20 (c) — Specific articles shown to purchaser at place of contract — Suit for damages — Jurisdiction.

Where the specific articles purchased have been shown to the purchaser at the place of contract the jurisdiction to entertain a suit for damages for supplying articles of inferior quality will only be in the Courts of that place and not in Courts in the place to which the articles may be subsequently consigned at the instance of the buyer. AIR 1949 Mad 145, Ref. (Para 3)

Anno: C. P. C., S. 20 N. 18.

P. M. Srinivasa Iyengar, for Petitioners; V. Rangachari and K. Mangachari, for Respondents.

REFERENCES: Courtwise/Chronological/ Paras
('48) 1948-2 Mad LJ 101: (AIR 1949 Mad 145) 2
('50) 1950-1 Mad LJ 38: (AIR 1950 Mad 768) 3

ORDER: There are no merits at all in this civil revision petition as no part of the cause of action in the petitioner's suit for damages arose in this State. The point for consideration is whether both the Courts below went wrong in holding that the District Munsif's Court, Peddapuram, had no jurisdiction to entertain the suit for damages filed against the defendants for supplying them fifty bales of inferior cotton, said to differ much from the sample cotton shown to them before the sale. The contract was admittedly, entered into at Chanda, in Madhya Pradesh, on 25-7-1943, and the District Munsif's Court, Peddapuram, would have, of course, no jurisdiction, if no part of the transaction arose within its own limits. Both the Courts below held that the delivery of the cotton was to be at Chanda & that the price also was to be paid there, judging from the correspondence.

(2) Mr. P. M. Srinivasa Aiyangar, for the petitioners plaintiffs, urged that both the lower Courts went wrong in holding that the District Munsif's Court, Peddapuram, had no jurisdiction, as it was a 'sale by sample,' and the 50 bales of cotton, sold as per sample, were to be despatched by the vendors, the defendants, from Chanda to Pittapuram 'via' Waltair, and were received at Waltair and carted to Pittapuram and examined only there by the plaintiffs. If that had been so, no doubt, both Courts would have been wrong in holding that the suit should have been filed only in Madhya Pradesh, as it could have been filed also at Peddapuram.

But the lower Courts have not gone on that footing, but on the footing that the sale was not merely by sample but after showing the 50 bales of cotton, the 'specific goods' as per sample, at Chanda itself, to P. W. 2 the plaintiffs' agent who examined it and bought it. So, it is a case of sample being shown first, and 'the specific goods next,' not at all an uncommon thing in India. It is a common experience in any shop in India for a buyer to be shown a sample of rice and then a bag of rice said to correspond to it. It is also possible for the bag shown later on not to correspond with the sample shown earlier though it is shown at that very place and is accepted by the buyer under a misapprehension that it corresponds to the sample. But where specific goods are shown, inspected and bought the cause of action would arise only at the place of sale (See — 'Parthasarathy Gupta v. Calcutta Glass & Sillicate Works (1936) Ltd,', 1948-2 Mad LJ 101).

(3) Paragraph 6 of the judgment of the trial Court shows that the defendants' contention was that the plaintiffs' agent, P. W. 2 was shown at Chanda itself the 50 bales of cotton which were sold to the plaintiffs, and that he agreed to buy 'that cotton' at Rs. 180 per bale, and that new Chandabani cotton was selling at Rs. 400 per bale at that very time. Whether the plaintiffs' agent, P. W. 2, was deceived into believing that the 50 bales of cotton shown to him at Chanda and bought by him was of the same quality as the sample shown to him prior to his being shown the bulk, or not, need not be discussed here. For the purpose of jurisdiction, even if he was so deceived, the suit ought to be filed only in Madhya Pradesh, where he saw the articles in bulk and bought them, though the bales were subsequ-

ently despatched to Waltair for taking them by cart to Pittapuram, and though the alleged fraud was actually discovered only on inspection at Pittapuram.

Mr. Rangachari, for the defendants, urges that they were got despatched to Waltair only at the instance of P. W. 2 who had been shown the fifty bales and had accepted them on behalf of the plaintiffs, and that the showing of the sample before is immaterial, and that the ruling in — 'Jwarmal Shivanath v. Maji Ibrahim', 1950-1 Mad LJ 38, will not apply. I agree. Mr. P. M. Srinivasa Iyengar says that it would be very difficult for anybody to inspect the quality of pressed cotton kept in bales, and that for that reason because there was no good chance of reasonable inspection for P. W. 2, Pittapuram, where the bales were ultimately received & opened & examined & found to be of inferior quality, would be the place where part of the cause of action arose, as a reasonable inspection could be had only there, & so the suit could be filed in the District Munsif Court, Peddapuram. I cannot agree.

In modern times of complicated machinery and manufacture, it is not reasonable to expect that all articles sold or brought would be in their elementary process or stages, and buyers are expected to be competent enough to deal with articles in various stages of manufacture or processing and judge their quality before buying. Thus, a man buying a car need not have the engine and other parts dis-membered and shown to him, and pressed cotton bales need not be unpressed and shown to him. If he chooses to buy the things after seeing them, the suit will only lie at that place. P. W. 2's inexperience or folly or gullibility cannot change the 'jurisdiction.' Where the specific articles purchased have been shown to the purchaser at the place of contract, as here to P. W. 2, the jurisdiction will only be in the Courts of that place, & not in Courts in the place to which the articles may be subsequently consigned at the instance of the buyer. So, the Courts below were right.

(4) In this view, this petition deserves to be and is hereby dismissed with costs. Time given to the plaintiffs till the 1st of March 1952 for presenting the plaint to the proper Court.

B/V.R.B. Petition dismissed.

A. I. R. 1953 MADRAS 390 (Vol. 40, C. N. 139)

SUBBA RAO J.

The Bhagat Estates Ltd., Petitioner v. The Accommodation Controller, Madras, Respondent.

Writ Petn. No. 805 of 1951, D/- 15-2-1952.

Houses and Rents — Madras Buildings (Lease and Rent Control) Amendment Act (8 of 1951), S. 3 — Objection to jurisdiction — Duty of Accommodation Controller.

The Accommodation Controller has no jurisdiction to act under S. 3 unless the monthly rent of a building is more than Rs. 25. When the owner takes objection to his jurisdiction on the ground of the rent being not more, the Accommodation Controller should on the material furnished to him determine whether the rent of the premises was more than Rs. 25 before he can exercise the jurisdiction conferred upon him by the section. (Para 3)

M. A. Chatala, for Petitioner; V. P. Sarathi, for Govt. Pleader, for Respondent.

ORDER: This is an application for issuing a writ of certiorari to quash the order of the Accommodation Controller of Madras dated 4-12-1951. The petitioners are the owners of premises No. 79-A and B, Sembudoss Street, G. T., Madras. It fell vacant on or about 24-9-1951. The petitioners gave notice of vacancy to the Accommodation Controller by letter dated 24-9-1951. On 6-10-1951, they informed the Accommodation Controller that the notice was given under a mistaken impression that the rent was about Rs. 26-10-0. The petitioners let that room to A. A. Kapodia and he has been occupying that room with his family. On 10-12-1951, i.e., three months after the notice of vacancy was given, the petitioners received a notice by the Accommodation Controller under S. 3(8) of the Act, demanding delivery of immediate possession within seven days of the receipt of the said notice. The petitioners complain that the rent of the premises in question does not exceed Rs. 25 and, therefore, the Accommodation Controller has no jurisdiction to issue the said order.

(2) The relevant provisions of the Act are as follows:

"3(1)(a). Every landlord shall, within seven days after the building becomes vacant by his ceasing to occupy it, or by the termination of a tenancy, or by release from requisition give notice of the vacancy in writing to the officer authorised in that behalf by the State Government;

Provided that this sub-section shall not apply to a building in respect of which the landlord has obtained an order for possession on any of the grounds specified in S. 7, sub-s. (3)."

3(5). If the building is required for any of the purposes, or for occupation by any of the officers, specified in sub-s. (3), the landlord shall deliver possession of the building to the authorised officer and the State Government shall be deemed to be the tenant of the landlord, with retrospective effect from the date on which the authorised officer received notice under sub-s. (1) or sub-s. (2), the terms of the tenancy being such as may be agreed upon between the landlord and the tenant and in default of an agreement, as may be determined by the City Civil Court in the City of Madras and elsewhere by the Subordinate Judge's Court having original jurisdiction over the area in which the building is situated or, if there is no such Court, by the District Court;"

Provided that the rent payable shall be the fair rent, if any, fixed for the building under the provisions of this Act; and if no fair rent has been so fixed, such fair rent as may be determined by the Court aforesaid in accordance with the provisions of this Act;"

S. 3(9). Nothing contained in this section shall apply—

(a) to a residential building the monthly rent of which does not exceed twenty-five rupees; or (b) to a non-residential building the monthly rent of which does not exceed fifty rupees; or (c) to any building or buildings in the same city, town or village, owned by any company, association or firm, whether incorporated or not, and bona fide intended solely for the occupation of its officers, servants or agents."

(3) It is clear from the aforesaid provisions that the Accommodation Controller has no jurisdiction to act under this section unless

the monthly rent of the building is more than Rs. 25. When the petitioners took the objection that he had no jurisdiction, the Accommodation Controller should have found, on the material furnished by the petitioners, whether the rent of the premises was more than Rs. 25. When a statute confers jurisdiction upon a tribunal, subject to a condition, the tribunal cannot exercise the jurisdiction unless the condition exists. The order of the Accommodation Controller is quashed and he is directed to decide, whether the monthly rent of the premises in question is more than Rs. 25. This petition is allowed, but as the petitioners themselves issued the notice to the Accommodation Controller under S. 3(1) of the Act, this is not a fit case for awarding costs.

B/M.K.S. Petition allowed.

A. I. R. 1953 MADRAS 391 (Vol. 40, C. N. 140)

GOVINDA MENON J.

V. M. S. Kandasamy Nadar, Appellant v. The Province of Madras, through the District Collector of Ramnad at Madura and another, Respondents.

Second Appeal No. 1114 of 1948, D/- 4-12-1951.

(a) Madras Survey and Boundaries Act (8 of 1923), Ss. 9 (ii), 13 and 14 — Absence of notice under S. 9 (ii) — Effect.

Where the party concerned has no notice of the survey as contemplated by S. 9 (ii), Madras Survey and Boundaries Act, it cannot be said that there has been a completion of the survey in accordance with the orders passed under S. 9 within the meaning of S. 13 and, therefore, the party adversely affected thereby is not bound to file a suit within three years to set aside the order of the survey officer. **(Para 1)**

(b) Civil P. C. (1908), O. 23 R. 1 — Suit dismissed with permission to bring fresh suit on request of defendant — Fresh suit — Defendant is estopped from contending that previous order was illegal — Evidence Act (1872), S. 115.

The Government like any other party cannot be allowed to approbate and reprobate. A suit against Government was decreed by the trial Court. In appeal the Government contended that the suit was bad for want of notice under S. 80. On request by the Government the plaintiff's suit was dismissed with liberty to bring fresh suit after complying with the requirement of notice. When the fresh suit was instituted the Government contended that the suit was barred under O. 23 R. 1 as the previous order was illegal.

Held that it was not open to the Government to raise such a contention when the previous order had been passed at their instance. **(Para 2)**

Anno: C.P.C., O. 23 R. 1 N. 29; Evi. Act, S. 115 N. 27.

T. V. Balakrishnan, for Appellant; Govt. Pleader, Srinivasan and K. Kuttikrishna Menon, for Respondents.

JUDGMENT: In view of the finding of the lower appellate Court refusing to rely upon the evidence of D. W. 6 that he affixed the notice to survey number 321 on the outer door of the shop, the lower appellate Court was justified in coming to the conclusion that the appellant did not have notice of the survey as contemplated in S. 9 (ii), Madras Survey and Boundaries Act. The question then arises as to whether such a survey without notice to the party concerned, when it is adverse to him, is binding on him, if he has not brought a suit to set aside the survey within three years as contemplated in S. 14 of the Act. The expression in S. 13 is

> "when the survey of any land or boundary which has been notified under S. 5 has been completed in accordance with the orders passed under Ss. 9, 10 or 11 etc., etc."

The question is, whether there has been a completion of the survey in accordance with the orders passed under S. 9, if no notice of the survey has been given to the party concerned. The learned Judge held that the words "in accordance with the orders" cannot be said to be synonymous with "in accordance with the provisions laid down". I am unable to agree. When a Statute says that an order should be passed under section so and so, it contemplates the fulfilment of all the necessary formalities which have to be completed under the section. Here the non-observance of the giving of a notice to the party would make the order passed not one correctly passed under the section. If the officer passes an order without complying with the requisites of the section, it cannot be said that it is an order passed under the section. I am, therefore, inclined to hold that the appellant is not bound to file a suit within three years to set aside the order of the Survey Officer because he had no notice of the survey.

(2) The next point is whether the learned Judge is right in holding that the decision of the District Judge of Ramnad in App. No. 182 of 1944 is not binding on the parties. That appeal arose out of a suit for a similar relief and in the trial Court, the present plaintiff was given a decree. In the Court of appeal, it was contended before the learned District Judge that the suit should have been dismissed because the requisite notice under S. 80, Civil P. C. had not been given. In the alternative, it was contended that liberty may be given to the plaintiff to file a fresh suit after complying with the provisions of S. 80, Civil P. C. The relevant portions of the learned District Judge's judgment are as follows:

> "If at all the lower Court felt that the plaintiff was entitled to some indulgence, it ought to have merely given him the liberty to file a fresh suit on the same cause of action after giving notice under S. 80, Civil P. C. to the Government."

The learned District Judge accepted the second alternative and held as follows:

> "I also give the plaintiff liberty to file a fresh suit on the same cause of action against both the defendants after giving the necessary notice under S. 80, Civil P. C., to Government."

When a party to an appeal has induced the Court to pass an order on a certain representation made to the Court, that party cannot later on be heard to say that the order passed by the Court on his request is illegal. It seems to me that if the learned District Judge of his own accord had dismissed the suit and given the plaintiff liberty to file a fresh suit, then his order would have been illegal under O. 23, R. 1 which definitely states that the leave to file a fresh suit can be given only when the suit is allowed to be withdrawn, on account of the fact that the suit is bad for some formal defect. But here, it was at the

instance of the respondents that the District Judge on that occasion granted the plaintiff permission to file a fresh suit after dismissing his suit. If a request like that had not been made at the instance of the Government, probably the District Judge would have permitted the plaintiff herein to withdraw the suit with permission to file a fresh suit and in that case nothing could have been said against the propriety of the order made by the District Judge on that occasion. The Government, like any other party, cannot be allowed to approbate and reprobate. I feel constrained to hold that the Government cannot now be heard to say that the present suit is not sustainable because of the provisions of O. 23 R. 1, Civil P. C. In this view, it is unnecessary for me to discuss the decisions relied upon by the learned Subordinate Judge as well as those cited before me by Mr. Srinivasan for the respondents that it is not open to a Court when a suit is dismissed to grant leave to file a fresh suit. That is perfectly sound law against which nothing could be said but none of those decisions go to the extent of saying that if a defendant requests the Court to dismiss a suit and grant permission to the plaintiff to file a fresh suit and when such a fresh suit is filed, he can turn round and say that the Court which granted him permission should not have done so. Both the points on which the learned Subordinate Judge has found against the plaintiff, thus failing and the lower appellate Court having found title in the plaintiff, the plaintiff's suit ought to be decreed.

(3) I, therefore, set aside the decision of the lower appellate Court and restore that of the District Munsif with costs throughout. (No leave).

B/K.S. Order accordingly.

A. I. R. 1953 MADRAS 392 (Vol. 40, C. N. 141)

SUBBA RAO J.

R. Pushpam and another, Petitioners v. The State of Madras, represented by the Secretary, Local Administration Department, Fort St. George, Madras, and another, Respondents.

Writ Petn. No. 648 of 1952, D/- 6-10-1952.

(a) Words and Phrases — "Consult".

"Consult" implies a conference of two or more persons or the impact of two or more minds brought about in respect of a topic with a view to evolve a correct or at least a satisfactory solution. It must be directed to the essential points of the subject under discussion and enable the consultor to consider the pros and cons before coming to a decision. The consultation may be between an uninformed person and an expert or between two experts. 1947-2 All E R 496, Ref. (Para 2)

(b) Municipalities — Madras District Municipalities Act (5 of 1920), Ss. 43 and 7 (3) — Allotment of seats reserved under S. 7 (3) — Duty of Government to consult municipality — Certiorari against order of allotment — (Constitution of India (1950), Art. 226).

When an authority is entrusted by a statute with a duty to be performed after consultation with another authority there is no performance of that duty when it does not consult or consults only in formal compliance with the statute. (Para 2)

Under S. 43, a duty is expressly cast upon the Government to "consult" the municipality and since that word is used distributively there, the obligation arises whether the proposal is to divide the municipality into wards or to set apart, in particular wards, seats reserved under S. 7 (3). The consultation must be in respect of every individual ward in which it is proposed to set apart the seats and a general consultation will not be sufficient compliance. If after consulting the municipality about certain wards the Government sets apart the seats in a ward which was not mentioned in their proposal there is no consultation in respect of that ward and the order allotting the seat to that ward becomes illegal and would be quashed by a writ of certiorari. But the consultation in respect of the ward mentioned in the proposal does not become a formality merely because the Government did not give its reason for making the proposal and the allotment of seat in that ward is valid and will not be set aside. (Paras 4, 6)

Anno: C.P.C., App. III; Constitution of India, Art. 226 N. 13.

(c) Constitution of India (1950), Art. 226 — Scope — Enactment affecting power of High Court — (Municipalities — Madras District Municipalities Act (5 of 1920), S. 351B).

Provisions of S. 351-B, Madras District Municipalities Act cannot in any way affect the power of the High Court under Art. 226 to issue writs in suitable cases. (Para 6)

Anno: C. P. C., App. III; Constitution of India, Art. 226 N. 13.

S. Mohan Kumaramangalam, for Petitioners; Govt. Pleader for Respondents.

REFERENCE..... /Para.

(1947) 1947-2 All ER 496: (63 TLR 499) 2

ORDER: This is an application under Art. 226 of the Constitution of India for issuing a writ of certiorari to call for the records and quash the order dated 29-7-1952 of respondent 1, the State of Madras. Petitioner 1 is the Secretary of the Progressive Women's Association, Aruppukottai; petitioner 2 is a Municipal Councillor of the Aruppukottai municipality. The elections to the said Council are now in progress. Under the programme of elections issued by respondent 2, Commissioner of the Municipality, the last date to file nominations is the 6th and 8th September 1952 and the date of this polling is fixed on 6-10-1952. The Municipality is divided into 24 wards with 38 councillors; one reserved seat for women is allotted to ward No. 2 and another to ward No. 12. The said allotment was made by the order of the Government dated 29-7-1952. The petitioners seek to get that order quashed for the reasons 'inter alia' that it is vitiated by 'mala fides' on the part of the Government and also on the ground that the Government did not comply with the provisions of the District Municipalities Act in issuing the said order.

(2) The contention of the learned counsel for the petitioners that the Government did not comply with the provisions of S. 43, District Municipalities Act, may be taken up first. Section 43 reads:

"For the purpose of election of Councillors to a Municipal Council, the Local Government after consulting the Municipal Council, may, by notification—

(a) divide the Municipality into wards:

(b) determine the wards in which the seats, if any, reserved in sub-s. (3) of S. 7 shall set apart;

(c) declare for whom such seats are reserved".

Under S. 7(3) the Local Government may in their

discretion by notification reserve seats for women and determine the number of such seats. The Government accordingly determined to give two seats for women and allotted the said reserved seats to wards 2 and 12. Under S. 43 such allotment of the reserved seats can only be made after consulting the Municipal Council. The statutory condition of consulting was conceived in public interests and expressed in clear terms. It is, therefore, the duty of this court to ensure that there is a full and fair compliance with the statutory condition. The question, therefore, is whether the Government consulted the Municipal Council before determining the wards in which the said seats were set apart. This turns upon the construction of the words "after consulting" in the section.

The word "consult" is so familiar that it often eludes the grasp of easy and exact definition. In the Law Lexicon by P. Ramanatha Aiyar it is stated as follows:

> "Consultations always require two persons at least; deliberations may be carried on either with a man's self or with numbers; an individual may consult with one or many; assemblies commonly deliberate; advice and information are given and received in consultations; doubts, difficulties, and objections are stated and removed in deliberations. Those who have to co-operate must frequently consult together; those who have serious measures to decide upon must coolly deliberate".

The word "consult" was subject of a judicial scrutiny in — 'Fletcher v. Minister of Town Planning', 1947-2-All E. R. 496. The question arose in connection with an application taken out for quashing the order made by the Minister for Town and County Planning. The Minister designated an area of land as the site of a proposed new town. It was contended that the requirements of the New Towns Act, 1946, had not been complied with in relation to the making of the order, in that there was no "consultation" within the meaning of S. 1 (1) of the Act between the Minister and the Local authorities before the making of the order designating the area of land in question as the site of the proposed new town. On the facts the learned Judge held that there was the requisite consultation; but in dealing with the question, at page 500, the learned Judge observed:

> "The word 'consultation' is one that is in general use and that is well understood. No useful purpose would, in my view, be served by formulating words of definition. Nor would it be appropriate to seek to lay down the manner in which the consultation must take place. The Act does not prescribe any particular form of consultation. If a complaint is made of failure to consult, it will be for the Court to examine the facts and circumstances of the particular case and to decide whether consultation was, in fact, held. Consultations may often be a somewhat continuous process and the happenings at one meeting may form the background of a later one".

It is clear from the aforesaid observations that the Court will have to scrutinise in each case whether the requisite consultation has taken place, having regard to the substance of the events. The word "consult" implies a conference of two or more persons or an impact of two or more minds in respect of a topic in order to enable them to evolve a correct, or at least, a satisfactory solution. Such a consultation may take place at a conference table or through correspondence. The form is not material but the substance is important. It is necessary that the consultation shall be directed to the essential points and to the core of the subject involved in the discussions. The consultation must enable the consultor to consider the pros and cons of the question before coming to a decision. A person consults another to be elucidated on the subject-matter of the consultation. A consultation may be between an uninformed person and an expert or between two experts. A patient consults a doctor; a client consults his lawyer; two lawyers or two doctors may hold consultations between themselves. In either case the final decision is with the consultor, but he will not generally ignore the advice except for good reasons. So too in the case of a public authority. Many instances may be found in statutes when an authority entrusted with a duty is directed to perform the same in consultation with another authority which is qualified to give advice in respect of that duty. It is true that the final order is made and the ultimate responsibility rests with the former authority. But it will not, and cannot be, a performance of duty if no consultation is made, and even if made, is only in formal compliance with the provisions. In either case the order is not made in compliance with the provisions of the Act. Having regard to the aforesaid observations let me now consider the correspondence which ended in the order made by the Government.

On 27-6-1952, respondent 1 wrote to the Municipality intimating their proposal to divide the Aruppukottai municipality into 24 electoral wards and also to reserve two seats for women and allot the same to wards 5 and 12. The Chairman, Municipal Council, was also requested to place the above proposals at an urgent meeting of the Council within two weeks. He was also informed that any suggestions which the Municipal Council may have to make before the expiry of three weeks would be considered by the Government. On 9-7-1952 the Municipal Council passed a resolution recommending to respondent 1 that the two seats for women be reserved in Wards 5 and 7 respectively instead of Wards 5 and 12 as suggested by the Government. The letter of the Chairman of the Municipal Council sent to the three councillors who had dissented from the proposal of the Council, a copy of which was sent to the Government, gives the reasons for preferring Ward Nos. 5 and 7 instead of 5 and 12. It reads:

> "the allotment of a woman's seat to Ward 12 as now proposed would mean allotting both the woman's seats to a single community, the Devangar community which is already the biggest single community in the Municipality resulting in the distribution of the wards on an unfair basis. Besides this legitimate claim for a woman's seat the Nadar community has a more reasonable claim to representation of the women in this town because the Nadar women are more than 75 per cent educated and under the auspices of their Ladies' Association containing more than 200 members they are taking a leading part in all the activities in this town, which are calculated to further the interests of women educationally and socially. I consider that for this important reason also the Nadar Community deserves to have a woman's seat. The ward committee & the council took this aspect also into consideration in allotting one of the women's seats to ward No. 7."

(3) The reason given by the Municipality for suggesting a modification of the proposal made by the Government was that if the Government's proposal was carried out, the two women's estate seats would be captured by women belonging to

the Devanga community and the women of the Nadar community would be deprived of their right to be represented in the Council. The Government did not accept the proposal of the Municipality but instead the two seats for women were reserved in Wards 2 and 12.

(4) Relying upon the aforesaid correspondence, learned counsel for the petitioners argued generally that though the Government went through the formality of a consultation, they did not, in fact, consult the municipality. It was said that an authority consulting another should at least give reasons for the proposals so that the other may give its considered opinion in regard to the proposals made, for any proposal unaccompanied by such reasons could not afford any opportunity to the other to advise for or against the proposal It is true that the giving of reasons by the Government would enable the Municipality to scrutinise them and offer advice or counter proposals. But I cannot say that the procedure adopted is not "consultation" in respect of the matters referred within the meaning of the section. The Government sent their proposals. Though the Government did not disclose their mind, by giving reasons nothing prevented the Municipality from making their suggestions in respect of the allotment of the reserved seats to Wards 5 and 12. They could give reasons, as they had given in this case, why the proposal was not conducive in the interests of the women voters and how it could be suitably modified. The Government and the Municipality had a "consultation" in respect of the allotment of reserved seats for women of wards 5 and 12. The Government wanted to allot to wards Nos 5 and 12; the Municipality, for reasons given, suggested they should be allotted to ward Nos. 5 and 7. It is, therefore, manifest that the Government consulted the Municipality in respect of ward No. 12, and though the Municipality did not agree, they allotted the reserved seat to that ward. So far as ward No. 12 is concerned, the provisions of S. 43 have been complied with. But I find it very difficult to say the same in respect of the allotment of the reserved seat to ward No. 2

Learned Government Pleader contended that the Government consulted the Municipality in respect of the division of the Municipality into wards and the allotment of the reserved seats to the different wards and it is not necessary that they should have consulted the Municipality in respect of the sutability of the allotment of a reserved seat to a particular ward. To put in other words, his argument was that a general consultation would be in compliance with the provisions of the Act and the fact that the allotment of a woman's seat to ward No. 2 was not referred to the Municipality could not invalidate the allotment. This argument, in my view, is not only contrary to the provisions of S. 43 but defeats the purpose for which the said section was enacted. Under S. 43 the consultation referred in sub-s. (1) must be read distributively. The local Government shall consult the Municipal Council for dividing the Municipality into wards and also shall consult the Municipality for determining the wards in which the seats, if any, reserved under sub-s. (3) of S. 7 shall be set apart. If so read, the consultation also must be with reference to the allotment of the reserved seats to the particular wards. If the Government proposed ward No. 5 for the allotment of a reserved seat and after consulting the Municipality in respect of that proposal, allotted the same to ward No. 2, it is impossible to hold that the Government consulted the Municipality in determining the wards for allotting the reserved seats. If the Government asked the Municipality to send their proposals in respect of all the wards for allotment of reserved seats and thereafter allotted a reserved seat to a particular ward, it may perhaps be argued on which question I do not express my opinion that the Government has consulted the Municipality; but where, as in this case, the attention of the Municipality is focussed only to a particular ward and their advice in respect of that ward obtained, I find it very difficult to hold that the Government consulted the Municipality in respect of the allotment of the seat to a different ward. I, therefore, hold that the Government in contravention of the provisions of S. 43 (b) did not consult the Municipality and, in respect of ward No. 2, therefore, the said allotment is illegal.

(5) Learned counsel for the petitioners then contended that the Government in allotting the reserved seats to Ward Nos. 2 and 12 were actuated by 'mala fides.' It was said that in the elections for these two wards held in 1948 the successful candidates were both from the Congress party and, therefore, the present Congress Government allotted those two reserved seats to women so that their party candidates might be elected. In my view there is not even a slender basis for this grave allegation. The fact that Congress candidates were elected in the year 1948 is not a guarantee that the candidates of the same party would be elected in the year 1952. Further, it is not the case of the petitioner in the affidavit that the Congress candidates were elected only for these two wards. Nor is it suggested that in these two wards alone they had an overwhelming majority, whereas they had lost or scraped through in other wards. Assuming that the Congress was successful in these two wards in 1948, it is impossible to hold from that fact alone that the Government allotted the reserved seats to these two wards to help their party candidates. The petitioners fail to establish 'mala fides' in this case.

(6) The learned Government Pleader raised a preliminary objection against the maintainability of the present application on the basis of S. 351 (B) Madras District Municipalities Act, which reads:

> "Notwithstanding anything contained in the Civil Procedure Code, 1908, or in any other law for the time being in force, no Court shall grant any permanent or temporary injunction or make any interim order restraining any proceeding which is being or about to be taken under this Act for the preparation or publication of electoral rolls for or for the conduct of any election."

This section obviously cannot affect the power of the High Court to issue suitable writs under Art. 226 of the Constitution of India. Under Art. 245 of the Constitution, the power of the Parliament or the Legislature of a State to make laws is subject to the provisions of the Constitution. So long Art. 226 stands in the Constitution, neither the Parliament nor the Legislature of a State can make laws depriving or limiting the power of the High Court to issue writs. I therefore, hold that the provisions of S. 351-B Madras District Municipalities Act, cannot in any way affect the power of the High Court to issue writs in suitable cases. For the aforesaid reasons I hold that the order of the Government allotting the seat reserved for women to ward No. 2 is illegal and I, therefore, issue a direction restraining the respondents from holding the

election in respect of the said reserved seat. This will not preclude the Government from allotting the said seat reserved for women to any of the wards after complying with the provisions of the Act. As the parties fail and succeed in part, there will be no order as regards costs.

A/M.K.S. Order accordingly.

A. I. R. 1953 MADRAS 395 (Vol. 40, C. N. 142)

GOVINDA MENON
AND BASHEER AHMED SAYEED JJ.

In re Mathuraman Chettiar and another, Appellants.

S. R. No. 38068 (A. A. O. No. of 1952), D/-30-10-1952.

† Civil P. C. (1908), S. 115 — Appeal — (Arbitration Act (1940), S. 39(1)) — (Madras Letters Patent, Cl. 15).

No appeal lies against an order passed by a single Judge of the High Court under S. 115 whereby a reference to an arbitration has been superseded and the suit is directed to be tried.

(Paras 1 and 5)

Anno: C.P.C., S. 115 N. 32; Arbitration Act, S. 39 N. 1; Letters Patent, Cl. 15 N. 4.

R. Viswanathan, for S. Gopalaratnam, for Appellants; Govt. Pleader, for the State.

REFERENCES: Courtwise/Chronological/ Paras
('34) 56 All 608: (AIR 1934 All 134) 4
('52) AIR 1952 Bom 229: (ILR (1952) Bom 570) 4
('48) ILR (1948) 2 Cal 265 4
('22) 45 Mad 928: (AIR 1922 Mad 495: 24 Cri LJ 78 FB) 3
('45) ILR (1945) Mad 564: (AIR 1945 Mad 184) 4

GOVINDA MENON J.: A question has been referred to us as to whether an appeal lies against an order passed by a single Judge of this Court under S. 115, Civil P. C., whereby a reference to an arbitration has been superseded and the suit is directed to be tried. Since the respondent was unrepresented at this stage, we gave notice to the learned Government Pleader who has been heard on the question of maintainability.

(2) There was a suit for partition in which a reference to arbitration was made. There were three arbitrators, one of whom was nominated by the plaintiff and another by the defendant. After some time when the proceedings were stagnating, the defendant filed an application that since the arbitrator nominated by the plaintiff was not functioning and was non-co-operating with the other arbitrators, the court may be pleased to remove him and appoint another in his stead. The plaintiff also filed an application, but the prayer was that the arbitration should be superseded and the suit should be tried on the merits. The learned Subordinate Judge dismissed the plaintiff's application for superseding the arbitration and allowed the defendant's application for the nomination of a new arbitrator.

Two revisions were filed to this Court under S. 115, Civil P. C., by the plaintiff, one against the order dismissing his application and the other against the order nominating a new arbitrator. Both of them were heard together by our learned brother, Raghava Rao J. who by a common order allowed the revision against the order dismissing the application to supersede the arbitration and also allowed the revision against the order by which a new arbitrator was to be nominated. The result of the allowance of these two revision petitions was that the arbitration was superseded and the suit was directed to be tried on the merits. The present attempt is by the defendant to file an appeal against the order of Raghava Rao J. The office has taken the objection that an appeal is not maintainable and the matter has come before us for arguments.

(3) Mr. R. Viswanathan for the proposed appellant relies upon S. 39 (1) (i), Arbitration Act, and contends that since the arbitration has been superseded for the first time by this Court, an appeal will lie under that clause. He invited our attention to a decision in — 'Munisami Mudaliar v. Rajaratnam Pillai', 45 Mad 928 (FB), in which a Full Bench of this Court held that an order of sanction to prosecute a party for giving false evidence passed by a Judge sitting on the Original Side of this High Court is appealable to a Division Bench under the provisions of S. 195, Criminal P. C. The unamended S. 195 (6) was to the following effect:

> "Any sanction given or refused under this section may be revoked or granted by any authority to which the authority giving or refusing it is subordinate."

Then, sub-s. (7) stated as follows:

> "For the purposes of this section every Court shall be deemed subordinate only to the Court to which appeals from the former Court ordinarily lie."

On a construction of these two sub-sections, the Full Bench held that an appeal lay to the Division Bench hearing appeals from a single Judge on the original side of the High Court, from an order granting sanction. On the analogy of this decision, the learned counsel contends that a Division Bench on the appellate side is a Court authorised by law to hear appeals from original decrees of the Court passing the order. What is urged is that supposing on the original side of this Court an order superseding arbitration is passed, then under S. 39 (1) an appeal will lie to this Court itself which will be heard on the appellate side by a Division Bench.

(4) The difficulty in accepting this contention is that when the learned Judge heard the two revisions before him he was exercising a power conferred on him under S. 115, Civil P. C., as is made clear by S. 41 (a), Arbitration Act, which is to the effect that

> "the provisions of the Civil Procedure Code of 1908, shall apply to all proceedings before the Court, and to all appeals under this Act."

In — 'Gauri Shankar v. Jagat Narain', 56 All 608, a single Judge in considering the nature of the powers exercised in revision expressed the view that as a "decree" as defined in S. 2, Civil P. C., means the formal expression of an adjudication which, so far as regards the Court expressing it, conclusively determines the rights of the parties with regard to all or any of the matters in controversy in the suit an order passed in revision undoubtedly comes within this definition. It is not necessary for us to rely on this decision for the proposition that the powers of revision are those exercised in the appellate jurisdiction, S. 115 makes it clear that a power of revision can only be exercised by the High Court when no appeal is provided to it, in its appellate jurisdiction. We, therefore, are of opinion that when Raghava Rao J. superseded the arbitration, he was functioning as an appellate Court and

when he functions as an appellate Court there is a prohibition that no second appeal shall lie from an order passed by him under S. 39(2), Arbitration Act.

This is concluded so far as this Court is concerned by the decision in — 'Radhakrishnamurti v. Ethirajulu Chetti and Co.', ILR (1945) Mad 564, which view has found acceptance in — 'Madhavdas v. Vithaldas', AIR 1952 Bom 229 and — 'R. Wright & Partner Ltd. v. Governor General in Council', ILR (1948) 2 Cal 265. If in an appeal an order is passed superseding an arbitration and no second appeal can lie from such an order, we fail to see how there can be an appeal against an order passed in revision. Clause 15 of the Letters Patent definitely says that an order passed under S. 115 by a single Judge of the High Court is not appealable to a Bench.

(5) Even on the wording of S. 39 (1), in our opinion, there can be no appeal. The Judge sitting for hearing revision petitions is not a different Court from a Division Bench hearing appeals. All the Judges constitute members of the same Court and both are parts of one and the same institution. It cannot be said that a Judge sitting on the appellate side singly is a Court different from a Division Bench. Section 39 (1) contemplates two different Courts, viz., a Court which supersedes the arbitration and a different Court which is authorised by law to hear appeals from the original decrees of the Court passing the order. Since there is no duality of Courts in this case, we cannot say that there can be any application of S. 39 (1) on the facts of the present case.

Mr. Viswanathan was asked the question as to what would be the result if a Division Bench for the first time hears a revision under S. 115 and supersedes an arbitration in which case would it be that an appeal can lie from a Division Bench to a Full Bench under S. 39(1)? The learned counsel is compelled to answer that since there is no other Court, an appeal would not lie except to the Supreme Court. In the view which we take that the Courts are one and the same, no appeal lies. The requirements of S. 39 (1) have not been satisfied and the papers will be returned to the proposed appellant.

A/V.R.B. Order accordingly.

A. I. R. 1953 MADRAS 396 (Vol. 40, C. N. 143)

BASHEER AHMED SAYEED J.

Pudusseri Vadakkethil Vikraman alias Kunhikuttan Nair, Petitioner v. V. Krishnan Nair, Respondent.

Civil Revn. Petn. No. 1283 of 1950, D/- 14-11-1951.

(a) Oaths Act (1873), S. 11 — Agreement to take oath — Failure to take oath for no fault of either party — Fresh opportunity.

Unless the oath is taken as agreed to by the parties, there cannot be said to be any evidence on the basis of which the Court can proceed to dispose of the case one way or the other, so that it is necessary that the agreement to take the oath must be put into operation before the Court can have any material before it to decide the case on the basis of the agreement. (Para 10)

Where, therefore, the defendant agreed to take oath in a temple on a certain day, but he could not do so as the temple was closed.

Held that a fresh opportunity should be made available to the defendant to take the oath. AIR 1935 Mad 591 Foll. (Para 9)

Anno: Oaths Act, S. 11 N. 1.

(b) Civil P.C. (1908), O. 23 R. 3 — Agreement to take oath — Agreement is not adjustment or compromise — (Oaths Act (1873), S. 11).

A mere agreement to take an oath on the challenge made by one of the parties and accepted by the other party cannot amount to an adjustment or compromise which could be incorporated in the form of a decree without any further inquiry or investigation and without a decision as to whether the case has been proved or not. Case law discussed. (Para 10)

Anno: C.P.C., O. 23 R. 3 N. 10 Pt. 1; Oaths Act, S. 11 N. 1.

B. Pocker, for Petitioner; P. K. Janakiram, for Respondent.

REFERENCES: Courtwise/Chronological/ Paras

('46) AIR 1946 Lah 78: (222 Ind Cas 623) 8, 10
('68-69) 4 Mad HCR 422 8
('78-80) 2 Mad 356 8
('99) 22 Mad 234 9
('07) Ayyakannu Nadar v. Muthiah Nadar, (17 Mad LJ 99) 9
('08) 31 Mad 1: (17 Mad LJ 545) 8
('12) 17 Ind Cas 339: (12 Mad LT 613) 8
('25) 49 Mad LJ 379: (AIR 1925 Mad 1264) 10
('35) AIR 1935 Mad 591: (157 Ind Cas 107) 9, 10
('38) AIR 1938 Mad 385: (182 Ind Cas 926) 10

ORDER: The defendant who is the petitioner in this civil revision petition seeks to revise the order of the Small Cause Judge who gave a decree in favour of the plaintiff under the circumstances set out in the said judgment.

(2) The suit was filed by the plaintiff for recovery of a sum of Rs. 250 lent in cash and interest thereon towards an agreement to sell a piece of land to the plaintiff. The defendant-petitioner contended that the alleged agreement was false, that he never received any money and that the suit was filed out of spite.

(3) When the point for determination was set down as to whether the plaint claim was true and binding on 1-2-1950 both the plaintiff and the defendant entered into an agreement which was endorsed on the reverse of the plaint.

(4) The agreement consists of two parts. The first part is signed by the plaintiff and his counsel and that part is to the effect that if the defendant would take an oath in Parambathukkudu Bhagavathi Amman temple at Vendalore that he did not receive the sum of Rs. 250 for the Kolankora lands the suit should be dismissed with costs; and in default there should be a decree. The second part of the agreement is signed by the defendant which says that the defendant agrees to take the oath as aforesaid and for that purpose he received a sum of Rs. 12-8-0 towards the cost of taking the oath. This agreement clearly sets out that the challenge was made by the plaintiff and that it was accepted by the defendant.

(5) But unfortunately for the parties, when the defendant went to the temple, the temple was closed and the 'poojari' of the temple who was met by the defendant informed the defendant that the money payable for taking the oath should be deposited as a condition precedent with the uralan who was residing at some distance off and so it was not possible to deposit

the amount on that day and take the oath at the appointed time. It may be mentioned that the oath was to be taken on the 19th of February at 10 a. m. for which purpose an amin of the Tirur Court was also sent to be present on the occasion of taking the oath.

Consequent upon this failure on the part of the defendant to take the oath, obviously for reasons beyond his control, the suit was decreed by the learned Small Cause Judge. The decree appears to have been passed on the representation of the plaintiff's counsel that the agreement of the parties according to the endorsement on the plaint should be given effect to and a decree should be passed. The learned Small Cause Judge says in his judgment that under O. 23 R. 3, Civil P. C., he had no option but to give effect to the agreement and, therefore, decreed the suit with costs. Against this judgment and decree, the defendant has preferred this revision petition.

(6) The main point taken by Mr. B. Pocker appearing for the petitioner is that the agreement to take the oath is not an adjustment or a compromise within the meaning of R. 3 of O. 23, Civil P. C. The agreement or adjustment or compromise contemplated under R. 3 of O. 23, C. P. C., should be one which could be capable of being incorporated in a decree and that an agreement of the kind where two parties have agreed merely to take oath cannot be said to be an adjustment or a compromise capable of being entered in a decree. An agreement of this kind merely provides for a decree being passed on the happening of certain contingencies. It cannot, therefore, be said to be an adjustment of the suit by itself. In the absence of there being any possibility of an agreement of this nature being incorporated in the form of a decree, the learned Small Cause Judge was not correct in having observed that he had no option but to pass a decree in terms of the agreement.

The further contention of the learned counsel for the petitioner is that the failure to take the oath cannot entitle the plaintiff to a decree straightway but that such failure can only be a circumstance which could be taken into account or consideration in deciding the case by the Small Cause Judge. By no means could the failure to take the oath should be taken as evidence in order to base a decree in favour of the plaintiff or the defendant as the case may be. When parties do not comply with the terms of the agreement in the matter of taking the oath the learned counsel argues there should be evidence taken in order that the case might be decided one way or the other. Therefore the finding of the learned Small Cause Judge that he had no option but to give effect to the agreement under R. 3, O. 23, Civil P. C., is not sustainable.

(7) There is considerable force in these contentions of the learned counsel for the petitioner and I am inclined to agree with him.

(8) In support of this contention the learned counsel for the petitioner has invited my attention to a series of decisions. The first is —'Vasudeva Shanbog v. Naraina Pai', 2 Mad 356. That decision discusses at length the old law and the law as amended later by the Oaths Act (Act 10 of 1873) and the discussion is very instructive. The substance of that decision is that if an agreement to take oath is broken, it can never be a proper ground for an adverse decision against the party responsible for the failure to take the oath though it may serve as corroborative evidence, if there is other evidence enabling the court to pass a decree. This decision follows an earlier decision reported in — 'K. Uttatchadayan v. P. M. Raman Nambiar', 4 Mad HCR 422 which is to the same effect, viz., that the failure to take the oath cannot be a sufficient ground to pass a decree immediately.

The next decision relied upon by the learned counsel for the petitioner is — 'Moyan v. Pathukutti', 31 Mad 1, which follows — 'Vasudeva Shanbog v. Naraina Pai', 2 Mad 356, — 'Olkilikara Siddaya v. Ambu Nair', 49 MLJ 379, which is also relied upon by the learned counsel for the petitioner which in turn follows —'Thukku Goundan v. Kuppandu Goundan', 17 Ind Cas 339 (Mad) is also to the effect that the failure to take oath can only be considered to be a circumstance which the Court can take into consideration and it can never be construed as an adjustment enabling the Court to proceed under R. 3 of O. 23, Civil P. C. The latest decision on the point is the one reported in — 'Shah Nawaz v. Ghulam Mohammad', AIR 1946 Lah 78, which reviews the earlier decisions and agrees with the decision in —'Vasudeva Shanbog v. Naraina Pai', 2 Mad 356 and — 'Moyan v. Pathukutti', 31 Mad 1. All these decisions represent one view of the matter.

(9) But the learned counsel for the respondent has invited my attention to another series of decisions which represent a 2nd view. The first of these decisions referred to by the learned counsel for the respondent is the one in — 'Ayyakannu Nadar v. Muthiah Nadar', (17 Mad LJ 99). In this case the party who agreed to be bound by the oath in a certain form by his own conduct prevented the oath being taken in that form. The oath was not taken although the other party was ready and willing to take it in the form which had been agreed to. The decision went on the basis that the agreement to be bound by an oath of this kind was in effect an agreement to treat the evidence given under the oath as the evidence in the case, and to dispense with other evidence and that if the party who had agreed to be bound prevented the oath being taken, the other party was in the opinion of the learned Judge entitled to a decree, at any rate in a case like the one before them, where it was the plaintiff who agreed to be bound and the result of his refusal to allow the oath to be taken in the form agreed upon was that there was no evidence in support of his case.

I do not think that the principle of this decision would apply to the facts of the present case. In the present case, the challenger was the plaintiff and the person who accepted to take the oath was the defendant and the taking of the oath was not prevented by any conduct either on the part of the challenger or on the party who accepted to take the oath. On the other hand the record goes to show that the defendant could not take the oath though he was willing for the reason that the temple was not kept open and by the time any attempt could be made to get the temple opened the 'uralan' who was in charge of the temple and who was to receive the fee for the purpose was not available. Only the 'Poojari' was available and, therefore, for reasons for which the defendant was not responsible the oath could not be taken. In those circumstances, it could not be said that there was any conduct on the part of either of the parties to the suit by which the taking of the oath was prevented.

The second case relied upon by the learned counsel for the respondent is — 'Thoyi Ammal v. Subbaraya Mudali', 22 Mad 234. In this case, the defendant in the suit before its trial filed a

petition under S. 9 of the Oaths Act of 1873 that if the plaintiff should take an oath according to law regarding certain facts this defendant should forfeit his right of contesting the suit. He subsequently desired to withdraw the petition on insufficient grounds but the plaintiff took the oath and on the strength thereof all the issues were decided and a decree passed in plaintiff's favour. The suit was, however, remanded on appeal for disposal after recording evidence on both sides.

On appeal by the plaintiff against the order of remand a Bench of this Court held that there was nothing in Ss. 9 to 11, Oaths Act, which allowed a party who had agreed to the administration of an oath under those sections to retract after the plaintiff had accepted the proposal, that the Act gives the Court the discretion to administer the oath or not, and that it should not administer it if good grounds be shown for retracting and it was justified in so doing notwithstanding the retraction if the grounds were frivolous.

Here again the facts of the case are not on all fours with the present case for, in the case decided by the learned Chief Justice and Benson J. in — 'Thoyi Ammal v. Subbaraya Mudali', 22 Mad 234, there was a petition for making one of the parties to take an oath according to law regarding certain facts and that the petition was retracted from. But in the present case, as had already been pointed out, there was no retraction. On the other hand, by circumstances which are said to be not brought about by either of the parties, the oath could not be taken. There was neither retraction nor refusal. So then, the reasoning given in this Bench decision does not, in my opinion, avail the respondent.

The next case referred to by the learned counsel for the respondent is the one — 'Bhagavathi Vannan Veera v. Vannan', AIR 1935 Mad 591. In this case Pandrang Row J. after discussing the various rulings on the point has come to the conclusion that the disposal of the suit at the stage where there was no completion of the process of the taking of the oath was improper and that the proper course for the trial Court was to issue a commission at the cost of the defendant directing the taking of the oath as agreed upon on a day to be fixed and direct the plaintiff to be present on that occasion and that if the plaintiff failed to be present then the trial Court should deal with the case as if S. 12, Oaths Act, applied. I think the decision in this case is a near approach to the facts of the case in this revision petition.

If the defendant was prevented from taking the oath as accepted by him, by reason of the fact that the temple was not open and that the 'uralan' was not available to receive the fee and then allow the taking of the oath to be proceeded with, there was no further attempt made by the defendant to complete his agreement to take the oath. He having received the fee to be paid to the 'uralan' for the purpose of making the oath was still bound to avail of another opportunity to make the oath and it would have been very proper and correct for the learned Small Cause Judge to have ordered a fresh opportunity to be made available to the defendant to take the oath. This has not been done and it could not, therefore, in the circumstances, be stated that there has been any failure on the part of either of the parties to fulfil the agreement which they entered into in regard to the taking of the oath.

In such circumstances, I am inclined to agree with and follow the course adopted by Pandrang Row J. in having directed that there should be a further opportunity made available to the defendant who seems to be still willing to abide by his original agreement to take the oath. In that case, the proper thing for the learned Small Cause Judge would be to appoint a commissioner and direct that the defendant to take the oath on a fixed day in the form which had been agreed upon in the presence of the Commissioner as well as of the plaintiff who has challenged the defendant to take the oath. On the completion of this oath, it will be for the learned Small Cause Judge to decide the matter.

(10) There is another Bench decision referred to by the learned counsel for the respondent and which is reported in — 'Valliammal v. Arunachala Moopanar', AIR 1938 Mad 385. A Bench of this Court held in that decision that if the oath is not taken in pursuance of an agreement the case cannot be disposed of on the basis of a default either on behalf of the challenger or by the acceptor. The provisions of S. 11, Oaths Act, can only be attracted if the oath had been taken in accordance with the agreement arrived at between the parties. Various other aspects of the case have been discussed at great length in this Bench decision but I do not think for the purpose of this civil revision petition I need go into a detailed discussion of the points that have been discussed in the said Bench decision.

The fundamental fact remains that unless the oath is taken, as agreed to by the parties, there cannot be said to be any evidence on the basis of which the Court can proceed to dispose of the case one way or the other so that it seems to me necessary that the agreement to take the oath must be put into operation before the Court can have any material before it to decide the case on the basis of the agreement. It also seems to be evident from the trend of these decisions that a mere agreement to take an oath on the challenge made by one of the parties and accepted by the other party cannot amount to an adjustment or compromise which could be incorporated in the form of a decree without any further inquiry or investigation and without a decision as to whether the case has been proved or not.

In such circumstances, I do not think that it will be safe, in the interests of justice, that the Court should follow any other course of action than what is set down in the first series of decisions ending with — 'Siddaya v. Ambu Nair', 49 Mad LJ 379 & — 'Shah Nawaz v. Ghulam Mohammad', AIR 1946 Lah 78. While adhering to the view that a mere agreement to go through the taking of an oath to enable the Court to decide a matter cannot be the same as a compromise or an adjustment of a suit I think, in the circumstances of the present case, it will be in the interests of justice that the course that has been followed in — 'Bhagavathi Vannan v. Veeran Vannan', AIR 1935 Mad 591 should be adopted in this case as well.

In view of this I direct that the learned Small Cause Judge should appoint a particular day for the taking of the oath by the defendant, direct him to do so in the form already agreed to, appoint a commissioner in whose presence it should be done and also direct that the plaintiff be also present on the occasion of the oath-taking. Of course, it follows that for the purpose of taking the oath, the defendant who had already received the fee to be paid to the 'uralan' will make all the necessary arrangements beforehand to keep

the temple open so that it may not again be said that the 'uralan' or the 'poojari' of the temple was not available for fulfilling his obligation under the agreement to take the oath.

In the circumstances, the suit will be remanded to the lower Court for being disposed of in the manner indicated above. In view of the fact that the judgment of the learned Small Cause Judge has not discussed all the relevant issues that arose in a matter like this, I think it is a proper direction in the circumstances of the case that each party should bear his costs.

B/V.R.B. Suit remanded.

A. I. R. 1953 MADRAS 399 (Vol. 40, C. N. 144)

SUBBA RAO J.

M. Gopalakrishna Menon, Appellant v. K. P. Vellakutty, Respondent.

Second Appeal No. 1041 of 1948, D/- 6-12-51.

† T. P. Act (1882), S. 111 (f) — New lease during continuance of original lease but after attachment of lease-hold — New lease is void under S. 64, Civil P.C., and does not operate as implied surrender — Subsequent sale in execution — Possession of lessee continues under original lease and cannot be disturbed — (Civil P. C. (1908), S. 64).

Where during the continuance of a lease, the lessee accepts a new lease, there is an implied surrender by law. But if the new lease is void, the implied condition of surrender does not operate. (1848) 11 QB 702; AIR 1924 Cal 355 and 15 Mad 166, Rel. on.

Where the new lease is executed when the lease-hold was under an attachment the lease is void and there is no implied surrender, though under S. 64, Civil P. C., a transfer is not absolutely void, that is, void as against all the world, but void only against all the claims enforceable under the attachment. The real principle is not whether a transaction is voidable or void, but whether it conveyed any interest according to the contract of the parties.

Consequently where the decree-holder who has attached the property puts up the property to execution sale and purchases it himself, the sale is not subject to the lease, created after the attachment, by virtue of S. 64. Since there is no surrender implied by law, the original lease continues and the possession of lessee under the original lease cannot be disturbed by the sale. **(Para 4)**

Anno: T. P. Act, S. 111 N. 10; C. P. C., S. 64 N. 10, 11, 12.

D. A. Krishna Variar, for Appellant; N. Sundara Iyer, for Respondent.

REFERENCES: Courtwise/Chronological/ Paras
('23) 71 Ind Cas 976: (AIR 1924 Cal 355) 4
('92) 15 Mad 166 4
(1908) 2 KB 126: (77 LJKB 942) 4
(1848) 11 QB 702: (17 LJQB 151) 4

JUDGMENT:— The question raised in the second appeal is one of implied surrender of a lease. The plaint schedule items of property were owned by the kanoor tarwad. In the partition, that was effected between the members of the tarwad, the said items were set apart to the share of Chamukutti Nair. The plaintiff, who was holding the said items under a prior lease, attorned to him. There was an agreement between the plaintiff and Chamukutti Nair, in and by which the plaintiff was allowed to continue in possession of the properties on a rental of 334 paras of paddy from 1940-41. On 16-2-1943, the plaintiff executed a pattomchit, Ex. P. 1, whereunder the rent payable was fixed at 264 paras of paddy. Meanwhile, the defendant, who obtained an assignment of the decree obtained against Chamukutti Nair, attached the said properties, brought them to sale and purchased them on 19-3-1945 and took delivery on 30-8-1945. It may be mentioned that the attachment was prior to the date of Ex. P. 1. The plaintiff filed O. S. No. 233 of 1945 for recovery of possession of the property from the defendant, mainly on the ground that as Ex. P. 1 did not come into effect, he would be in possession under his earlier oral lease. The defendant pleaded, inter alia, that there was an implied surrender of the earlier lease by the execution of Ex. P. 1, and, therefore, the plaintiff would not be entitled to possession. The learned District Munsif held that the implied surrender was not valid, since Ex. P. 1 was not operative, having been created while the attachment was pending over the properties. In appeal, the learned Subordinate Judge took the same view and held that, as Ex. P. 1 was inoperative and invalid, the respondent should be deemed to be in possession as lessee under the earlier lease. The defendant preferred the above second appeal.

(2) The learned counsel for the appellant contended that the execution of Ex. P. 1 operated as an implied surrender and that the fact, that it was executed after the attachment, would not affect the question as, though the lease was void against all claims enforceable under the attachment, it was otherwise valid. He also contended that, if it operated as substitution of the earlier lease, the circumstance that subsequently the lease-hold properties were brought to sale and purchased free from the lease deed, would not invalidate the surrender that was already effected.

(3) A lease of immovable property may be determined in any of the modes prescribed under S. 111, T. P. Act. The relevant provision of S. 111 reads:

"111. A lease of immovable property determines
(f) by implied surrender
Illustration to clause (f): A lessee accepts from his lessor a new lease of the property leased, to take effect during the continuance of existing lease. This is an implied surrender of the former lease, and such lease determines thereupon."

(4) A leading decision on the scope of an implied surrender is —'Doe d. Egremont v. Courtenay', (1848)11-Q.B. 702. The following neat statement of law on the subject by Coleridge J. may be quoted:

"Where the new lease does not pass an interest according to the contract, the acceptance of it will not operate as a surrender from the acceptance of a new lease, a condition ought also to be understood as implied by law, making void the surrender in case the new lease should be made void and in case of an express surrender so expressed as to show the intention of the parties to make the surrender only in consideration of the grant, the sound construction of such instrument, in order to effectuate the intention of the parties, would make that surrender also conditional, to be void in case the grant should be made void."

The said principle was accepted and applied by Farewell L. J. in —'Zick v. London United Tramways', (1908)2-K.B. 126. In —'Jamini Mohan v. Debendra Narayan', 71 Ind Cas 976 (Cal), the Calcutta High Court applied that principle to a case arising under S. 111, T. P. Act. There the facts were: A Hindu widow granted a permanent

lease at a fixed rent to the predecessor-in-interest of the defendant. The reversioner filed the suit to recover possession on the ground that the lease granted by her was in excess of her authority as a Hindu widow. The defendant raised the plea that, if the lease ceased to be operative upon the death of the lady, he was entitled to fall back upon another lease, which was in existence, when the permanent lease was granted by the widow. The question in that case was whether the acceptance of the lease of 26-10-1869 by the predecessor of the defendant must be taken to be equivalent to an implied surrender of the prior lease. The learned Judges in holding that the lease of 26-10-1869 did not operate as an implied surrender of the prior lease, made the following observations at page 978:

"It is well-settled that an implied condition of surrender by operation of law is that the new lease should be a valid one. Accordingly, a lease which is void or voidable or which does not pass interest according to the contract of the parties does not operate as a surrender."

Much the same view has been expressed by Collins C. J. and Shephard J. in —'Ramunni v. Kerala Varma Valia Raja', 15 Mad 166. In that case, the 'karnavan' of a Malabar 'kovilagam' executed a 'kuikanom' lease of certain land in 1843 and in 1861 his successor demised the same land to the same tenants in perpetuity. The next 'karnavan' sued in 1889 to recover possession of the land. The learned Judges held that the perpetual lease, as being of an improvident character, was 'ultra vires' and void and, therefore, the execution of that lease would not have the effect of a valid surrender of the prior lease. The learned Judges stated at page 167:

"In our judgment, however, any surrender by operation of law that might have ensued on the taking of the perpetual lease was nullified by the plaintiff's repudiation of the perpetual lease. The surrender must fall to the ground with the transaction on which it is supported."

The learned counsel for the appellant attempted to distinguish these cases on the ground that the subsequent leases in both the cases were void from the inception, whereas in the present case, the lease was void only against all claims enforceable under the attachment but otherwise valid. S. 64, C. P. C., which invalidates transfers made after attachment runs as follows:—

"Where an attachment has been made, any private transfer or delivery of the property attached or of any interest therein and any payment to the judgment-debtor of any debt, dividend or other monies contrary to such attachment, shall be void as against all claims enforceable under the attachment."

It is true that, under this section a transfer is not absolutely void, that is, void as against all the world, but void only against all the claims enforceable under the attachment. So too, the permanent lease executed by the widow in —'Jamini Mohan v. Debendra Narayana', 71 Ind Cas 976 (Cal) and that executed by the 'Karnavan' in —'Ramunni v. Kerala Varma Valia Raja', 15 Mad 166. The alienations there were also voidable in the sense that it was open to the reversioner in one case and the succeeding karnavan in the other case to elect to treat them as invalid. The real principle is not whether a transaction is voidable or void, but whether it conveyed any interest according to the contract of the parties. The law implies a condition that the surrender would be invalid, if the transaction, on which the surrender rests, turns out to be void. In the present case, Ex. P. 1 was executed when the attachment by the defendant was subsisting and, therefore, was void as against all claims enforceable under the attachment. The defendant brought the property to sale and purchased it himself. His sale by reason of S. 64, C. P. C., was not subject to the lease created by the original owner subsequent to the attachment. In view of the events that happened, Ex. P. 1 turned out to be a void document and the condition implied, viz., where a new lease does not pass an interest according to the contract, the acceptance of it will not operate as a surrender of the former lease, would operate and, therefore, the latter transaction could not effectuate as an implied surrender. There is no force in the learned counsel's argument that if the debt was paid off or the attachment ceased for one reason or other, Ex. P. 1 would have conveyed interest, for in that case, Ex. P. 1 would have been put into effect and the implied condition would not have been broken. I, therefore, agree with the court below that there was no implied surrender of the earlier lease and the plaintiff is entitled to a decree for possession.

(5) The second appeal fails and is dismissed with costs. No leave.

B/R.G.D. Appeal dismissed.

A. I. R. 1953 MADRAS 400 (Vol. 40, C. N. 145)

MACK AND RAMASWAMI GOUNDER JJ.

In re Krishnan Naidu.

Ref. Trial No. 50 and Criminal Appeal No. 387 of 1951, D/- 8-11-1951.

(a) Criminal Trial — Splitting up cases — Both father and son charge-sheeted — Sessions Judge splitting up cases — He should in judgment make reference to the manner in which cases were split up and the fact that father also was charge-sheeted — (Criminal P. C. (1898), S. 239). (Para 2)

Anno: Criminal P. C., S. 239 N. 1.

(b) Criminal P. C. (1898), Ss. 239(d), 236 — Son charged under S. 302, I.P.C., and father under S. 201/511 — Case should not be split up into two — Charge against father should be altered with notice to father — S. 236 also should be applied.

In cases, in which the disposal of the body is done by one of the persons directly charged with murder, the persons who help him to dispose of the body, knowing he was the murderer, can be tried together with him, regarding murder and the disposal of the body as offences in the course of the same transaction under S. 239(d), Cr. P. C., though where disposal of a murdered corpse is done by persons, none of whom had any connection with the murder, then they should be tried separately. Where the committing magistrate framed a charge of murder only against the son, and the charge under S. 201, I.P.C., read with S. 511, I.P.C., i.e., for attempting to dispose of the murdered corpse against the father, the Sessions Court should not split up the case into two. It is open to him after notice to the father to alter the charge against the father also under S. 302, I.P.C., or better still to frame alternative charges under Ss. 302 and 201, I.P.C., against both the accused, keeping the original accusation intact for a single judicial determination. AIR 1949 Mad 9 (FB), Distinguished. (Para 15)

Anno: Cr. P. C., S. 239 N. 6, 8, 3; S. 236 N. 6.

(c) Evidence Act (1872), S. 60 — A and B tried separately — In trial of A, witness telling that B told him that A had stabbed the

deceased — Evidence is hearsay and therefore inadmissible — B not being tried along with A, should be produced as witness — Evidence would be admissible only if A and B were tried in one case. (Para 9)

Anno: Evidence Act, S. 60 N. 4.

V. L. Ethiraj, for Petitioner; The Public Prosecutor, for the State.

REFERENCES: Courtwise/Chronological/ Paras
('25) 6 Lah 226: (AIR 1925 PC 130: 26 Cri LJ 1059) 15
('49) ILR (1949) Mad 220: (AIR 1949 Mad 9: 50 Cri LJ 80 FB) 2, 15

MACK J.: Appellant aged 19, the son of Rangappa Naicker, has been found guilty under S. 302, I. P. C., of the murder of a young woman Chittliammal aged about 16 and sentenced to death.

(2) The facts of this case are remarkable. The police originally laid a charge-sheet against the father Rangappa Naicker as A. 1 and the son, the present appellant, as A. 2, it would appear, under S. 302 read with S. 34, I. P. C. The committing Magistrate on some unusual evidence in the case framed a charge of murder only against the son, and a charge under S. 201, I. P. C., read with S. 511, I. P. C., i. e., for attempting to dispose of the murdered corpse against the father. In the Sessions Court, the case was split up into two and the learned Sessions Judge has tried the appellant separately on the charge of murder, it would appear, in view of the Full Bench decision of this Court, — 'In re Narayana Bhatta', I. L. R. (1949) Mad. 220. The trial Court judgment makes no reference at all to the fact that the father had also been charge-sheeted and that the case was split up in this manner. A perusal of it leaves one in doubt and speculation as to the position of the father, whose absence either from the witness-box or the dock, on the evidence admitted in the case, is otherwise quite inexplicable. Mr. Netto of the Salem Bar, who appeared in the trial Court and was present here to assist Mr. Ethiraj for the appellant, has clarified an obscure position. The learned Sessions Judge should, when he splits up cases in this manner, make reference to it in his judgment.

(3) The facts of this strange case according to the prosecution are these. The corpse of Chittliammal was found in the field of Rangappa Naicker, according to the official plan about 300 yards from Kondireddipāṭṭi village, where he lived. She had been stabbed through the heart, the only fatal injury on her. She also had six abrasions or contusions, 4 in the chest and abdominal region, one on the forehead and one on the right knee. They are all simple injuries pointing to some struggle, which preceded the fatal stab injury 2½" deep in the chest, which pierced the heart.

(4) Rangappa Naicker himself had arranged for the marriage of this girl to his nephew P. W. 3 a few years before the offence and constructed a house for them to live in near his own. P. W. 3 left the village some time before this murder and Rangappa Naicker is said to have kept Chittiliammal as his concubine with whom his son also got infatuated & was having illicit intimacy. The only witness, who deposes to the existence of this alleged amorous rivalry between the father and the son is rather strangely the Village Magistrate of Kondireddipatti Munuswami Naidu (P. W. 4), who lived in another village Antheripatti about a mile from the scene of offence. The burden of the defence, which may be anticipated here is that false evidence has been given and concocted by this Village Magistrate, who was a family enemy.

x x x x

(5-8) (Then His Lordship narrated the evidence given by the Village Magistrate and the other witnesses including P. W. 1 who said that he was told by Rangappa Naicker that the appellant stabbed the deceased).

(9) Now the evidence that this witness was permitted to give at the sessions trial and also the evidence of the Village Magistrate that Rangappa Naicker told him that his son had stabbed Chittliammal is legally inadmissible in a trial against the son himself without the father appearing as witness. It is hearsay evidence of a dangerous character and wholly and legally inadmissible. The learned Sessions Judge merely made a note of the objection taken but allowed the evidence to go in. Had the father been on joint trial along with his son, the official complaint Ex. P. 1 made by P. W. 1 to the village magistrate and also the extraordinary request made by the father for his assistance in cremating the body, would have been legally admissible. The result of the splitting up of this case has been that all that the father is alleged to have said fastening responsibility on the son is totally inadmissible without his being examined as a witness himself. The learned Sessions Judge has based the conviction of the appellant mainly on P. W. 2's lower Court deposition Ex. P. 2. This is no doubt under S. 288, Cr. P. C. substantive evidence in case.

(10-13) (His Lordship then discussed the evidence of P. Ws. 2, 3, 7 and 8 all of whom deposed in favour of the prosecution before the Sub Magistrate and resiled in the Sessions Court.)

(14) The wholesale resiling of these witnesses in the Sessions Court is an extraordinary feature of this case. It is capable of more than one explanation. It may be due to their being tutored to give false testimony, in a false twist given to this case by the Village Magistrate or to their having been gained over by Rangappa Naicker. There is a third reason which, we think, is more likely and that is that these witnesses after this case was split up and a case of murder was concentrated only on the present appellant, decided to give it no support at all. We are not prepared to say that they have deposed in the circumstances in all respects truly in the committing Court and falsely in the Sessions Court.

(15) It is very unfortunate that the case as originally laid by the police was split up in this manner into two separate trials. Mr. Ethiraj and the learned Public Prosecutor both agree that if the father and the son had been both tried together on charges under S. 302, I. P. C., there would have been no misjoinder at all. In the Full Bench decision in — 'In re Narayana Bhatta', I. L. R. (1949) Mad. 220, there was a separate charge framed against three persons for causing the disappearance of a murdered corpse who had nothing to do with the murder itself. That Full Bench decision was on a reference made by Horwill J. and myself and was occasioned by a difference of opinion between us. The view I then took and with the greatest respect to which I still incline is that in cases, in which the disposal of the body is done by one of the persons directly charged with murder, the persons who help him to dispose of the body, knowing he was the murderer, can be tried together with him, regarding murder and the disposal of the body as offences in the course of the same transaction under S. 239 (d), Crl. P. C., though where disposal of a murdered corpse is done by persons, none of whom had any connection with the murder, then they should be tried separately. In our opinion, and in this both Mr. Ethiraj and the learned Public Prosecutor agree, the Full Bench were

dealing with the facts of a peculiar case as is clear from the following observation they made:

"Obviously no general rule can be laid down as to when different offences can be said to have been committed in the course of the same transaction. The question when it arises must be determined on the facts of the particular case".

If the learned Sessions Judge split up this case on the strength of this decision, all we can say is that he misapplied it. It was open to him after notice to the father to have altered the charge against the father also under S. 302, I. P. C., or better still to have framed what we consider to have been proper charges on the facts alleged by the prosecution, viz, alternative charges under Ss. 302 and 201, I. P. C., against both the accused, keeping the original accusation made by the investigating police intact for a single judicial determination. On the peculiar facts in this case as alleged by the prosecution, it was clearly doubtful which offences they will constitute and the procedure of alternative charges was fully justified under S. 236, Crl. P. C. Mr. Ethiraj and the learned Public Prosecutor agree that if this had been done, there would have been no misjoinder at all. A superficial reading of the Full Bench decision appears to have engendered an erroneous view that an offence under S. 201, I. P. C. can in no circumstances be tried along with S. 302, I. P. C. It is perfectly open to a Court to convict an accused charged of murder under S. 302, I. P. C., of an offence only under S. 201, I. P. C., without even framing any separate charge under the latter section. This has been recognised in the Full Bench decision itself following the Privy Council decision —'Begu v. Emperor', 6 Lah 226 (P.C.).

(16) We have carefully considered whether in this case there should be a retrial of the appellant along with his father. This cannot now be done without notice to the father. The only legal evidence against the son is the retracted evidence of the only eye-witness P. W. 2 and his lower Court deposition admissible under S. 288, Crl. P. C. The evidence of P. W. 1 that he was standing with a knife in his hand with his father by the corpse is 'prima facie' incredible. The legally admissible evidence against the appellant in the present case is quite insufficient to warrant a conviction. We have also decided that it is insufficient to justify even a retrial along with his father. We do not desire to express any opinion here about the truth or falsity of the evidence of the village magistrate, P. W. 4, in view of the case pending against the father Rangappa Naicker on the charge under S. 201, I. P. C. read with S. 511, I. P. C., in respect of which he has been committed, which must take its course. Without the father appearing before us in the capacity of either witness or accused, we do not feel justified also in expressing any opinion. This is the unfortunate result of the bisection of the case and the Police accusation with the evidence against the son forced into the narrow groove of the first complaint and report made by the village magistrate in this case. With these observations we allow the appeal, acquit the appellant and direct him to be set at liberty.

B/R.G.D. Appeal allowed

A.I.R. 1953 MADRAS 402 (Vol. 40. C. N. 146)

BASHEER AHMED SAYEED, J.

K. S. Deenadayalu Reddy, Appellant v. Lalithakumari Respondent.

City Civil Court Appeal No. 50 of 1950 D/- 4-12-1951.

(a) Civil P. C. (1908), O. 6 R. 17 — **Wife's suit for separate maintenance on ground of desertion — During pendency of suit husband marrying again another wife — Wife can be allowed to amend plaint by introducing this fact as further ground for her claim to maintenance — Court can take into account events happening during pendency of suit and even at stage of first and second appeal.** (Para 4)

Anno: C. P. C. O. 6 R. 17 N. 10, 13.

(b) Hindu Married Women's Right to Separate Residence and Maintenance Act (19 of 1946), S. 2 — Proviso — **Burden is on husband defendant to show that there is decree for restitution of conjugal rights and that the plaintiff wife failed to comply with it without sufficient cause.**

The proviso to S. 2 is one, which seeks to disentitle a married woman from separate maintenance or residence, provided certain conditions exist and among those conditions one of them is failure for sufficient cause to comply with the decree of a competent Court for restitution of conjugal rights. If a married woman brings a suit against her husband, and if the husband wants that the woman should not be entitled to separate residence or maintenance, when there exists a decree for restitution of conjugal rights, then, it will be open to the husband to show that she has failed to comply with that decree for restitution of conjugal rights without sufficient cause. This proviso cannot be interpreted to throw the burden on the plaintiff, a married woman, who seeks to enforce her right to residence and maintenance on grounds mentioned in the earlier part of S. 2 of the Act. (Para 5)

The mere fact of obtaining a decree for restitution of conjugal rights will not 'ipso facto' disentitle the married woman to claim maintenance. Having obtained a decree, as provided for under O 21 R. 32 the husband should have proceeded to execute the decree thereby giving an opportunity to the wife to obey and comply with the decree, in order that her failure to comply with such a decree might be made a ground for disentitling her to the maintenance. If such an opportunity had been given and then if a failure had arisen certainly the question of whether such failure was due to sufficient cause or otherwise, would arise. (Para 6)

(c) Hindu Married Women's Right to Separate Residence and Maintenance Act (19 of 1946), S. 2 — Quantum of maintenance — Husband earning Rs. 165/- per month — No other source of income — Husband maintaining himself and second wife — Service in far off place—Plaintiff wife not in very penurious circumstances — Maintenance at Rs. 20/- per month held proper. (Para 7)

S. Balasinga Satya Nadar, for Appellant; P. Somasundaram, for Respondent.

REFERENCE..... /Para.

('94) 21 Cal 784: (21 Ind App 89 PC) 6

JUDGMENT: This appeal is against the decree of the learned City Civil Judge, granting maintenance at the rate of Rs. 20 per mensem to the plaintiff, who is married wife of the defendant. The marriage has taken place in 1943, and for a year or two the husband and wife lived amicably. Later on, when the husband was transferred to Nagpur where his employment took him, there seem to have been some differences between the husband and wife

and there has been exchange of notices. In 1947, a suit seems to have been filed by the defendant appellant for restitution of conjugal rights against his wife. It was first instituted in the Poonamallee District Munsif's Court and then on the ground that that Court had no jurisdiction, it was transferred to Nagpur and the appellant appears to have obtained a decree against his wife on 20-7-1948, for restitution of conjugal rights. The respondent filed the present suit on 12-7-1948 but in the plaint, she has referred to the filing of the suit by her husband at Nagpur for restitution of conjugal rights.

(2) When the suit was pending, it transpires that the defendant appellant married a second wife on 3-2-1949. Before the trial of the suit was taken up by the learned City Civil Judge, an application was filed by the plaintiff for amending the plaint in view of the second marriage, which the defendant contracted. That amendment was allowed and the point was amended accordingly. The suit proceeded on the basis of the amended plaint.

(3) The suit itself is filed under S. 2 of Act 19 of 1946, an Act which gives a Hindu married woman the right to separate residence and maintenance under certain circumstances. Section 2 of that Act is to the following effect:

"Notwithstanding any custom or law to the contrary a Hindu married woman shall be entitled to separate residence and maintenance from her husband on one or more of the following grounds, namely:

1. if he is suffering from any loathsome disease not contracted from her.
2. If he is guilty of such cruelty towards her as renders it unsafe or undesirable for her to live with him.
3. If he is guilty of desertion, that is to say, of abandoning her without her consent or against her wish.
4. If he marries again.
5. If he ceases to be a Hindu by conversion to another religion,
6. if he keeps a concubine in the house or habitually resides with a concubine,
7. for any other justifiable cause.

Provided that a Hindu married woman shall not be entitled to separate residence and maintenance from her husband if she is unchaste or ceases to be a Hindu by change to another religion or fails without sufficient cause to comply with a decree of a competent Court for the restitution of conjugal rights."

The learned City Civil Judge relying on the ground that the defendant had married a second time and finding that there was no desertion, gave a decree for maintenance against the appellant. The defendant relied upon his decree for restitution of conjugal rights as a defence to the suit and contended that in so far as the plaintiff had failed without sufficient cause to comply with the decree of a competent Court for the restitution of conjugal rights she was disentitled to the claim for separate maintenance from the appellant. This contention was rejected by the learned City Civil Judge.

(4) The learned counsel appearing for the appellant has raised various contentions before me to get the decree of the learned City Civil Judge set aside. The first ground taken up by him is that the learned City Civil Judge ought not to have allowed the amendment, as the amendment tantamounted to a new cause of action being substituted in the place of the old one, and that it tended to change the character of the suit. I do not think that I can agree with the learned counsel for the appellant in this contention, for the reasons that the suit itself was for a separate maintenance on the ground that there was desertion on the part of the defendant, but during the pendency of the suit when a further event took place it cannot be said that it was not open to the plaintiff to take advantage of that ground, which would give rise to a further cause of action for maintaining her suit for separate maintenance. After all what she was claiming was only separate maintenance, and she could easily urge more than one ground for the purpose of establishing her claim for maintenance. It has been an accepted principle that Courts when deciding suits, could take into account events that happen either during the pendency of the suit, or even at the stage of the first or second appeal. Such being the case, it cannot be said that there was anything wrong in the learned City Civil Judge having allowed amendment sought for by the plaintiff. Even otherwise, it can be stated to be a legal ground, which was available to the plaintiff when the defendant had married during the pendency of the suit a second time and when it came to the knowledge of the plaintiff that that event had taken place. She was entitled to make use of it as a valid ground under the law. Therefore, I do not think that any illegality has been committed by reason of the allowing of the amendment of the plaint. The amendment having been allowed and the defendant having been given an opportunity to plead against the amendment, there has also been no prejudice caused to the defendant in the proper prosecution of his defence.

(5) The next contention raised by the learned counsel for the appellant is that the learned City Civil Judge did not consider the failure on the part of the plaintiff to comply with the decree of the Nagpur Civil Court from the proper perspective. According to the learned counsel for the appellant the burden was on the plaintiff to show that she failed to comply with the decree for restitution of conjugal rights for sufficient cause and this burden not having been discharged by her and the learned City Civil Judge not having discussed this aspect of the case, the decree and judgment were vitiated and, therefore, there was ground, according to the learned counsel for the appellant for remanding this suit for further trial, after framing an issue as to whether there was or no sufficient cause for the respondent to have failed to comply with the decree for restitution of conjugal rights. I do not think that this contention of the learned counsel for the appellant could be accepted. Section 2 of Act, 19 of 1946, says that notwithstanding any custom or law to the contrary, a Hindu married woman shall be entitled to separate residence and maintenance from her husband on one or more of the grounds which are given in the next seven sub-clauses to that section. After these sub-clauses comes the proviso which says that a Hindu married woman shall not be entitled to separate residence and maintenance from her husband if she is unchaste or ceases to be a Hindu by change to another religion or fails without sufficient cause to comply with a decree of a competent Court for restitution of conjugal rights. The interpretation put upon the proviso by the learned

counsel for the appellant is that the burden, in the matter of failure to comply with a decree of a competent Court for restitution of conjugal rights is thrown upon the married woman, who claims maintenance and not upon the persons who seeks to disentitle the married woman, who is otherwise entitled to maintenance under the main part of S. 2 of the Act. I do not think I can agree with this interpretation of the learned counsel for the applt. The proviso is one, which secks to disentitle a married woman from separate maintenance or residence, provided certain conditions exist and among those conditions one of them is failure for sufficient cause to comply with the decree of a competent Court for restitution of conjugal rights. If a married woman brings a suit against her husband, and if the husband wants that the woman should not be entitled to separate residence or maintenance, when there exists a decree for restitution of conjugal rights, then it will be open to the husband to show that she has failed to comply with that decree for restitution of conjugal rights without sufficient cause. I do not think that this proviso can be interpreted to throw the burden on the plaintiff, a married woman, who seeks to enforce her right to residence and maintenance on grounds mentioned in the earlier part of S. 2 of the Act.

(6) As has been pointed out by the learned counsel for the respondent it may be that the appellant has secured a decree for restitution of conjugal rights against the respondent, but the mere fact of obtaining such a decree and, in this case, it being an ex parte decree, will not 'ipso facto' disentitle the married woman, the wife of the appellant to claim maintenance. Having obtained a decree, as provided for under O. 21, R. 32, appellant should have proceeded to execute the decree thereby giving an opportunity to the respondent to obey and comply with the decree. Though the learned counsel for the appellant would say that the decree was sought to be executed, there is absolutely no shred of evidence on record in this suit to show that there has been any such execution, or that notices have been exchanged between the parties calling upon the respondent to comply with the decree that was obtained by the appellant in Nagpur. No question appears to have been put to the appellant, when he was in the witness-box as to what steps he took in regard to the execution of the decree obtained by him, and what opportunity he gave to the respondent to comply with that decree, in order that her failure to comply with such a decree might be made a ground for disentitling her to the maintenance, which she is otherwise entitled under the law. If such an opportunity had been given and then, if a failure had arisen certainly the question of whether such failure was due to sufficient cause or otherwise, would arise. The more majore premise not having been satisfied in this case, I do not think the question of any sufficient cause or otherwise arises to justify a remand of this suit for further hearing on the question of sufficient cause for failure to comply with the decree for restitution of conjugal rights. I, therefore, think that inasmuch as the appellant not having discharged the duty cast upon him to prove that there was failure on the part of the respondent to comply with the decree that had been obtained by the appellant against her and that such failure was without any sufficient cause, the mere obtaining of a decree for restitution of conjugal rights would not be a sufficient defence to defeat the right of the plaintiff to maintenance from her husband, the appellant. The rule laid down in — 'Kishore Burn v. Dwarakanath', 21 Cal 784 (PC) at pages 786 and 787 would seem to apply to the facts of this case, and I do not think that there is any justification for me to adopt the course suggested by the learned counsel for the appellant. I am inclined to hold that the decision of the learned City. Civil Judge is not wrong in having declined to consider the existence of a decree for restitution of conjugal rights operating as a defence against the claim of the plaintiff for separate maintenance. His decision has, therefore, to be upheld and the respondent will be entitled to separate maintenance from the appellant.

(7) The learned counsel for the appellant has objected to the demand of the respondent to enhance the quantum of maintenance, that has been awarded to the respondent. The respondent has preferred a memorandum of cross-objection stating that the quantum awarded by the learned City Civil Judge is inadequate and meagre, considering the hard days that prevail at present and the status and position of the parties to the suit. The learned City Civil Judge has taken into consideration the total income of the appellant, which is said to be Rs. 165 and taking into consideration that he has to maintain himself as also his second wife whom he has married, has fixed the maintenance allowance at the rate of Rs. 20 per mensem. There has been no evidence to show that this appellant has any other additional source of income beyond the Rs. 165 he is said to be earning by means of his employment at Nagpur. Considering the circumstances of the parties and there being also some evidence that the respondent is not really in very penurious circumstances I should say that the quantum of maintenance that has been fixed need not be revised. The rate of Rs. 20 per mensem will stand as it is.

(8) The learned counsel for the respondent has also taken the ground that the finding on the question of desertion by the learned City Civil Judge is not correct. I do not think that I need go into that question because I am inclined to hold that the finding of the learned City Civil Judge is well supported on the question of desertion. On the facts as they emerge in the suit, it cannot be said that the appellant has really deserted his wife.

(9) In the result, the main appeal preferred by the defendant as well as the memo of objections preferred by the respondent will both stand dismissed with costs.

B/R.G.D. Appeal dismissed.

A.I.R. 1953 MADRAS 404 (Vol. 40, C. N. 147)

CHANDRA REDDI J.

Annamalai Ammal, Appellant v. Sundarathammal and others, Respondents.

Second Appeal No. 835 of 1948, D/- 14-11-51.

† Hindu Law — Alienation — Father — Gift of reasonable portion of family property in favour of unmarried daughter as a marriage provision — Validity.

It is competent for a Hindu father to make a gift of a reasonable portion of the family property, whether movable or immovable, in

favour of his daughter whether on the occasion of her marriage or before or after the marriage. Such a gift is valid and cannot be challenged by the sons, even if made before the marriage, the object of such a gift being to make a future provision for the bridal couple to enable them to live with comfort. (Paras 4, 5, 7, 9)

The mere circumstance that a gift is not described as a marriage provision in the document does not render it invalid or affect its validity because it may be assumed in such a case that it was meant to be a marriage provision. AIR 1922 PC 201; 17 Mad LJ 528; 35 Mad 628; 37 Cal 1 and AIR 1936 Mad 825, Rel. on; AIR 1935 Bom 324, Dissent.; 30 Mad 452, disting. (Para 6)

K. Veeraswamy, for Appellant; V. Ramaswami Iyer, for Respondents.

REFERENCES: Courtwise/Chronological/ Paras

('07) 30 Mad 452: (17 Mad LJ 405) 8
('35) 59 Bom 459: (AIR 1935 Bom 324) 8
('22) 45 Mad 489: (AIR 1922 PC 201) 7, 8
('36) 71 Mad LJ 259: (AIR 1936 Mad 825) 4
('10) 37 Cal 1: (1 Ind Cas 945) 4
('12) 35 Mad 628: (10 Ind Cas 56) 4
('07) 17 Mad LJ 528: (5 Mad LT 40) 4

JUDGMENT: This second appeal raises a question relating to validity of a gift of a reasonable portion of the joint family property by a father in favour of his daughter, a few years before her marriage. The gift in question was made by the father of the plaintiffs, one Mahalinga Nadar, under Ex. P. 1 dated 3-2-1921. Under that document the donor gave a life estate to defendant 1 his wife, & a vested remainder to the plaintiff in 3 acres and 17 cents of dry land and a house. Defendant 1 was married by the said Mahalinga Nadar, as his first wife, who was no other than the first defendant's sister, was sickly. As the two wives of Mahalinga Nadar could not pull on together, defendant 1 began to live separately with her daughter, the plaintiff herein, and in 1921 as stated above, Mahalinga made a gift of the property in the manner mentioned above. Sometime after the death of the donor, defendant 1 executed a release deed in respect of the said property in favour of defendants 3 and 4, the sons of Mahalinga Nadar by the first wife under D. 3 dated 15-11-1929. This led the plaintiff to institute the suit for a declaration of her title to the suit property. The suit was resisted 'inter alia on the ground that it was not competent for the father to make a gift of any portion of joint family property in favour of the daughter.

(2) While finding that the property gifted under Ex. P. 1 to defendant 1 was a reasonable portion of the property, the Courts below held that it was beyond the powers of a father to gift away a portion of the joint family property to the daughter, though it would have been within the powers of a father to make such a gift on the occasion of the marriage of the daughter. In the result they dismissed the suit.

(3) The aggrieved plaintiff has filed this second appeal challenging the correctness of the finding of the Courts below. On this question there does not seem to be any direct case. The case is, therefore, one of first impressions and I have to decide it in the light of observations contained in some of the decided cases.

(4) It is now well settled that a father can make a marriage provision to his daughter out of joint family properties even long after the marriage. In — 'Kudutamma v. Narasimhacharyulu', 17 Mad LJ 528 a gift by a Hindu brother who was the managing member of the joint family of a reasonable portion of the joint family property to his sister who was married during the lifetime of their father but to whom no marriage provision was made at that time was held to be a valid one. In — 'Sundaramayya v. Sitamma', 35 Mad 628 a gift of a reasonable portion of the joint family property by the father to the daughter nearly 40 years after the marriage was upheld by a Bench of the Court. Dealing with the validity of such a gift the learned Judges observed that there was a strong moral obligation on the father to make a gift of a portion of the joint family property at the time of the marriage either to the daughter or the son-in-law. It was also pointed out by the learned Judges

> "that these gifts are intended as a provision for the married couple and are made by the father probably in lieu of her share of the family property."

In that case reliance was placed on a decision of the Calcutta High Court in — 'Churman Sahu v. Gopi Sahu', 37 Cal 1, where that Court held that it was competent to a managing member to make a valid gift of immoveable property to a daughter born in the family on the occasion of her Gowna ceremony if it was only of a reasonable portion. In — 'Seethamahalakshmiamma v. Kottiah', 71 Mad L.J. 259, it was observed by Venkataramana Rao J. that it was a continuing moral obligation on the part of the father to make a marriage provision to the daughter. In the last case also the gift was long after the marriage and the learned Judge upheld it on the ground that the moral obligation continued till it was discharged. What emerges from these decisions is that the obligation to make a marriage provision for the daughter being a moral and continuing one and probably in lieu of a share a gift of a reasonable portion of the property could be validly made for that purpose, even long after the marriage and if the father died without making any such provision the managing member of the family could do it. According to the decisions, the purpose of the gift is to enable the bridal couple to live in comfort.

(5) If the obligation is moral and continuing one and could be made long after the marriage, could it be said that it is not within the competence of a father to make such a gift before the marriage? In my opinion, there is not much difference in principle between a gift after the marriage, and a gift before the marriage, the object of such a gift being to make a future provision for the bridal couple.

(6) This leads me to the next question whether the circumstance that a gift is not described as a marriage provision under the document renders it an invalid one? To my mind, it appears it does not affect the validity of the gift. When a father makes a gift of a reasonable portion of the property to an unmarried daughter it may be assumed that it was meant to be a marriage provision. It is to be observed in this case that under Ex. P. 1 the plaintiff was given only a vested remainder and the gift in her favour would take effect only after the lifetime of the first defendant.

(7) In this context I may usefully refer to the decision of the Judicial Committee of the Privy Council in — 'Ramalinga Annavi v. Narayana Annavi', 45 Mad 489. There, in a partition suit the validity of a gift of a sum of about Rs. 8500 by assigning a promissory note for Rs. 5000 and a usufructuary mortgage for Rs. 3500 by the father in favour of his daughter was attacked by the other coparceners. Their Lordships upheld the gift. In the opinion of their Lordships, the father

has undoubtedly a power under the Hindu law to make gifts of moveable property within reasonable limits. While dealing with the question of the validity of such a gift it was observed by their Lordships that

"in one case the Board upheld the gift of a small share of immoveable property on the ground that it was not shown to be unreasonable".

It may be noted that this gift does not seem to have been made on the occasion of the marriage of the daughter nor does it appear to have any reference to a marriage provision. In spite of it, their Lordships held that it was within the competence of the father to make a gift of moveable property within reasonable limits. It looks as if their Lordships did not make any difference between the gift of a moveable property and that of immoveable property having regard to their observations that in some cases the Board upheld the gift of immoveable property. No doubt we have not been able to get reference to the decision referred to by their Lordships. But, it may be assumed that there is such a decision in view of the observations made by their Lordships. On the reasoning of that case, I think it could be reasonably held that gift of moveable or immoveable property whether on the occasion of a marriage or before or after the marriage can be made by a father within reasonable limits to a daughter.

(8) On behalf of the respondents, reliance was placed by Mr. Meenakshisundaram, counsel for the respondents on a decision of a single Judge of the Bombay High Court in — 'Jinnappa Mahadevappa v. Chimmava Krishnappa', 59 Bom 459. In that case it was held by the learned Judge that it was not competent for a father to gift away a small portion of the joint family property to the daughter who was looking after him in his old age. Referring to the decisions of this Court, the learned Judge observed that the validity of such gifts in Madras Presidency was grounded upon a longstanding custom and that apart from the ground of custom he was unable to agree with respect with the view taken by the Madras High Court. With great respect to the learned Judge, I am not able to subscribe to the view taken by him in that decision especially in view of the authority in — 'Ramalinga Annavi v. Narayana Annavi', 45 Mad 489. This case is dealt with thus in Mayne in Hindu Law and Usage; 11th edition, page 473:

"This would be right if it merely rested on the view that a gift of affection (prasadana) which is mentioned in the Mitakshara 1, 1, 27, could only be made of ancestral moveable property and not of ancestral immoveable property. But where the gift is in discharge of the moral obligation to provide a marriage portion as in the Madras cases it could come under the Mitakshara 1, 1, 29, as a gift in discharge of an indispensable duty. In — 'Ramalinga Annavi v. Narayana Annavi', 45 Mad 489 the Judicial Committee evidently regarded the gift of a small share of immoveable property to a daughter as within the authority of a Karta."

Mr. Meenakshisundaram next cited to me a decision of the Bench of this Court in — 'Kamakshi Ammal v. Chakrapani Chettiar', 30 Mad 452, in which it was decided that an undivided member of a Hindu family could not alienate a considerable portion of immoveable property belonging to the family by way of a gift to a female member of the family. The ground of decision in that case was that the property gifted to the female member consisted of a considerable portion of the family property. In view of the concurrent finding in this case that the property given under Ex. P. 1 was only a very reasonable portion of the property the present case cannot be governed by the principle laid down in — 'Kamakshi Ammal v. Chakrapani Chettiar', 30 Mad 452.

(9) On this discussion it follows that a gift of immoveable property by Hindu father to his daughter, if within reasonable limits, is valid and cannot be questioned by the sons even though such a gift was made before the marriage. Consequently I must hold that the view of the Courts below that it was not competent to the father to make a gift of immoveable property under Ex. P. 1 is not correct. In the result, the second appeal is allowed and the judgments and decrees of the Courts below are set aside.

(10) Appellant will be entitled to the costs of this appeal. Leave granted.

B/K.S. Appeal allowed.

A.I.R. 1953 MADRAS 406 (Vol. 40, C. N. 148)

RAMASWAMI J.

In re M. K. P. Kadar Moideen, Manager M. K. P. Rice and Oil Mills Manjakollai, Negapatam, Petitioner.

Criminal Revn. Case No. 352 and Cri. Revn. Petn. No. 351 of 1951, D/- 7-12-1951.

Factories Act (1948), S. 2(l) — Watchman, when can be a worker.

A watchman as the term is generally understood will be a worker only if he can be brought within the words "employed in any other kind of work whatsoever incidental to or connected with the subject of the manufacturing process" which may take in many categories like packers, movers of the goods, etc. Therefore it is a question of fact in each case, namely, what were the duties discharged actually by the watchmen employed in a mill and what was their connection with the subject of the manufacturing process. (Para 4)

Anno: Factories Act, S. 2 N. 1.

J. R. Gundappa Rao, for Petitioner; Public Prosecutor, for the State.

ORDER: This is a criminal revision case filed against the conviction and sentence of the Sessions Judge, East Tanjore in Cri. Ap. No. 11 of 1951 modifying the convictions and sentences of the Additional First Class Magistrate, Negapatam in S. T. C. No. 142 of 1950.

(2) The accused has been convicted for certain offences under Factories Act, Ss. 21 and 68, and fined on the assumption that the Mill which he runs is a factory and which is again on the footing that he employed 11 workers. The case of the appellant is that he employed only 8 workers and that another two included by the Factory Inspector to make up his 11 were watchmen and watchmen are not workers.

(3) The learned Sessions Judge held that the two watchmen are factory workers on the foot of the following reasoning.

"According to S. 2(l) 'worker' includes a person employed not only in any manufacturing process or cleaning machinery or premises used therefor, but also a person employed in any other kind of work incidental to or connected with the manufacturing process or the subject of the manufacturing process. A watchman is certainly embraced in the wide sweep of the last portion of the definition. This was a rice and oil mill and watching the machinery, paddy and oil seeds and the products thereof is work

incidental to or connected with the work of the mill. The duties of a watchman are mainly physical not clerical. I hold that the Mill of the accused is a factory to which the Act applies."

(4) This 'a priori' reasoning does not commend itself to me. The term "worker" is defined in S. 2(h) of the Factories Act, and we have got to see whether the alleged watchmen in this case fall within the said definition. A watchman, as the term is generally understood, will be a worker only if he can be brought within the words "employed in any other kind of work whatsoever incidental to or connected with the subject of the manufacturing process" which may take in many categories like packers, movers of the goods, etc. Therefore it is a question of fact in each case, namely, what were the duties discharged actually by these watchmen and what was their connection with the subject of the manufacturing process. There has not been any finding of fact in the case regarding the watchman being worker within the meaning of the definition of "worker". I have no materials before me to hold one way or the other.

(5) The conviction and sentence are set aside and the case is directed to be reheard in the trial Court in the light of the observations made above.

B/V.S.B. Rehearing ordered.

A.I.R. 1953 MADRAS 407 (Vol. 40, C. N. 149)

RAJAMANNAR C. J.
AND VENKATARAMA AIYAR J.

Commr. for Hindu Religious Endowments Board, Madras, Appellant v. Vinayakar Arudra Tiruppani Sabha, having its office at No. 32, Vinai Theertha Vinayakar Koil Street, Kosapet, Madras, Respondents.

O. S. Appeal No. 9 of 1950, D/- 18-10-1951.

Madras Hindu Religious Endowments Act (2 of 1927), S. 9 (11A) — Specific endowment — There must be divesting of ownership — Association registered under Act 21 of 1860, owner of property — Part of income set apart for conducting of certain religious festival in a certain temple — Association entitled to change its object — Income set apart held did not constitute specific endowment.

There cannot be an endowment unless there is a clear divesting of ownership by the owner in favour of a third party as trustee or by a declaration constituting the owner himself as trustee. Where property has always been treated as the property of the Sabha and likewise the income also has been treated to be at the unfettered disposal of the Sabha, because of the fact that by a common agreement, they provided as one of its objects for the conduct of the festival in the Vinayakar temple at a cost of not less than Rs. 150, the income cannot be called an "endowment" within the meaning of the Act. The Sabha which is registered under Act 21 of 1860, is entitled to change its objects. There is no divesting of ownership which is essential to constitute an endowment in such a case. AIR 1938 PC 73, Explained. (Para 3)

M. Seshachalapathi and T. A. Ramaswami Reddi, for Appellant; N. K. Mohanarangom Pillai, M. V. Gopalaratnam and N. K. Pattabhiraman, for Respondents.

REFERENCE ..... /Para
('38) 65 Ind App 106: (AIR 1938 PC 73) 3

RAJAMANNAR C. J.: This is an appeal by the Hindu Religious Endowments Board, Madras, against the judgment of Rajagopalan J. setting aside its order dated 22-2-1949 in and by which they declared that the income from the property, namely, premises No. 32, Vinaitheerthavinayakar Koil Street, Kosapet, Madras, is intended for the performance of Arudra festival in the temple of Sri Vinaitheertha Vinayakar in the said locality and that the income is a specific endowment as defined in S. 9 (11-A), Madras Act 2 of 1927.

(2) In or about 1908 some of the residents of the said locality formed themselves into an unregistered society with the object of collecting funds and performing festivals in the temple of Sri Vinaitheerthavinayakar, Kosapet, at the time of the Arudra Darsanam. In 1913 the premises in question were purchased in the name of one of the members of the society, but evidently with the moneys collected by way of subscriptions from the members of the society. There is no dispute that the property belongs to the society. Subsequently the society was registered under Act 21 of 1860 in 1929. Ex. P. 4 is the memorandum of association of this registered society. The object of this society was given as the conduct of the festival during Margali month on Arudra Nakshatram day in the temple of the said Vinayakar at a cost not less than Rs. 150 out of the income which may be derived from the said property. The balance was to be kept as savings and out of the amount saved in this manner other immovable properties were to be purchased. The festival was being performed year after year till the year 1947 when the members of the society met and passed a resolution at a special meeting of the general body altering the object of the society. As altered the object ran as follows:

"To perform Arudra Archanai Abhishegam and Tirupavadam every year when the day of Arudra Dharisanam occurs in the month of Margali to Sree Vinayakar installed in any temple in Kosapet locality or in any other place, within or without the City of Madras as the members may by a majority decide year after year."

The Hindu Religious Endowments Board launched proceedings to collect contribution from the society treating the income from the said property as a specific endowment. There was a protest by the society and the Board decided the question under S. 84 of the Act, in the manner already set out above. Thereupon the society filed an application under S. 84 (2) of the Act to set aside the order of the Board. Rajagopalan J. held on the evidence that there was no specific endowment within the meaning of the definition contained in Cl. 11-A of S. 9 of the Act and, therefore, allowed the petition and set aside the order of the Board. Hence the appeal.

(3) We have no hesitation in agreeing with Rajagopalan J. in his conclusion. The definition of a "specific endowment" is as follows:

" 'specific endowment' means any property or money endowed for the performance of any specific service or charity in a temple or math."

It is not the case of the Board that the property as such was ever endowed. It is only the income that is said to have been endowed and before us Mr. Seshachalapathi, the learned counsel for the Board was willing to limit it

to a sum of Rs. 150 being the minimum mentioned in the articles of association. The question, therefore, is whether there can be said to be an endowment of the entire income or part of the income of this property for a specific religious charity. The appellant's case rested almost entirely on the terms of the memorandum of association, Ex. P. 4. According to him, the fact that the object was mentioned as the conduct of the festival in a particular temple was sufficient to prove an endowment. We cannot agree. There cannot be an endowment unless there is a clear divesting of ownership by the owner in favour of a third party as trustee or by a declaration constituting the owner himself as trustee. Neither alternative had happened in this case. The property has always been treated as the property of the Sabha; likewise the income also has been treated to be at the unfettered disposal of the Sabha, though by a common agreement, they provided for the conduct of the festival in the Vinayakar temple at a cost of not less than Rs. 150. An association registered under Act 21 of 1860 is entitled to change its objects. No doubt such a change will not operate to affect any valid trust which might have been created before the alteration, but so long as there was no irrevocable trust, there is nothing to prevent the association from changing its objects. In this case as there is no divesting of ownership even as regards the income, there was nothing to prevent the society from changing its objects.

Mr. Seshachalapathi drew our attention to a decision of the Judicial Committee in — 'Sunder Singh-Mallah Singh Sanatan Dharam High School Trust, Indaura v. Managing Committee, Sundar Singh Mallah Singh Rajput High School, Indaura', 65 Ind App 106 (PC). In that case the owner of certain property constituted a committee for the management of a school which he endowed with considerable properties. In effect the owner divested himself of his ownership and transferred it to a committee which occupied the position of a trustee. Once this position is made clear, it is not difficult to follow the ruling of the Judicial Committee, namely, that it was not permissible for this committee to give up the trust or in any manner to destroy the effect of the dedication irrevocably made by the owner. Their Lordships of the Judicial Committee accepted the statement of the law as made in the judgment of the High Court, namely, that all that was necessary for the foundation of a charitable endowment by a Hindu was that the purpose should be clearly specified and that the property intended for the endowment should be set apart as dedicated to that purpose. It was necessary that the donor should divest himself of the property. Once a valid endowment was created, it could not be revoked by the donor. In the case before us, we are unable to find any divesting by the society of either the property or the income therefrom. There was, therefore, no endowment within the meaning of the definition. The learned Judge was right in setting aside the order of the Board in the circumstances.

(4) The appeal fails and is dismissed with costs.

B/R.G.D. Appeal dismissed.

A.I.R. 1953 MADRAS 408 (Vol. 40, C. N. 150)

SATYANARAYANA RAO
AND RAJAGOPALAN JJ.

Singareni Collieries Co. Ltd. by agents, Best and Co. Ltd., Applicants v. Commissioner of Income-tax, Madras, Respondent.

Case referred No. 23 of 1949, D/- 20-9-1951.

Income-tax Act (1922), Ss. 4 (1) (a) and 42 (1) and (3) — Non-resident company doing business through Agent in British India — Cheques drawn on banks in British India and received in British India — Though sent for encashment outside British India, amount ultimately coming into British India — Profits held received, accrued and arose in British India — S. 42(3) held applied.

The assessee was a limited company incorporated under the Hyderabad Companies Act. It had its registered office at Singareni Collieries, Deccan, outside British India. Messrs. Best and Co. Ltd., Madras, were appointed Secretaries and Managing Agents of the company on a remuneration. Extensive business in coal was carried on by Messrs. Best and Co. on behalf of the company under which coal was sold under contracts to companies in specified areas in British India. The contracts for sale of the goods were accepted in British India, and the cheques for the payment of the price were drawn on banks in British India and were received in British India. They were, however, sent for collection to the Imperial Bank at Secunderabad and, it could be inferred from facts and evidence that thereafter the amounts were received by the agents at Madras:

Held that the profits were received by the assessee in British India within meaning of S. 4 (1).

Held also that the profits also accrued and arose in British India, through a business connection in British India within meaning of S. 42 (1).

Held further that S. 42 (3) was applicable to the facts of the case. (Para 3)

Anno: Income-tax Act, S. 4 N. 6, 7; S. 48 N. 3, 4.

O. T. G. Nambiar, Instructed by King and Partridge, for Applicants; C. S. Rama Rao Sahib, for Respondent.

SATYANARAYANA RAO J.: Under the directions of this Court, under S. 66(2) of the Income-tax Act, the following four questions were referred to us by the Appellate Tribunal:

"(1) Whether, on the facts and in the circumstances of the case, the profits on the sale of coal to (1) State-managed and company-managed railways in British India, (2) the Madras Electric Supply Corporation Ltd., and other customers in British India (marked out by the Appellate Tribunal) constitute profits accruing or arising in British India within the meaning of S. 4 of the Indian Income-tax Act;

(2) Whether, on the facts and in the circumstances of the case, the profits on the sale of coal were received by the assessee company in British India within the meaning of S. 4(1)(a) of the said Act;

(3) Whether, on the facts and in the circumstances of the case, the profits on certain sales of coal to customers in British India, other than those mentioned in ques-

tion (1), accrued or arose to the assessee company directly or indirectly through or from a business connection in British India within the meaning of S. 42(1) of the Indian Income-tax Act?

(4) Whether, on the facts and in the circumstances of the case, S. 42(3) of the Indian Income-tax Act is applicable to the profits assessable as received under S. 4(1) (a) and as accruing and arising under S. 4(1) (c) of the Income-tax Act?"

(2) In the statement of the case and the Appellate Tribunal's order the contention between the parties were narrowed down considerably in view of the elaborate orders of the Appellate Assistant Commissioner and the Income-tax Officer. The assessee is a limited company incorporated under the Hyderabad Companies Act. It has its registered office at Singareni Collieries, Deccan, outside British India. Messrs. Best and Co., Ltd., Madras, were appointed under two deeds of 25-11-1931, Secretaries and Managing Agents of the company on a remuneration stated in the agreement. Extensive business in coal was carried on by Messrs. Best and Co. on behalf of the company under which coal was sold under contracts to State-managed and company-managed railways in British India, to the Madras Electric Supply Corporation and also through brokers or agents in specified areas in British India. A large volume of business amounting to several lakhs was done by the company. As the company is resident outside British India, the question raised was whether its income was to any extent assessable under the Indian Income-tax Act. Its income could be assessed to tax, as if it accrued or arose or was received in British India, or if there was a business connection within the meaning of S. 42, in which case there would be an appointment under S. 42(3). It was found by the Appellate Tribunal that the contracts for sale of the goods were accepted in British India, and that the cheques for the payment of the price were received in British India. In fact, it was admitted by counsel who appeared before the Appellate Tribunal that the cheques or the treasury orders for payment of coal supplied by the assessee were drawn on banks in India and were received by Messrs. Best and Co., Ltd., who, however, passed them on the Colliery office situated in the State of H.E.H. the Nizam of Hyderabad for encashment. On these facts it was found that the profits not only accrued or arose in British India but that they were also received in British India. It was further found on the facts there that there were a business connection to justify an apportionment in cases where it was not clear whether the income accrued or arose or was received in British India.

(3) It was contended on behalf of the assessee by Mr. Nambiar that on the facts as stated in the statement of the case it was not possible to sustain the conclusion, that the income was received in British India. We are not prepared to accept this contention. His contention was that the cheques were received no doubt in British India and were also drawn on Banks in British India; but they were sent for collection to the Imperial Bank at Secunderabad, and thereafter there was nothing to show that they were received by the agents at Madras. It is pointed out by Mr. Rama Rao Sahib, the learned advocate for the Income-tax Commissioner, that before the Appellate Assistant Commissioner the assessee was asked to produce a copy of his account with the National Bank at Madras in order to determine the method and the manner in which the cheques were realised. It must be remembered that under the Managing Agency agreement Messrs. Best and Co. were authorised to deposit the monies in the National Bank of India at Madras and in such other banks as the company may direct. There is no evidence of any direction by the company that Messrs. Best and Co. were authorised to deposit monies in any other bank or banks than the National Bank of India. In answer to a querry put by the Appellate Assistant Commissioner as noted by him in his order it was stated on behalf of the assessee that he was not in a position to produce a copy of his account with the National Bank of India, and that he had no objection for any adverse inference that might be drawn against him by reason of the non-production of such accounts. In view of this very important circumstance it was rightly assumed by the Revenue authorities that the amount after collection must have found its way into the National Bank at Madras, and the finding, therefore, that the receipt of the profits was in British India was perfectly warranted on the facts as found by the Appellate Tribunal. From this point of view, it is unnecessary to go into the question, which has also been decided by the Appellate Tribunal, whether the profits did not accrue or arise in British India. However, on the facts as stated by them, we have no hesitation in agreeing with their conclusion. There is a business connection which has been found by the Appellate Tribunal, and in view of that, in cases in which it is not possible to determine whether the profits accrued or arose or were received in British India there was justification for applying S. 42(3).

(4) It follows that the questions which have been referred to us must be answered against the assessee. As the assessee has failed, he must pay the costs of the Income-tax Commissioner, which we fix at Rs. 250.

B/R.G.D. Questions answered.

A.I.R. 1953 MADRAS 409 (Vol. 40, C. N. 151)

SUBBA RAO J.

Marina Appa Rao and others, Appellants v. Marina Veeranna, Respondent.

Second Appeal No. 1007 of 1948, D/- 27-11-1951.

T. P. Act (1882), Ss. 54 and 40 — Agreement to sell immovable property — Subsequent sale in favour of third person with notice of prior agreement — Sale is subject to obligation under prior agreement — (Trusts Act (1882), S. 91) — (Specific Relief Act (1877), S. 27(b)).

An agreement to sell immovable property does not create any interest in the said property unless a sale deed is executed conveying the said property. The vendor, who has not transferred his interest in the property, though he entered into an agreement with another to sell the same, can certainly confer title on a third party by executing a sale deed in his favour. As between the vendor and the subsequent purchaser, there is a transfer of ownership and therefore the title to the property vests in the latter. But the title of the

subsequent purchaser with notice of the prior agreement in favour of another is subject to the obligation under S. 91 of the Trusts Act. He holds the property for the benefit of the latter to the extent necessary to give effect to the contract. The person in whose favour there was a prior agreement can specifically enforce his agreement under S. 27(b), Specific Relief Act, and compel him to execute a sale deed in his favour. But till such a sale deed is executed by the subsequent purchaser, the person in whose favour there was a prior agreement cannot acquire any title to the same. Case law reviewed. **(Para 7)**

Anno: T. P. Act, S. 40 N. 8, 17; S. 54 N. 5, 23; Trusts Act, S. 91 N. 1; Specific Relief Act, S. 27 N. 3.

K. Rajah Aiyar and N. Bapiraju, for Appellants; M. S. Ramachandra Rao and K. Rangachari, for Respondent.

REFERENCES: Courtwise/Chronological/ Paras

('32) AIR 1932 All 694: (139 Ind Cas 714) 6
('02) 26 Bom 159: (3 Bom LR 596) 5a
('12) 22 Mad LJ 124: (13 Ind Cas 176) 3, 6, 7A
('14) 26 Mad LJ 518: (AIR 1914 Mad 462) 4
('16) 30 Mad LJ 559: (AIR 1917 Mad 190(2)) 4
('35) AIR 1935 Mad 333: (157 Ind Cas 1056) 5

JUDGMENT: This is a second appeal against the decree and judgment of the Court of the Subordinate Judge of Rajahmundry confirming that of the Court of the District Munsif of Ramachandrapur in O. S. No. 212 of 1946.

(2) The plaint schedule property originally belonged to one Kondepudi Ramanna. He executed a Khandagutta cowle, Ex. D. 1 dated 9-6-1905, in favour of Sattiraju for a period of forty-one years. On 4-12-1915, Ramanna entered into an agreement to sell the same property in favour of the plaintiff's grandfather, Marina Veeranna. Marina Veeranna filed O. S. No. 926 of 1916 on the file of the Court of the District Munsif, Ramachandrapur, for recovery of a sum of money due to him on a promissory note executed by Ramanna. In that suit, on 17-9-1916 he attached before judgment the suit properties subject to his own right under the aforesaid agreement. After attachment, on 14-10-1916, Ramanna executed a sale deed conveying the plaint schedule properties to Sattiraju under Ex. D. 2. On 10-11-1916 Sattiraju, in his turn, executed a mortgage deed, Ex. D. 4 in favour of defendant 1 for a sum of Rs. 2000. Veeranna filed O. S. No. 1174 of 1916 for specific performance of the aforesaid agreement to sell and obtained a decree therein. To that suit Ramanna and Sattiraju were made parties. Pursuant to the decree for specific performance, Ramanna executed a sale deed, Ex. P. 1, on 6-4-1918 conveying the property to Veeranna for a sum of Rs. 2000. The first defendant, in whose favour Sattiraju executed a mortgage deed dated 10-11-1916 filed twelve years thereafter, O. S. No. 33 of 1928 for recovery of the amount due under the mortgage and obtained a decree therein. In execution of the decree, the said properties were purchased by the other defendants in different shares and subsequently there were exchanges between them. The plaintiff who is the grandson of Marina Veeranna and is presumably named after him, filed O. S. No. 212 of 1946 on the file of the District Munsif of Ramachandrapur for establishing his right to the plaint schedule properties, for possession, and for mesne profits. The defendants raised various pleas which are reflected in the following issues:

1. Whether the agreement dated 4-12-1915 in favour of the plaintiff's grandfather is true and whether the decree in O. S. No. 1174 of 1916 in pursuance of the same is binding on the defendants?
2. Whether the sale deed dated 14-10-1916 in favour of Rimmalapudi Sattiraju the predecessor-in-interest of the defendants and the mortgage by him in favour of the first defendant and the subsequent proceedings O. S. No. 33 of 1928 and the E. P. No. 11 of 1930 are all true, valid and binding on the plaintiff?
3. Whether the defendants are entitled to any relief under S. 41 of the Transfer of Property Act?
4. In any view whether the claim of the defendants is vitiated by the rule of 'lis pendens'?
5. Whether the schedule properties were attached before judgment in O. S. No. 926 of 1916, and if so what is the effect of the same?
6. What is the effect of the proceedings in O. P. No. 73 of 1928 on the rights of the plaintiff and defendants?
7. Whether defendants are estopped to question the rights of the plaintiff?
8. Whether the khandagutta cowle in favour of Rimmalapudi Sattiraju is only a usufructuary mortgage and whether the suit of the plaintiff in its present form is not maintainable?
9. To what mesne profits and what rate is the plaintiff entitled?
10. To what relief is the plaintiff entitled?

The learned District Munsif held, on the evidence, that the sale deed executed by Ramanna in favour of Sattiraju was a collusive one and therefore Ramanna had validly conveyed title to Veeranna under Ex. P. 1. He also held that the mortgage by Sattiraju in favour of defendant 1 was also collusive. He also found that the claim of the mortgagee was affected by the doctrine of 'lis pendens'. In the result the learned District Munsif gave a decree to the plaintiff as prayed for. The defendants preferred an appeal to the Court of the Subordinate Judge of Rajahmundry. In appeal the only point argued was that notwithstanding the decree in O. S. No. 1174 of 1916 the plaintiff's grandfather did not acquire a valid title under Ex. P. 1 as Sattiraju also did not join the sale deed. The learned Subordinate Judge held that the sale deed was executed by Ramanna for and on behalf of all the parties interested in the property at the time it was executed. He dismissed the appeal. The defendants have preferred this second appeal against that decree.

(3) Learned counsel for the appellants contended that Ramanna having sold the property to Sattiraju, could not convey valid title to Veeranna and that the only person who could do so was Sattiraju. To put in other words, his contention was that if a person enters into an agreement to sell his property in favour of another and thereafter sells the same to a third party with notice of the prior agreement, the third party acquires a valid title to the same, subject to the right of the person in whose favour the earlier agreement has been executed to enforce his contract against him. At this stage it may be convenient to consider

the relevant provisions of the various statutes and the cases cited by the learned counsel:

S. 54, T. P. Act: A contract for the sale of immovable property is a contract that a sale of such property shall take place on terms settled between the parties. It does not, itself, create any interest in or charge on such property.

S. 91, Trusts Act: Where a person acquires property with notice that another person has entered into an existing contract affecting that property, of which specific performance could be enforced, the former must hold the property for the benefit of the latter to the extent necessary to give effect to the contract.

S. 40, T. P. Act: .....where a third person is entitled to the benefit of an obligation arising out of contract and annexed to the ownership of immovable property, but not amounting to an interest therein or easement thereon, such right or obligation may be enforced against a transferee with notice thereof or a gratuitous transferee of the property affected thereby, but not against a transferee for consideration and without notice of the right or obligation, nor against such property in his hands.

S. 27, Specific Relief Act: Except as otherwise provided by this Chapter, specific performance of a contract may be enforced against .....

(b) any other persons claiming under him by a title arising subsequently to the contract, except a transferee for value who has paid his money, in good faith and without notice of the original contract.

In — 'Subbiah Pillai v. Vellappa Naicken', 22 Mad LJ 124, Benson and Sundara Aiyar JJ. pointed out the proper form of a decree to be passed in a suit for specific performance of a contract to sell land. There the facts were: The first defendant agreed to sell certain land to the plaintiff. The first defendant subsequently sold the land to 2 to 4 defendants. The plaintiff asked for a declaration that the sale in favour of defendants 2 to 4 was void as against him and for a direction that defendant 1 do execute a conveyance of the land in the plaintiffs' favour. The District Court in that case gave the decree as prayed for. The High Court dismissed the appeal. At page 124 the learned Judges observed:

"The sale to defendants 2 to 4 is good in law subject to the plaintiff's right. S. 91, Trusts Act, enacts that in such a case the subsequent purchaser is a trustee of the property in law for the person who has a prior agreement for sale. The proper course in such a case would be to direct a reconveyance to be executed by the subsequent purchaser. We believe that the practice generally in the mofussil Courts is to declare the subsequent sale void and to direct the vendor to execute a conveyance."

It will be seen from the aforesaid observations that the practice of Courts before 1912 was to declare the subsequent sale void and to direct the original owner to execute the sale deed in favour of the person with whom he entered into an agreement to sell; though the later practice was to direct the vendor and the subsequent vendee who purchased with the knowledge of the prior agreement to sell, to convey the property to the plaintiff. This judgment also establishes the position that the subsequent sale deed is good though subject to the plaintiff's right.

(4) Sadasiva Aiyar and Seshagiri Aiyar JJ. in — 'Suryaprakasarayadu v. Lakshminarasimha Charyulu,' 26 Mad LJ 518 at p. 522 accepted the said principle and stated their opinion as follows:

"The object of adding the 2nd defendant (subsequent purchaser with notice of the plaintiff's contract) as a party was to enforce specific performance of the plaintiff's contract as against him, he having become the legal owner of the property since date of the contract to sell the property made with the plaintiff."

In — 'Thiruvenkatachariar v. Seshadri Aiyangar', 30 Mad LJ 559, defendants 1 to 3 who contracted to sell certain immovable property to defendants 4 and 5 sold the same by registered sale deed to the plaintiff who had notice of the prior contract. Subsequently defendants 1 to 3 executed a registered sale deed of the same property to defendants 4 and 5 in pursuance of the prior contract and put them in possession. The plaintiff, the purchaser with notice of the prior contract in favour of defendants 4 and 5, filed a suit for possession of the property against his vendors and the persons in whose favour there was a prior agreement to sell and also a sale by the vendors subsequent to the sale in his favour. The learned Judges held that in view of S. 91, Trusts Act, plaintiff was not entitled to recover possession from defendants 4 and 5. The learned Chief Justice stated at page 560:

"Here the plaintiff has obtained a transfer by a duly registered document from defendants 1 to 3 with notice of the prior contract by these defendants to sell the property to defendants 4 and 5. In this state of things he is bound by S. 91, Trusts Act, to hold the property for the benefit of defendants 4 and 5 to the extent necessary to give effect to the contract."

Srinivasa Aiyangar J. observed at page 564:

"Though at the time of the conveyance to the said defendants they had already executed a sale in favour of the plaintiff, I am inclined to hold that they were still entitled to fulfil their original contract by executing a conveyance, at the request of the contractees, and to this extent repudiate the title conveyed to the plaintiff, not for their own benefit, but for the benefit of the 4th and 5th defendants and to the extent necessary to fulfil their obligation."

If the original owner who contracted to sell his property in favour of another can subsequently confer title on a third party, it is not logical to hold that the original owner can confer a valid title if the purchaser in whom the title vests does not join the sale. It is one thing to say that a person in whose favour there is an agreement can enforce it against a person who purchased the property with notice of the said agreement to sell; but it is a different thing to say that the owner having parted with the title in favour of another can, without reference to that person, confer indefeasible right on the person to whom he agreed to sell the property.

(5) In — 'Sathiraju v. Venkanna', AIR 1935 Mad 333, the legal position was stated by Varadachariar J. with clarity as follows:

"As provided in S. 91, Trusts Act, the natural result of the plaintiffs having purchased the property with notice of the prior con-

tract in defendant 1's favour was that they must hold the property for the benefit of the latter to the extent necessary to give effect to the contract. For all other purposes, and as between themselves and their vendors, the plaintiffs were the owners. See — 'Subbiah Pillai v. Vellappa Naicker', 13 Ind Cas 176 (Mad). And this is the reason why several cases have held that in such circumstances the decree for specific performance must direct the first purchaser also to join in executing the conveyance."

(5A) In — 'Gaffur v. Bhikaji', 26 Bom 159, the plaintiff in whose favour there was an agreement to sell, filed a suit only against the person who agreed to sell for specific performance of the agreement in his favour, and obtained a decree. In execution of the decree conveyance of the land was executed to him by the Court. As the subsequent purchaser did not give him possession, he filed another suit for possession. The learned Judges decreed the suit. At page 162, Jenkins C. J. observed:

"Had the second defendant's claim of title rested on contract only, then a simple decree for possession would have sufficed; but an actual conveyance was executed in his favour whereby the property in the thikan passed to him, though no doubt burdened in the way we have indicated. Therefore we think the decree should be in this form; there should be a declaration that the second defendant holds the property for the benefit of the plaintiff to the extent necessary to give effect to the contract of the 25th of June 1895; there should be a decree that the second defendant do execute to the plaintiff a proper conveyance of the thikan and a decree for possession."

The 'raison detre' of this judgment also is that title passed to the subsequent purchaser burdened with a right in favour of the person in whose favour there was a prior agreement to sell.

(6) Sulaiman C. J. described the rights of parties in — 'Kalicharan v. Janak Deo', AIR 1932 All 694, as follows:

"When a person with knowledge of a previous contract of sale, purchased the property, the purchase is voidable at the option of the prior promisee and the contract with him can be enforced specifically against the subsequent purchaser. In such a suit the Court should declare the second purchase as null and void and cancel it, and order the original promisor to carry out his contract by executing a sale deed in favour of the plaintiff."

The procedure pointed out by the learned Judge is similar to that followed by the Madras High Court prior to the ruling in — 'Subbiah Pillai v. Vellappa Naicken', 22 Mad LJ 124.

(7) The legal position may, therefore, be put thus: An agreement to sell immovable property does not create any interest in the said property unless a sale deed is executed conveying the said property. The vendor, who has not transferred his interest in the property, though he entered into an agreement with another to sell the same, can certainly confer title on a third party by executing a sale deed in his favour. As between the vendor and the subsequent purchaser, there can be little doubt that there is a transfer of ownership and, therefore, the title to the property vests in the latter. But the title of the subsequent purchaser with notice of the prior agreement in favour of another is subject to the obligation under S. 91, Trusts Act. He holds the property for the benefit of the latter to the extent necessary to give effect to the contract. The person in whose favour there was a prior agreement can specifically enforce his agreement under S. 27(2) (S. 27(b)?), Specific Relief Act, and compel him to execute a sale deed in his favour. But till such a sale deed is executed by the subsequent purchaser, the person in whose favour there was a prior agreement cannot acquire any title to the same. If the contract for the purchase of immoveable property with the original owner does not create any interest in him, the subsequent sale by the owner to a third person cannot confer a better title on him. He can only acquire title to the property by getting a conveyance from the subsequent purchaser. That is the reason why though at one time Courts were directing only the original owner to execute a conveyance in favour of the plaintiff, they are now adopting the procedure, consistent with principle and the legal title of the parties, directing the subsequent purchaser also to execute the sale deed in favour of the plaintiff. I must, therefore, hold that the execution of a sale deed by the original owner without the subsequent purchaser joining the same will not confer any title on the person in whose favour there was a prior agreement to sell.

(7A) But the view I expressed will not dispose of the appeal for in this case the solution to the problem raised really turns upon the scope of the suit and the effect of the decree in O. S. No. 1174 of 1916. As aforesaid that suit was instituted by Veeranna for specific performance of the agreement to sell the suit property in his favour. To that suit Ramanna, Sattiraju and Ammayi were made parties. After the suit dragged on for two years, on 25-3-1918, Sattiraju filed a petition Ex. P. 5 under S. 151, C.P.C. In that petition he prayed that the Court may pass a decree according to the statement given by the plaintiff in that suit in the witness-box. The plaintiff gave evidence on 6-4-1918 which is marked as Ex. P. 8. In that he stated that the sales in favour of defendants 2 and 3 by defendants 1 and 2 respectively should be set aside and that defendant 1 should execute a sale deed in his favour for the suit lands according to the draft to be supplied by him and on his failure to do so the sale deed should be executed by the Court. On 6-4-1918 after considering the petition filed by Sattiraju and also the evidence given by the plaintiff, the Court delivered the judgment. The judgment discloses that the plaintiff appeared by pleader and defendants 1 and 2 appeared in person. It also records that defendants 1 and 2 put in petitions consenting to a decree in terms of the deposition given by the plaintiff. The learned District Munsif accepted the evidence given by the plaintiff and decreed the suit. The decree that followed directed defendant 1 to execute a duly registered sale deed in favour of the plaintiff in respect of the suit lands as per the schedule thereunder given within one week from the date of decree; defendants 2 and 3 were directed to put the plaintiff in possession of the lands after the expiry of the lease in second defendant's favour. It is clear from the aforesaid proceedings that the parties agreed

for setting aside the sale by defendant 1 in favour of defendant 2 and for defendant 1 conveying the property to the plaintiff. The parties followed the old procedure that was in vogue prior to the decision in — 'Subbiah Pillai v. Vellappa Naicken', 22 Mad LJ 124. If the sale in favour of Sattiraju was set aside, it is manifest that Sattiraju ceased to have any interest and, therefore, he did not join in the sale deed. The decree and judgment are binding on Sattiraju. In this view, Ramanna, by executing the sale deed, validly conveyed the property to the plaintiff.

(8) There are other findings given by the District Munsif which afford a complete answer to the defendants' case. He found that the sale in favour of Sattiraju and the mortgage by Sattiraju in favour of defendant 1 were collusive. This finding was not canvassed in the appeal. It is true, as contended by the learned counsel for the appellants, that if that finding was accepted by the appellants, the point argued before the Subordinate Judge would not have arisen for consideration; for if the sale in favour of Sattiraju and the mortgage by him to defendant 1 were collusive and invalid, Ramanna was certainly entitled to sell the property to the plaintiff. But the fact that the learned counsel appearing before the Subordinate Judge and the learned Subordinate Judge missed this obvious point is not a sure indication that the other findings of the District Munsif were also attacked before the learned Judge. He definitely stated in para 2 of the judgment as follows:

> "The only point argued in appeal and hence arising for determination is that, in spite of the decree in O. S. No. 1174 of 1916, respondent's grandfather did not acquire a valid title under Ex. P. 1, as it was not executed also by Sattiraju."

The last paragraph of the judgment shows that another point was also pressed viz., that Ex. D. 1 was a mortgage and that, therefore, the suit should have been filed for redemption. The learned Judge held against the appellants on both the points. Nor did the appellants take a ground in the memorandum of second appeal to the effect that the other findings given by the learned District Munsif were also attacked but that the Subordinate Judge failed to consider them. Ground 19 of the Memorandum of Second Appeal reads:

> "The Court below is wrong in stating that the only point argued before it is whether Veeranna acquired a valid title under Ex. P. 1 as Sattiraju did not join in its execution. The point in regard to the collusive character of the decree in O. S. No. 1174 of 1916 was argued before it and it ought to have held that the said decree was collusive and not binding on the defendants."

The only complaint, therefore, was that another point with which we are not now concerned, viz., that the decree in O. S. No. 1174 of 1916 was collusive, was raised before the Subordinate Judge but not considered by him. This also shows that other points were not pressed. When the learned Judge definitely stated that only two points were pressed before him and the appellants did not take a ground, or file an affidavit stating that the learned Judge was wrong in observing that only two points were raised, I think I will not be justified at this stage in holding that other points were raised but were not considered by the learned Subordinate Judge. If the sale in favour of Sattiraju, and the mortgage in favour of defendant 1 were collusive, the plaintiff is certainly entitled to a decree.

(9) In the result, the second appeal fails and is dismissed with costs.

(10) No leave.

B/R.G.D. Appeal dismissed.

A.I.R. 1953 MADRAS 413 (Vol. 40, C. N. 152)

RAMASWAMI J.

In re S. Gopal, Petitioner.

Criminal Revn. Case No. 299 of 1951 and Criminal Revn. Petn. No. 298 of 1951, D/-14-11-1951.

Penal Code (1860), S. 504 — Insult and provocation.

In order to sustain a conviction under S. 504 it is sufficient for the complainant to prove that the abusive language was such as would ordinarily provoke the man or woman of his or her position to commit a breach of the peace. The mere forbearance of the person insulted being provoked is not sufficient to protect the offender. (Paras 1, 2)

Anno: Penal Code, S. 504 N. 2.

M. C. Sreedharan, for Petitioner; Narayanan Nair, for State Prosecutor, for the State.

ORDER: The criminal revision petitioner lost his temper and abused the complainant a woman in grossly abusive and deliberately insulting language, and the argument put forward on his behalf is that the essentials of the section have not been made out. I regret my inability to accept this contention. S. 504, I. P. C., requires two essentials. There must be intentional insult of a person and thereby due provocation to him or to her and secondly the person insulting must intend or know it to be likely that such provocation would cause prejudice to the public peace. But it has been laid down by a long line of decisions that the offence may be committed under the section without the person likely to commit the breach of peace being not provoked. In order to sustain the conviction under this section it is sufficient for the complainant to prove that the abusive language was such as would ordinarily provoke the man or woman of his or her position to commit a breach of the peace.

(2) The mere forbearance of the person insulted being provoked is not sufficient to protect the offender. The only two points necessary are that the person insulted must be present and such insult must give provocation to the person so insulted then or soon after to commit a breach of the peace. In this case these requirements have been completely fulfilled and the fact that the woman in the position of the complainant has not committed a breach of the peace is certainly not material.

(3) Finally it was pointed out that there is no finding of the Magistrate in regard to the elements of the offence committed. But it can be gathered from the concluding portion of the judgment of the learned Magistrate that in this case the prosecution evidence has proved the elements of the offence and he has convicted the accused accordingly. I do not say that it would not have been better if the learned Magistrate had been a little more explicit. But this is far from saying that the learned Magistrate on the fundamental issue did not come to the right conclusion that the offence has been made out.

(4) I, therefore, dismiss this petition.

B/V.B.B. Petition dismissed.

A.I.R. 1953 MADRAS 414 (Vol. 40, C. N. 153)

RAJAMANNAR C. J. AND VENKATA-RAMA AIYAR J.

Express Estates Ltd., Appellants v. Modern Furnishing House, Respondent.

Original Side Appeal No. 145 of 1951, D/-15-10-1952.

Houses and Rents — Madras Buildings (Lease and Rent Control) Act (25 of 1949), Ss. 7 and 2 (4) — Decree in ejectment suit — Execution — Sub-tenant in occupation cannot obstruct possession — "Tenant" does not mean 'sub-tenant' — Amendment to S. 2 (3) by Act 8 of 1951 does not affect landlord. AIR 1953 Mad 356, Rel. on. (Paras 4, 5)

Advocate General and V. Srinivasan, for Appellants; K. N. Karunakaran, for Respondent.

REFERENCE..... /Para

('52) 1952-2 Mad LJ 179: (AIR 1953 Mad 356) 6

RAJAMANNAR C. J.: This is an appeal against an order of Krishnaswami Nayudu, J. passed on 17-7-1951 by which he disposed of 4 applications in C. S. No. 419 of 1947 on the Original Side of this Court. Though there were four applications before Krishnaswami Nayudu J., the appeal relates only to one of the applications in which the respondent is the only party interested.

(2) The facts necessary for disposal of this appeal are as follows: Premises Nos. 177 to 179, Mount Road, Madras, were originally leased to Bosotto Brothers Ltd. by the then owners of the building, Jamal Mahomed. On 22-5-1946, the Express Estates Ltd., the appellant before us, purchased the premises. By an order dated 13-6-1947, the Government exempted the building from the operation of the Madras Buildings (Lease & Rent Control) Act, 1946. On 26-9-1947, the appellant filed a suit, C. S. No. 419 of 1947 on the Original Side of this Court, for recovery of possession from Bosotto Brothers Ltd. and also for the recovery of rent at an enhanced rate. Pending the suit, the Government, by a subsequent order dated 11-3-1950 cancelled their prior order exempting the premises from the Rent Control Act. On 31-7-1950, a decree was passed in the suit for possession and for enhanced rent till delivery of possession. The appellant filed an application for execution of the decree, E. P. No. 233 of 1950. After notice to Messrs. Bosotto Brothers Ltd. the judgment-debtor in the case, the application was ordered. When the representative of the appellant went along with the bailiff to take delivery of possession, he found that portions of the premises were in occupation of 4 persons, one of whom was the respondent before us, namely, the Modern Furnishing House. The said persons obstructed the delivery of possession and claimed that they were entitled to remain in possession in their own right. Thereupon the appellant filed an application for removal of obstruction, E. A. 788 of 1951. The learned Judge dismissed the application on the ground that the obstructors were entitled to remain in possession, because, the decree for possession could not be executed on account of the provisions of S. 7 of Madras Act 25 of 1949 (which had replaced the Act of 1946).

(3) The reasoning of the learned Judge was shortly as follows: Under S. 7(1), Rent Control Act, a tenant shall not be evicted in execution of a decree or otherwise except in accordance with the provisions of that section. The expression "tenant" in S. 7(1) of the Act does not mean and include only a tenant in actual possession but will also include a tenant in constructive possession, with the result that even though a tenant might have vacated a portion of the building and had let in sub-tenants in other portions of the building, the tenant must be deemed to be in constructive possession of the entire premises, and there can be no execution of a decree for ejectment against such a tenant.

(4) With respect to the learned Judge, we think he has overlooked one important fact in this case. Whether in actual possession or in constructive possession, there can be no doubt whatever that the tenant of the premises was Bosotto Brothers Ltd. It is common ground that Bosotto Brothers Ltd. did not raise any objection to the execution of the decree for possession. It may be that they could have raised an objection under S. 7(1), Rent Control Act, but actually they did not. After notice to them, a final order for execution was passed by this Court. The question is, can the respondent who admittedly was a sub-tenant of Bosotto Brothers Ltd. having been let into possession by them sometime in 1949 when the ejectment suit was pending, be heard to say that the decree cannot be executed against them? It was contended on behalf of the respondent company that as they claimed under Bosotto Brothers Ltd. they could raise all objections which Bosotto Brothers Ltd. themselves could have raised to the execution and they could take advantage of S. 7(1), Rent Control Act, advantage of which could have been taken by Bosotto Brothers Ltd. We do not agree with this contention. The right given by S. 7(1) of the Act is expressly given to the tenant and the definition of "tenant" in S. 2(4) of the Act would not include a person placed in occupation of a building by its tenant, that is, a person in the position of the respondent. While therefore S. 7(1) cannot, according to a proper construction of its language, apply to the respondent and confer any rights on him, we cannot permit the respondent to get the same benefit indirectly on the ground that they claim under Bosotto Brothers Ltd. We reject this contention.

(5) Reference was made to an amendment to S. 2(3) of the Act by Act 8 of 1951. By S. 3 of the Act, an Explanation was inserted after the definition of "landlord" in S. 2(3) of the Act. It ran as follows:

> "A tenant who sub-lets shall be deemed to be a landlord within the meaning of this Act in relation to the sub-tenant."

In our opinion, this Explanation would not help the respondent. It may be that if Bosotto Brothers Ltd wanted to evict the respondent under the provisions of the Act, the respondent would be entitled to the protection afforded by S. 7(2) of the Act. That is to say, the respondent could not be evicted except on one of the grounds mentioned in that sub-section; for example, failure to pay rent, causing damage to the premises, etc. Except to this extent, we do not think the effect of the amendment in any way affects the rights of the original landlord. The effect of the Explanation is certainly not to enable a sub-tenant to raise an objection to being evicted by the landlord either under the provisions of the Rent Control Act or otherwise, as for example, in execution of a decree for possession. The expression "tenant" in S. 7(1) would not include a sub-tenant in relation to the original landlord.

(6) Reference may be made to the recent ruling of a Division Bench of this Court in — 'Devaraja Bhatt v. V. S. Raja', 1952-2 Mad L. J. 179 (which included Krishnaswami Nayudu J.) in which it was held that the Rent Control Act does

not recognise any rights in a sub-tenant. Govinda Menon J. delivering the judgment of the Bench observed as follows:

"Under the Madras Buildings (Lease and Rent Control) Act, a sub-tenant as such is not recognised and if a landlord brings a suit in ejectment a sub-tenant let into possession cannot raise any question and submit that he has a status under the Act which should be safeguarded by its provisions."

The insertion of the Explanation does not make any difference.

(7) In this view, the appeal must be allowed and the order of the learned Judge dismissing the application of the decree-holder for removal of obstruction should be set aside. There will be an order directing the removal of the obstruction caused by the respondent. The appellant will be entitled to the costs of this appeal. The respondent will have time to deliver possession till 2-1-1953.

B/H.G.P. Appeal allowed.

A.I.R. 1953 MADRAS 415 (Vol. 40, C. N. 154)

RAJAMANNAR C. J.

Kothandaraman and others, Appellants v. Collector of Chingleput District, Respondent.

A. A. O. No. 537 of 1949, D/- 12-9-1952.

Court-fees Act (1870), Sch. I, Art. 1 — Two separate appeals from mortgage decree — One from preliminary decree, the other from final decree — Full 'ad valorem' court-fee is payable in each appeal — No credit can be given for court-fee paid on appeal against preliminary decree — Hardship to subject no consideration. AIR 1947 Pat 113, Rel. on; AIR 1932 Mad 453 and AIR 1923 Lah 632, Expl.

(Paras 2, 3, 5)

Anno: Court-fees Act, Sch. I, Art. 1 N. 25.

R. Subramania Iyer and R. Gopalan, for Appellants; Govt. Pleader, for Respondent.

REFERENCES: Courtwise/Chronological/ Paras

('23) 4 Lah 406: (AIR 1923 Lah 632) 4
('32) 55 Mad 664: (AIR 1932 Mad 453) 3
('46) 25 Pat 305: (AIR 1947 Pat 113) 2, 3

JUDGMENT: O. S. No. 23 of 1944 was a suit filed in the Court of the Subordinate Judge of Chingleput on the foot of a mortgage against the present appellants. The learned Subordinate Judge passed a preliminary decree in favour of the plaintiffs. The appellants applied for leave to appeal to the District Court in forma pauperis. This application was rejected by the learned District Judge. Thereupon, the appellants filed a revision petition to this court, C. R. P. No. 767 of 1946. By order dated 5-4-1948 this Court allowed the appellants to file the appeal in forma pauperis. The appeal was therefore numbered as A. S. No. 277 of 1948. In the meantime the learned Subordinate Judge proceeded to pass a final decree. The appellants filed an appeal therefrom and also sought to file it in forma pauperis. The learned District Judge allowed this application and that appeal against the final decree was numbered as A S. No. 325 of 1947. Both appeals were heard and disposed of by a common judgment. The result was that the appeals were dismissed with costs. The court-fee due to the Government was directed to be recovered from the appellants. The appellants then filed an application before the learned District Judge of Chingleput objecting to the direction to court-fee on both the appeals. The contention of the appellants was that as the full 'ad valorem' court-fee had already been paid on the appeal against the preliminary decree, viz. Rs. 329-15-0, there was no necessity to pay over again 'ad valorem' court-fee on the entire decree amount in the appeal against the final decree. According to the appellants, only a deficit sum of Rs. 30 was payable as court-fee after giving credit to the sum of Rs. 329-15-0, the court-fee already paid on the appeal against the preliminary decree. The learned District Judge refused to grant the application of the appellants. He held that credit could not be given to the court-fee paid in one appeal, in another appeal. There were two independent appeals, one against the preliminary decree and another against the final decree and they had both to be valued under the provisions of the Court-fees Act. An 'ad valorem' court-fee was, therefore, payable on the entire amount of the subject matter in each of the appeals. The appellants seek to have this order of the learned District Judge revised.

(2) 'Prima facie' the view taken by the learned District Judge appears to be correct. Undoubtedly there were two distinct appeals. It may be true that there were no new grounds which could be urged in the appeal against the final decree, which could not be urged in the appeal against the preliminary decree. That only shows that the appeal against the final decree was unnecessary and a superfluity. But so far as I am aware, there is no statutory provision, or authority, which lays down that a superfluous appeal need not bear any court-fee. If a litigant desires to indulge in the luxury of filing an appeal totally unnecessary, he will have to pay the court-fee in accordance with the provisions of the Court-fees Act, in this case Sch. I, Art. 1. I agree, with respect, in the following observations of Meredith J. in —'Kausalya v. Kauleshwar', 25 Pat 305,

"Apart from all this, however, ethical considerations do not really enter into the picture. It is a question merely of construing the Court-fees Act. I have already shown that under the Court-fees Act 'ad valorem' court-fees are payable upon an appeal from the final decree in a mortgage suit, and that is settled by numerous decisions. If, therefore, for any reason the appellants can claim any credit or exemption from any portion of the fee it can only be by reason of some provision in the Court-fees Act. A complete search of the Act fails to reveal any provision for such a case."

(3) Learned counsel for the appellants cited to me the case in —'Sapputnayammal in re', 55 Mad 664, where it was held that when in a suit for accounts the same party appeals first from a preliminary decree and pays 'ad valorem' fee on the amount mentioned in the plaint and before the decision of that appeal files another appeal to the same court against the final decree, he need not again pay ad valorem fee on the entire amount awarded by the final decree but need only pay on the amount, if any, in excess of that on which court-fee has already been paid. It is obvious from the judgment of Pandalai J. who delivered the judgment of the Bench, that their decision was not intended to be of universal application to all cases of appeals against preliminary and final decrees. Though they were prepared to accept the principle above referred to in suits for accounts, they were aware of difficulties in extending the doctrine to other cases. Dealing with this case and other similar cases Meredith J. in — 'Kausalya v. Kauleshwar', 25 Pat 305, already referred to, observed:

"In account suits and mesne profits cases, the amount due is not decided by the preliminary decree. The decree provides only that the

amount is liable to be ascertained. Though the law provides that court-fees upon the preliminary appeal must be paid upon the plaintiff's estimate of the amount, that is, as it were, only provisional and by way of anticipation. The actual court-fee payable can be finally determined only later and in the case of the plaintiff the balance will have to be made up under S. 11, Court-fees Act before he can execute. It is, therefore, only reasonable that it should be the balance that the defendant must make up in his appeal from the final decree. It is the final decree which settles the actual liabilities, and not the preliminary decree, whereas in mortgage suits it is the preliminary decree which really settles the liabilities and the final decree is substantially merely a postponement of the final order of the Court to give the defendant a chance to pay."

(4) Reliance was placed by learned Counsel for the appellants on the ruling in — 'Budhuram v. Niamat Rai', 4 Lah 406. It was held in that case that in a suit for redemption where a preliminary decree was first passed fixing the amount payable and then a final decree after that amount had been paid, if appeals were preferred from both decrees asking for a reduction of the amount fixed in the preliminary decree and ad valorem court-fee has been paid on the appeal from the preliminary decree on the amount of reduction claimed, a court-fee stamp of Rs. 2 is sufficient on the appeal from the final decree. With great respect to the learned Judges, I am unable to follow the reasoning of this decision. There was a preliminary objection raised as to the sufficiency of the stamp on the appeal against the final decree, but it appears that the objection was not seriously pressed. That is why I do not find a full discussion which is likely to be of any assistance to me. I agree with the learned Judges when they say that the final decree is a mere corollary to the preliminary decree, and follow it as a matter of course. If that be so, then the obvious course was not to file an appeal against the final decree. The learned Judges referred to the appeal from the final decree as being of a formal nature and as not contesting anything beyond what was contested in the appeal from the preliminary decree. I am unaware of any distinction made in the Court-fees Act between appeals which are of a formal nature and appeals which are not. I am unable to derive any help from this decision.

(5) It may appear to be hard on a litigant to make him pay court-fee twice over for what really is one adjudication. But this hardship is not inevitable and in the present case it is purely the appellants' own seeking. Obviously they need not have filed an appeal against the final decree. An appeal was being filed against the preliminary decree and that would have sufficed. If the appellants had succeeded in that appeal, the final decree, even if passed, would automatically have been vacated or modified. If the appellants chose to file an unnecessary and superfluous appeal, they will have to pay the court-fee in accordance with the provisions of the Court-fees Act. I agree with the learned District Judge that the appellants cannot claim any credit or exemption from any portion of the fee payable on the appeal against the final decree. The Civil Miscellaneous Appeal is therefore dismissed with costs.

B/H.G.P. Appeal dismissed.

A.I.R. 1953 MADRAS 416 (Vol. 40, C. N. 155)

RAJAMANNAR C. J.
AND VENKATARAMA AIYAR J.

In re Raja of Vizianagaram, Petitioner.
Writ Petn. No. 118 of 1952, D/- 22-2-1952.

Madras Estates (Abolition and Conversion into Ryotwari) Act (26 of 1948), S. 3 (b) — Vacant sites.

Vacant sites are not outside the scope of the Permanent Settlement. What passed to the Zamindar under the sanad was not confined to the lands on which the peishcush was calculated. The fact that in 1802 no income accrued to the zamindar from these lands does not really affect the question. AIR 1917 PC 42, Rel. on. (Para 1)

P. Ram Reddi and V. Venkataramana Reddy, for Petitioner.

REFERENCE..... /Para
('17) 40 Mad 886: (AIR 1917 PC 42) 1

RAJAMANNAR C. J.: The Rajah of Vizianagaram is the petitioner in this application. The estate of Vizianagaram was notified under the Madras Estates (Abolition and Conversion into Ryotwari) Act, 1948, in September 1949. This application relates to certain vacant house sites in the town of Vizianagaram. These house sites certainly form part of the estate of Vizianagaram. They are admittedly situated within the ambit of the estate and it is impossible to accept the contention raised in the affidavit that the petitioner's predecessor owned these lands before the Permanent Settlement. It is not suggested that they were parts of pre-settlement inams. It was contended that the permanent assessment was not arrived at after taking into account uncultivated arable lands and waste lands and these were given practically free to the Zamindar without any additional assessment and therefore the vacant sites in question which fall under that category must be taken to be outside the scope of the Permanent Settlement.

The contention is based on a fallacy. What passed to the Zamindar under the sanad was not confined to the lands on which the peishcush was calculated — see — 'Prasad Row v. Secy. of State for India', 40 Mad 886 PC. The fact that in 1802 no income accrued to the Zamindar from these lands does not really affect the question. Once it is granted that these sites form part of the permanently settled estate, S. 3 (b) of the Abolition Act certainly gives power to the Government to take them over unless the Zamindar is entitled to be granted ryotwari pattas under S. 12 and similar provisions of the Act. Obviously, these lands do not fall within such provisions and the petitioner will not be entitled to a ryotwari patta in respect of them.

(2) There is no reason therefore to quash the order of the Board of Revenue which gave effect to correct principles in directing the vesting of the sites in question in the Government.

(3) The application is therefore dismissed.

B/D.H. Application dismissed.

A.I.R. 1953 MADRAS 417 (Vol. 40, C. N. 156)

RAGHAVA RAO J.

Venkata Reddi and others, Petitioners v. Ventrapragada Ramabrahmam and another, Respondents.

Civil Revn. Petn. No. 149 of 1950, D/- 1-10-1952.

(a) Civil P. C. (1908), S. 141 O. 43 R. 1 (a) — Original petitions.

The right of appeal under O. 43 R. 1 (a) cannot stand attracted to orders made in connection with matters other than suits or plaints merely because of S. 141. (Para 1)

Anno: C.P.C., S. 141 N. 2.

(b) Debt Laws — Madras Agriculturists' Relief Act (4 of 1938), S. 25A — Order returning petition.

Section 25A is wide enough to authorise an appeal against an order for the return of the petition under S. 19 for presenta ion to he proper Court on the ground of want of jurisdiction in the Court to which it is presented. (Para 1)

M. S. Ramachandra Rao and S. Krishna Rao, for Petitioners; M. V. Nagaramiah, for Respondents.

REFERENCE..... /Para

('50) C. M. P. No. 918 of 1950 (Mad) 1

ORDER: The petition presented under S. 19, Madras Agriculturists Relief Act to the Court of First Instance where its decree had gone up on appeal and on second appeal also to this Court was returned by that Court for presentation to the proper Court on the ground that the proper Court was the Court of second appeal and not itself. To this view of the learned District Munsif, Mr. Krishna Rao urges his objection on the basis of a ruling in a Divisional Bench of this Court consisting of the present Chief Justice and Somasundaram J. in C. M. P. No. 918 of 1950. Mr. Nagaramayya for the respondents has, however, invited me to dismiss this petition on the ground that there is an appeal rightly preferred against the order of the learned District Munsif to the Sub-Court, Vijayawada which is pending. The learned counsel for the respondents says that if the order under revision is an appealable order, I ought not to interfere in revision with the order in question. Mr. Krishna Rao seeks to get over the point made by Mr. Nagaramayya by saying that against the order of the learned District Munsif now under consideration no appeal can properly lie because all that S. 141, Civil P. C. renders possible of application to the original petition for scaling down with which we are concerned in the present case is the procedure provided by the Code of Civil Procedure which may well include a provision for the return of the petition to the proper Court under O. 7 R. 10, Civil P. C. but not necessarily a provision for right of appeal under Order 43 Rule 1 (a), Civil P. C.

The learned counsel has, in my opinion, rightly maintained that the right of appeal is not a matter of procedure but a substantive right which unless expressly given by the statute cannot be held to be available to a litigant. The interpretation to be placed upon the language in Order 43 Rule 1 (a) is, in my opinion, this namely, that if under Order 7 Rule 10 an order for the return of a plaint has been made, that will certainly be appealable. I am inclined to think that the right of appeal under that provision cannot stand attracted to orders made in connection with matters other than suits or plaints merely because of S. 141 Civil P. C. which can only imply and involve that the mode of trial laid down by the Code in regard to suits will be available in the case of all original petitions as well. It is stated by Mr. Krishna Rao that there is unreported ruling of this Court (Wadsworth J.) in support of his present submission. I am satisfied that even apart from any such authority the submission of the learned counsel is sound and that the preliminary point of objection of Mr. Nagaramayya based upon section 141, Civil P. C. has no force and must be repelled. It is next contended that the appeal now pending in the Sub-Court at Vijayawada is valid under section 25A of the Madras Agriculturists' Relief Act. That section provides for an appeal against orders amending or refusing to amend decrees—language which according to the submission of the learned counsel Mr. Nagaramayya is wide enough to include an order for the return of the petition under section 19 on the ground of want of jurisdiction in the Court to which it is presented. Mr. Krishna Rao urges in answer to this further point of Mr. Nagaramayya that refusing to amend can only mean refusing to amend on a consideration of the merits and not a refusal to amend on the ground of want of jurisdiction in the Court to which the petition for amendment is presented.

Mr. Krishna Rao urges that the right of appeal conferred by section 25A ought to be understood in this restricted sense which is the only natural sense that one can 'prima facie' impute to the words amending or refusing to amend in the context in which they occur. I am of the opinion that if the language of the rule authorising an appeal is sufficiently wide to take in a case of the kind before me by a Court of first instance, such a right of appeal ought not to be restricted by the considerations of the kind relied on by Mr. Krishna Rao. No consideration except that derived from the language of the rule authorising the appeal ought to enter into the mind of the Court when deciding the question of appealability and if any consideration other than the literal meaning of the language is permissible I rather think that an interpretation in favour of appealability should prevail rather than the interpretation against appealability. The only one consideration that is permissible is whether the language in its literal tenor leaves one in doubt whether a particular case is within the scope of the language or outside it. In the present case as I have already indicated, the language of S. 25A is sufficiently wide to authorise an appeal preferred by the petitioners to the sub-Court, Vijayawada.

(2) In view of my upholding the objection of Mr. Nagaramayya based upon section 25A, Madras Agriculturists Relief Act it follows that this revision petition must be dismissed but in the circumstances without costs.

(3) Mr. Krishna Rao wants me to make it clear that in view of this objection taken by the respondents to this revision petition the competency of the appeal preferred by his clients to the Sub-Court would no longer be a matter for controversy between the parties there. I can only say that it would not be a matter of controversy hereafter. Mr. Nagaramayya, it must be stated in fairness to him has in answer to a question put by me, conceded that it will not be open to him or his clients to question the validity of the appeal in the Sub-Court at Vijayawada.

B/D.H. Revision dismissed.

A.I.R. 1953 MADRAS 418 (Vol. 40, C. N. 157)

SOMASUNDARAM J.

In re D. Pandurangan and another, Appellants.

Criminal Appeals Nos. 276 and 277 of 1952, D/- 7-11-1952.

(a) Penal Code (1860), S. 292 — "Obscene", meaning of — Determination of obscenity — Non-prosecution of publishers of similar books — Effect.

The word "obscene" in the section should be interpreted to have its dictionary meaning. (Para 4)

Whether a particular book is obscene is a question of fact. (Para 5)

Non-prosecution of publishers of similar books cannot mean that the book which is an obscene one does not fall within the scope of S. 292, Penal Code. (Para 7)

Anno: Penal Code, S. 292 N. 1.

(b) Penal Code (1860), S. 292 — Scope — (Press Objectionable Matter Act (1951), S. 11).

Prosecution under section does not amount to evasion of S. 11, Press Objectionable Matter Act of 1951 — That Act does not repeal any provision of Penal Code and is not a bar to prosecution under the section. (Paras 6, 8)

Anno: Penal Code, S. 292, N. 1.

(c) Penal Code (1860), S. 292 — Proof of offence.

Conviction of keeper of press and printer and publisher — (Criminal P.C. (1898), S. 342) — (Press and Registration of Books Act (1867), S. 7).

Prosecution not proving that book was printed at particular press — Keeper of that press cannot be convicted on the mere evidence of the printed statement on the book as to where it was printed for it raises no presumption under S. 7, Press and Registration of Books Act and is no evidence against him. Nor can he be convicted on admission in his statement under S. 342, Criminal P. C. (Para 9)

The presumption under S. 7, Press and Registration of Books Act however arises against the person who is shown as the printer and publisher. (Para 10)

Anno: Penal Code, S. 292, N. 1; Press and Reg. of Books Act, S. 7, N. 1; Criminal P. C., S. 342, N. 23 Pt. 7.

V. S. Chandrasekharan and P. K. Janakiraman, for Appellants; A. C. Muthanna, for State Prosecutor, for the State.

JUDGMENT: The two appellants were tried and convicted by the Chief Presidency Magistrate for an offence under S. 292, I. P. C. and sentenced each to three months' rigorous imprisonment and a fine of Rs. 1,000.

(2) Accused 2 in the case is the keeper of a Press called "Sri Andal Press". This is situated in 175 Lloyds Road, Royapettah. Accused 1 is the printer and publisher of a book called "Kama Leelai". The book contains pictures of various postures of sexual intercourse with an explanatory note on the opposite page. It is clear from Ex. P. 5 filed in the case that accused 1 printed as many as 700 copies of the book. The two ledgers Exs. P. 2 and P. 3 seized by the police show the number of books sold by accused 1. It is clear therefore from these two documents that accused 1 has printed and published these books for the purpose of sale. In fact, this is not seriously disputed, though it is stated that the sale was intended only for adults. Even so these books were undoubtedly printed and published for sale.

(3) The prosecution case is that these are obscene books and therefore fall within the mischief of S. 292, I. P. C. The learned Chief Presidency Magistrate after referring to the various decisions cited before him has in a well considered judgment held that they are obscene. The main question therefore in the appeal is whether these books are obscene within the meaning of the term in S. 292, I. P. C.

(4) The word "obscene" is not defined in the Code. The natural and ordinary meaning of the term as given by the dictionaries is this:

'Webster's New International Dictionary: Obscene: Offensive to chastity or modesty; expressing or presenting to the mind or view something that delicacy, purity and decency forbid to be expressed;' impure, as, obscene language, obscene pictures.

Oxford New English Dictionary: Obscene: Offensive to modesty or decency; expressing or suggesting unchaste and lustful ideas; impure, indecent, lewd.

(5) It is therefore a question of fact in each case whether a particular book falls within the meaning of this word. In this case a perusal of the book will convince anyone that it falls within the meaning given above. The book therefore is obscene and the offence is clearly made out.

(6) It is contended by the learned counsel for the appellant that this is a matter which falls more within the scope of Act 56 of 1951 (the Press Objectionable Matter Act, 1951), & a proceeding against the appellant for an offence under S. 292, I. P. C. really amounts to an evasion of the provisions of that Act. The provisions in the above Act regarding the publication of books which contains any objectionable matter and which as per S. 3 (6) of the Act include publications which are grossly indecent or obscene are contained in S. 11 and it only deals with the forfeiture of those books to the Government. There is nowhere in that Act anything to indicate that S. 292, I. P. C. is either abrogated or superseded. In my view the prosecution of the appellants for an offence under S. 292, I. P. C. does not in any way amount to evading the provisions of Act 56 of 1951.

(7) It is next contended that there are several such books which are published and which are under circulation and those publishers have not been prosecuted. In support of that, certain exhibits have been filed by the defence advocate. The fact that other publishers of similar publications have not been prosecuted does not mean that the book in question does not fall within the scope of S. 292, I.P.C. We are concerned here only with the question whether this book is an obscene publication within the meaning of the term under S. 292, I. P. C. The argument of the learned counsel in my opinion is without force.

(8) It is further contended that by this prosecution the accused must have been deprived of their rights to have the matter decided by a jury in accordance with the provisions of Act 56 of 1951. That Act is intended mainly to provide against the printing and publication of

objectionable matter. Its object is to prevent and not to punish. As already stated that Act does not in any way repeal any of the provisions in the Indian Penal Code. Act 56 of 1951 is no bar to the prosecution for an offence under S. 292, I. P. C. The contentions in my opinion of the learned counsel fail.

(9) But so far as accused 2 is concerned, there is no proof that these books were printed in his press except what is printed on the books as to where they are printed. The presumption which applies under S. 7 of Act 25 of 1867 to the printer and publisher does not apply to the keeper of a press. Apart from Ex. P. 5, the presumption under S. 7 of Act 25 of 1867 makes it clear that accused 1 is the printer and publisher of these books. There is no such presumption against the keeper of a press. No evidence has been let in that this was printed in this press. It is true that accused 2 admits in his statement that he was the keeper of the press and that at the time when the copies of the book in question were printed, he was out of Madras. He also admits that they were printed in his press for sale. It is a well recognised principle that when the prosecution does not make out a case against an accused, no question shall be put to the accused under S. 342, Cr. P. C. and any answer that he might give cannot be used to fill up the gaps in the prosecution case. The case therefore against accused 2 that he was the keeper of the press in which this book was printed has not been proved and the conviction and sentence of accused 2 are set aside and he is acquitted. The fine if paid will be refunded.

(10) So far as accused 1 is concerned, I have already pointed out that there is a presumption under S. 7 of Act 25 of 1867 and there is also Ex. P. 5 which clearly shows that he was the printer and publisher. I have already held that the book is an obscene one within the meaning of the term in S. 292, I. P. C. His guilt is therefore established beyond all doubt. I therefore confirm his conviction. As regards the sentence, the learned Chief Presidency Magistrate observes: "The accused show no signs of repentance and are bent upon printing and selling pornographic publication....." Even so in view of the undertaking given by the learned advocate for the accused that he shall not print any more copies extra I think that the ends of justice will be met by sentencing him to the period undergone and a fine of Rs. 500, in default 2 weeks rigorous imprisonment.

(11) With these modifications the appeal of accused 1 is dismissed, while the appeal of accused 2 is allowed.

B/M.K.S. Order accordingly.

A.I.R. 1953 MADRAS 419 (Vol. 40, C. N. 158)

GOVINDA MENON J.

Puthiya Purayil Puthanpurayil Ussain, Petitioner v. Pavayi Kunhiraman and others, Respondents.

Civil Revn. Petn. No. 116 of 1950, D/- 24-10-1952.

Civil P. C. (1908), O. 47, R. 1 — Error apparent on face of record.

If a Court ignores or does not decide a case on the principle of 'res judicata', it cannot be stated that such an error is one apparent on the face of the record. Thus, where a second application for amendment of a decree is allowed for the same reasons mentioned in the first application which was dismissed, the proper procedure to be followed by the party aggrieved by the order allowing the application is by way of an appeal and not by applying for review of the order as in such a case there is no error apparent on the face of the record. AIR 1939 Mad 293, Disting. (Para 2)

Anno: C. P. C., O. 47 R. 1 N. 15 Pts. 6 to 9.

A. Atchuthan Nambiar, for Petitioner; V. P. Gopalan Nambiar, for Respondents.

REFERENCE..... /Para

('39) AIR 1939 Mad 293: (189 Ind Cas 320) 2

JUDGMENT: R. I. A. No. 3041 of 1947 was an application made by one of the parties in O. S. No. 789 of 1944 on the file of the Court of the District Munsif of Kuthuparamba for amendment of the plaint as well as the decree by scoring out the name of the desom and the old survey number and substituting in their place another desom and a fresh survey number. That application was based on the allegation that there was a mistake made by the parties in the plaint. For some reason or other R. I. A. No. 3041 of 1947 was dismissed without the amendment being allowed. Later on an application R. I. A. No. 645 of 1949 was made to amend the decree and plaint practically for the same reasons as had been alleged in the earlier petition. The District Munsif, on this application alllowed the amendment. The third defendant, who was aggrieved by that amendment, instead of filing an appeal against that portion of the amended decree, applied to the lower Court by R. I. A. No. 1091 of 1949 for a review of the order in R. I. A. No. 645 of 1949 on the ground that at the time when the order in R. I. A. No. 645 of 1949 was passed the learned District Munsif committed an error which was apparent on the face of the record because he should have taken into consideration the fact that since an earlier application for the same relief had been dismissed another petition was not sustainable. The lower Court has now held that the provisions of O. 47, R. 1, Civil P. C. have not been complied with in this application for the reason that there is no error apparent on the face of the record and that the proper course which defendant 3 should have taken was to have filed an appeal against the amended decree.

(2) Mr. Achuthan Nambiar for the petitioner contends on the authority of — 'Venkatarajulu v. Rattamma', AIR 1939 Mad 293, that where a Court overlooks a provision of law and passes an order, an application for review of that order would lie, even if the ground for review may not be strictly one that is apparent on the face of the record, but is only an error of law. I do not think that decision can be applied to the facts of the present case. When the District Munsif passed the order in R. I. A. No. 645 of 1949, he was cognisant of the fact that already an application for amendment of the decree and plaint had been rejected by him. It may be that he should not have passed the order reviewing the order in R. I. A. No. 645 of 1949 following the principle of 'res judicata'. But if a Court ignores or does not decide a case on the principle of 'res judicata', it cannot be stated that such an error is one apparent on the face of the record. The proper procedure which the petitioner here should have had recourse to was to have filed an appeal against the order in

R. I. A. No. 645 of 1949 and contending in that appeal that the Court had no jurisdiction to amend the decree.

(3) I, therefore, dismiss the civil revision petition, but, in the circumstances, without costs.

B/V.S.B. Revision dismissed.

A.I.R. 1953 MADRAS 420 (Vol. 40, C. N. 159)

RAJAMANNAR C. J.
AND VENKATARAMA AIYAR J.

Mahomed Abdul Rahman, Appellant v. Tajunnissa Begum and another, Respondents.

Original Side Appeal No. 80 of 1952, D/- 3-9-1952.

Civil P. C. (1908), S. 151 — No power overriding express provisions of law.

The Civil Procedure Code confers certain powers on the Court to grant relief in interim proceedings such as for example, power to issue injunctions, attachments before judgments or appointment of receivers. Where such a relief is claimed the Code prescribes the conditions on which such relief could be granted. But apart from such powers, there is no inherent jurisdiction in Courts to grant interim relief which properly ought to be granted only by the decree after determination of the points in controversy. Therefore in a suit for maintenance by the wife where the claim is hotly contested an order for payment of interim maintenance is without jurisdiction: Case law referred and followed. (Para 3)

Anno: C.P.C., S. 151 N. 2.

K. Rajah Ayyar and K. Kuppuswami, for Appellant; K. Krishnaswami Iyengar and N. C. Raghavachari, for Respondents.

REFERENCES: Courtwise/Chronological/ Paras

('30) C. R. P. No. 1312 of 1930 (Mad) 2
('40) 1940-2 Mad LJ 572: (AIR 1941 Mad 55) 2
('50) C. R. P. No. 662 of 1950 (Mad) 2
('23) 77 Ind Cas 718: (AIR 1924 Pat 69) 2

VENKATARAMA AIYAR J.: This is an appeal against the order of Panchapakesa Aiyar J. directing the appellant to pay to respondent 1 a sum of Rs. 500 by way of interim maintenance pending the disposal of a suit on the Original Side of this Court. Respondent 1 in her plaint alleged that the appellant had married her in 1943 and that she continued to live with him for some time but that he latterly neglected her and did not maintain her and the relief prayed for is that defendant 1 be directed to pay arrears of maintenance and also future maintenance at the rate of Rs. 500 a month. The plaintiff also filed an application for an award of interim maintenance during the pendency of the suit. Defendant 1 contested the claim. He denied he ever married the plaintiff and disputed his liability to pay any maintenance. The application for award of interim maintenance came up before Panchapakesa Aiyar J. After taking some evidence, he properly declined to express any opinion on the merits of the case but directed that defendant 1 should pay to the plaintiff a sum of Rs. 500 as interim maintenance pending the final disposal of the suit. It is against that order that defendant 1 has preferred this appeal.

(2) Mr. K. Rajah Aiyar, learned advocate for the appellant, contends that the Court had no jurisdiction to award interim maintenance in a case where the claim is contested. In — 'Latchanna Dora v. Malludora', 1940-2 Mad LJ 572, the facts were that the plaintiff filed a suit to recover possession of certain properties or in the alternative for partition, and during the pendency of the suit, he made an application for the award of interim maintenance to him. The District Judge awarded Rs. 250 a month. In revision, Horwill J. set aside that order on the ground that the Court had no jurisdiction to make such an order when the claim is in dispute. The learned Judge observed:

> "In — 'Gopal Saran v. Sita Devi', 77 Ind Cas 718 (Pat), a Divisional Bench of the Patna High Court held that a Court has no inherent power under S. 151 to pass such an order. That case was very like the present, in that the plaintiff sued on a maintenance agreement, and only differed from it in that the defendant there did not admit that the plaintiff was entitled to anything."

The learned Judge also followed the decision of Jackson J. in — 'C. R. P. No. 1312 of 1930 (Mad)' where that Judge observed:

> "A Court cannot interfere with a private person's property merely because he happens to be a defendant, on behalf of another person merely because he happens to be a plaintiff. There is no inherent power in a Court to act without findings, so that if a matter is asserted by the plaintiff and denied by the defendant, the Court cannot presume that the plaintiff's allegations are true and give some interim relief pending disposal of the suit."

The following observations of Sir Dawson Miller C. J. in — 'Gopal Saran v. Sita Devi', 77 Ind Cas 718 (Pat) may be quoted:

> "It seems to me that the only ground which would justify an order compelling the defendant to pay the annuity or a portion thereof to the plaintiff is that the defendant's liability on the bonds has been established. The liability, however, cannot possibly be determined until the evidence is taken and the suit heard and decided. There appears to me to be no ground disclosed in this case, and certainly no authority has been cited before us to justify the learned Subordinate Judge in passing an order granting the plaintiff a portion of the relief claimed before the suit has been tried, and in the absence of any authority supporting such a contention, it seems to me that we ought not to allow the present order to stand. Section 151 of the Code saves the Court's inherent power to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the Court, but I am not aware of any rule of law or equity, which requires, in the interests of justice, that a plaintiff suing to enforce a contract for the payment of money, where the claim is disputed, should be awarded a portion of the amount claimed before his rights has been established by the suit brought for that purpose."

In — 'C. R. P. No. 662 of 1950 (Mad)', Viswanatha Sastri J. adopted this principle and observed:

> "It is true that the inherent powers of the Court are wide and undefined and indefinable, but for that very reason a Court must be on its guard against an arbitrary or capricious exercise of that power. Section 151, Civil P. C. itself indicates the limitations on the exercise of the power, namely, that its exercise is necessary and further that it

must secure the ends of justice or prevent the abuse of the process of the Court..... It is not right for any Court by passing an order in favour of one or other of the parties really to decide the suit or any part of the suit before it is tried"

and the learned Judge followed the authority of this Court in — 'Latchanna Dora v. Mallu-Dora', 1940-2 Mad LJ 572.

(3) Thus there is overwhelming authority for the position that when the claim made in the plaint is contested, the Court has no inherent jurisdiction to grant relief until that claim is determined on its merits and that can only be by the final hearing in the suit. To grant any relief in an interim application would be to grant the relief which can properly be granted only by the ultimate determination in the suit and the decree following thereon. The Civil Procedure Code confers certain powers on the Court to grant relief in interim proceedings such as for example, power to issue injunctions, attachments before judgments or appointment of receivers. Where such a relief is claimed the Code prescribes the conditions on which such relief could be granted. But apart from such powers, there is no inherent jurisdiction in Courts to grant interim relief which properly ought to be granted only by the decree after determination of the points in controversy. We are accordingly of opinion that the order of the learned Judge granting interim relief in the suit in which the claim of the plaintiff is hotly contested, was without jurisdiction. In the result, the appeal will be allowed and the order of the learned Judge will be set aside.

(4) Both sides have represented to us that having regard to the nature of the contentions, it would be desirable to have an early determination of the suit. In C. S. No. 235 of 1951 the present respondent 1 claims an amount by way of mahr under the Muhammadan law. The defence in that suit is the same as that in the suit out of which this appeal has arisen viz., that the plaintiff was not the wife of defendant 1 and was not entitled to any claim by way of mahr. That suit will be posted for hearing on 10-11-1952. It is also desirable that the suit out of which this appeal has arisen, the maintenance suit, should, if possible, be tried with it but the hearing of C. S. No. 235 should not be delayed on account of any delay in the preparation of the maintenance suit. There will be no order as to costs in this appeal.

B/M.K.S. Appeal allowed.

A.I.R. 1953 MADRAS 421 (Vol. 40, C. N. 160)

RAJAMANNAR C. J.

Narayanan Chettiar, Petitioner v. Rathinasami Padayachi, Respondent.

Civil Revn. Petn. No. 2037 of 1949, D/-12-9-1952.

Debt Laws — Madras Agriculturists' Relief Act (4 of 1938), Ss. 19 and 20 (as amended by Act 23 of 1948) — Successive applications under.

A judgment-debtor has no right to file successive applications under S. 20 or S. 19 if the reliefs which he claims as being entitled to are the same in the several applications. But if a subsequent application is based upon a provision of law not in existence at the time of a prior application of his, he will not be debarred from filing the latter application simply because he had filed a prior application when the state of law did not entitle him to the relief to which he became entitled by a subsequent change in the law. (Para 2)

K. Venkateswaran, for Petitioner; R. Desikan, for Respondent.

JUDGMENT: There is no reason whatever to interfere with the order passed by the learned District Munsif. The petitioner is the decree-holder. The respondent who was the first judgment-debtor made an application on 3-6-1949 under section 19 of Madras Act 4 of 1938 as amended by Act 23 of 1948 for scaling down the decree which had been passed against him on 24-11-1933. The decree-holder raised a preliminary objection that the application was not maintainable on the ground that the judgment-debtor had previously filed an application for stay under section 20 of the Act and there was an order staying execution passed on 14-3-1946, but he did not file any application within 60 days thereafter and therefore the judgment-debtor was not entitled to once more file an application for stay as he did and then file a substantive application under section 19. It may be mentioned that prior to the present application under section 19 there was another application under section 20, and there was an order of stay passed on 17-3-1949 and it is not disputed that the present petition under section 19 has been filed within the prescribed time from the date of that order.

(2) The only question therefore is whether the judgment-debtor not having filed an application under S. 19 within the prescribed time from the date of the stay order under section 20 passed on his prior application, is now precluded from again filing another application under S. 20 followed by an application under section 19. Undoubtedly, the judgment-debtor would not have such a right, that is, a right to file successive applications under section 20 or section 19 if the reliefs which he claims as being entitled to are the same in the several applications. But at the same time it is equally clear that if a subsequent application is based upon a provision of law not in existence at the time of a prior application of his he will not be debarred from filing the later application simply because he had filed a prior application when the state of law did not entitle him to the relief to which he became entitled by a subsequent change in the law. The judgment-debtor in this case alleges that he has become entitled to relief under the provisions of the Amending Act 23 of 1948, relief which was not available to him before the amendment. On this footing, the second application was certainly maintainable. The learned District Munsif was right in holding that the prior application under section 20 filed in 1946 will not be a bar to a fresh application under S. 20 after the Amending Act 23 of 1948.

(3) Learned counsel for the petitioner is afraid that the order of the learned District Munsif may be understood as having finally decided the question of the applicability of the provisions of the Amending Act of 1948. In my opinion, any apprehension on this score is unfounded. The learned District Munsif has not finally decided as to the applicability of the provisions of the new Act; he has only 'prima facie' held on the allegations of the judgment-debtor that there will be no bar on account of the prior application under

section 20 and that the petition was maintainable.

(4) The revision petition is therefore dismissed with costs.

B/D.R.R. Revision dismissed.

A.I.R. 1953 MADRAS 422 (Vol. 40, C. N. 161)

GOVINDA MENON AND BASHEER AHMED SAYEED JJ.

In re C. S. Subramaniam, Petitioner-Accused.

Criminal Revn. Case No. 217 and Cri. Revn. Petn. No. 216 of 1951, D/- 28-10-1952.

Penal Code (1860), S. 497 — "Without the consent or connivance" — (Evidence Act (1872), Ss. 101 to 103).

To sustain a conviction under S. 497 the complainant must not only prove that the accused had sexual intercourse with his wife but also that the act was done without his consent or connivance.

(Paras 9, 10)

Anno: Penal Code, S. 497 N. 1; Evi. Act, Ss. 101 to 103 N. 3.

M. K. Nambiar for V. Rajagopalachari and N. C. Srinivasan, for Petitioner; Asst. Public Prosecutor, for the State.

REFERENCES: Courtwise/Chronological/ Paras

('97) 19 All 74: (1896 All WN 178)	5
(1938) 2 All ER 480: (107 LJP 90)	6, 7
(1945) 2 All ER 190: (1945 P 44)	7
(1950) 1 All ER 602: (1950 WN 107)	7
(1830) 3 Hag Ecc 57: 27 Digest 327	6

GOVINDA MENON J.: The charge against the petitioner before the Court of the Additional First Class Magistrate of Erode was that he, between October 1948 and 16-5-1949, at Gobichettipalayam committed aduitery with one Dr. Suguna Bai, knowing that she is the wife of one Dr. P. V. Ramchandra Reddi, the complainant, and without the consent of the said Ramchandra Reddi, and thereby committed an offence punishable under S. 497, I. P. C. He was found guilty of the offence and sentenced to rigorous imprisonment for six months. On appeal, the learned Additional Sessions Judge of Coimbatore confirmed the conviction and sentence. Hence this revision.

(2) Mr. Panchapakesa Aiyar J. before whom the revision came on for hearing on 13-3-1951, directed the case to be posted before a Bench of two Judges as according to the learned Judge, S. 497, I. P. C. perpetuates a discrimination solely on ground of sex and as such is repugnant to the provisions of the Indian Constitution, viz., Art. 13(1) read with Art. 15(1). It was for the purpose of deciding the validity of S. 497, I. P. C. and its repugnancy in relation to the Articles of the Constitution that the reference was made. The learned Judge overlooked the fact that the offence complained of had been committed before the coming into operation of the Indian Constitution. Both the learned counsel for the petitioner and the learned Public Prosecutor conceded that no question of fundamental rights arises in this case, as the alleged offence took place before 26-1-1950.

(3) Under S. 497, I. P. C. whoever has sexual intercourse with a person who is, and whom he knows, or has reason to believe, to be, the wife of another man, without the consent or connivance of that man, commits the offence of adultery, if such sexual intercourse does not amount to rape.

(4) The complainant had been married to one Dr. Suguna Bai on 26-1-1940 under the Special Marriage Act (3 of 1872) at Madras. From the evidence of P. W. 1, the complainant, it appears that the wedded life of the parties had not been a happy one. It is in evidence that both the husband and wife were members of the Communist Party and that they are interested in the activities of that party. The petitioner who was a friend of both the spouses, was also a member of the Communist party and knew them very intimately. The relations between the married couple became very much estranged from 1942 onwards and the inference that can be drawn from the prosecution case is that the husband allowed the wife to lead her own life without much interference on his part. From 1946 the wife was in different places on private as well as on Government service. It is further alleged that in the second week of October 1946 the wife went away from the house of the complainant at Madras without his knowledge and in spite of diligent enquiries made by the complainant he could not know her whereabouts till the end of December 1946.

In May 1948 it is alleged that the differences between both of them were patched up in the presence of a respectable mediator; but even after that, the estrangement continued. Ex. P. 2 is a copy of the petition in O. M. S. No. 22 of 1948 filed by the complainant on the Original Side of this Court under S. 17, Special Marriage Act and S. 10, Indian Divorce Act for a dissolution of the marriage on the ground of the wife's adultery with one Mr. G. P. That petition was withdrawn sometime in July 1949. P. W. 1 says that though he had sufficient evidence that his wife committed adultery with Mr. G. P. he withdrew the suit at the advice of his lawyer. The complaint in the present case was filed on 16-5-1949 before the withdrawal of that application. Both the lower Courts have found that the accused and Dr. Suguna Bai were living together in house No. 13 Cutchery Street, Gobichettipalayam, that no other person lived in that house that both of them had one and the same mess and that both of them used to sleep in one and the same room. On this evidence it was found that the only inference is that the accused committed an offence under S. 497, I. P. C.

(5) We have been taken through the evidence of the various witnesses examined on behalf of the complainant as well as the testimony of the defence witnesses and it seems to us that the finding of the lower Court on the question of fact that the complainant's wife and the accused were living together in the same house and under the conditions described in the judgment of the lower Court cannot be disputed. But the argument that is put forward by the learned counsel for the petitioner is that assuming without conceding, that the accused had sexual intercourse with Dr. Suguna Bai, knowing that she was the lawfully wedded wife of the complainant, still the necessary prerequisite for a conviction under S. 497, I. P. C. viz., that such sexual intercourse was without the consent or connivance of the husband, should be proved. It is urged that the evidence in this case does not show that there was no connivance. It is argued that from the conduct of the husband the Court has to presume that though he did not positively consent to his wife living apart and living with others, he must have tacitly connived at such a life. The learned counsel for the appellant invited our attention to the observations of Edge C. J. and Aikman J. of the Allahabad High Court in — 'Brij Basi

v. Queen-Empress', 19 All 74. That was a case where the accused person was found guilty by the lower Courts of an offence under S. 451, I. P. C. for having committed house trespass with intent to commit an offence, the prospective offence being adultery. During the course of the discussion the learned Judges observe as follows:

"It is the first principle of criminal law that where a statute creates a criminal offence the ingredients of that criminal offence must be strictly proved, and that where the doing of an act without consent or without authority is made a criminal offence, and the statute does not expressly put upon the accused the proof of such consent or authority, it is a necessary part of the case for the prosecution to negative by evidence such consent or authority. In this case, if Brij Basi had actually been caught in the act of sexual intercourse with the wife of Ramgopal, assuming that he knew to be Ramgopal's wife, the offence of criminal adultery would not have been made out without proof that such sexual intercourse was without the consent and without the connivance of Ramgopal."

Granting that the prosecution has proved that the accused has committed adultery with the complainant's wife, still is there anything in the evidence to show that it was without his consent or connivance? It is not sufficient for the complainant to prove the act of adultery. He must also prove that he did not connive at it. Paragraph 20 of Ex. P.2 is clear that the complainant knew that his wife was committing adultery with persons other than the accused on 13-4-1948 and on other occasions during April and December 1947 and between 10th April and 12-4-1948 and also between 14-4-1948 and 16-4-1948. There is not a word in the deposition of P. W. 1 that subsequent to his having known about his wife's adultery with other persons, he had done anything to prevent her committing adultery with anyone else. In fact the inference is irresistible that after he was convinced that his wife had adulterous intercourse with the co-respondent in O. M. S. No. 22 of 1948, he tacitly acquiesced in the conduct of his wife. His filing an application for divorce and later on withdrawing it is proof that he did not take any steps to wean away his wife from the alleged evil conduct into which she has fallen. We are therefore satisfied that the necessary pre-requisite for a finding that an offence under S. 497, I. P. C. has been committed is absent in this case. It is absolutely essential as stated in — 'Brij Basi v. Queen-Empress', 19 All 74 that being a criminal offence, one of the two ingredients to be proved is that the husband did not connive at the adultery.

(6) What "connivance" means in cases under the English Matrimonial Causes Act has been the subject of discussion in — 'Lloyd v. Lloyd & Leggari', (1938) 2 All E. R. 480. Langton J. after discussing all the earlier cases on the subject holds that when the husband having been fully apprised of what was going on, viz., that his wife was committing adultery with other persons, took no active steps to prevent it, and therefore acquiesced in it, it should be presumed that there has been connivance on the part of the husband and therefore a petition for divorce should be dismissed. The learned Judge discussed the earlier cases on the point such as — 'Rogers v. Rogers', (1830) 3 Hag Ecc. 57: 27 Digest. 327, and other cases.

(7) But it is argued by the learned Public Prosecutor that this decision has not been approved in England in the subsequent cases. He invites our attention to — 'Churchman v. Churchman', (1945) 2 All E. R. 190. In that case the Court of Appeal dissented from certain observations of Langton J. in — 'Lloyd v. Lloyd & Leggari', (1938) 2 All E. R. 480, but lays down that it is the essence of connivance that it preceded the event and, generally, the material event was the inception of the adultery, and not its repetition, although the facts might be such that connivance at the continuance of an adulterous association showed that the petitioner must be taken to have connived at it from the first. The same view has been taken in—'Manning v. Manning', (1950) 1 All ER 602 again a judgment of the Court of Appeal. It may therefore be taken that unless there has been connivance at the inception, the English law would not accept subsequent condonation of adultery as connivance.

(8) We are satisfied from the evidence that after the filing of O. M. S. No. 22 of 1948, the complainant was no longer interested in his wife leading a chaste life. In fact he was anxious to get a divorce and for some reason, which is not clearly explained, he withdrew the suit on the advice of his counsel. It is alleged by the accused in this case that the complainant abducted his wife from Gobichettipalayam with the intention that she should not give evidence in the divorce suit. Whatever that might be, on a careful reading of P. W. 1's evidence, we are driven to the conclusion that it mattered to him nothing as to what his wife did after he had filed the divorce suit. He allowed her to have her own mode of living without any kind of let or hindrance on his part. That was the reason why there was no evidence let in on behalf of the prosecution that there was no connivance on the part of the husband. As the necessary ingredients of the offence have not been proved we find that the petitioner is not guilty of the offence with which he is charged and we acquit him and set him at liberty.

(9) BASHEER AHMED SAYEED J.: I agree with my learned brother in the conclusions he has arrived at and the reasoning which he has put forth for allowing the revision petition filed by the petitioner. I would like to add a few words of mine. Section 497, I. P. C. requires that the complainant should prove that the accused had sexual intercourse with the complainant's wife without the complainant's consent or connivance. That means the burden is cast upon the prosecution to prove that the sexual intercourse had been without the consent or connivance of the complainant himself. My learned brother has rightly held that this onus which is cast upon the complainant has not been discharged by the complainant. All that has been proved by the complainant in the case is that the accused must have had or actually had sexual intercourse with the wife of the complainant. This cannot be full compliance with the requirements of the section. On the other hand, it was incumbent upon the complainant to prove that the said sexual intercourse which the accused had with the wife of the complainant was without his consent or connivance.

As has been pointed out, there has been no evidence whatsoever that such want of consent or connivance has been proved by the complainant though averments have been made by the complainant to that effect in his complaint. A reference to paragraph 5 of the complaint will make this clear. So also his sworn statement at the time he filed the complaint makes reference to the fact that he did not consent to the sexual intercourse of the accused with his wife. But it does not really meet the requirements of the sec-

tion. The complainant who gave evidence as P. W. 1 has not shown that he did not give his consent or that he did not connive at the accused having sexual intercourse with his wife. In order to show this he should have spoken to the steps which he took to prevent the accused or his wife from having intercourse with each other from the moment he came to know of the intimacy between the wife and the accused and from the time he began to suspect that the accused was having sexual intercourse with his wife. Far from speaking to any such facts or steps taken by him, it appears from the evidence that he actually took no steps whatever, though he was fully aware from August 1946 uptill 16-5-1949 when he actually filed the complaint that the accused and his wife were on intimate terms with each other. Paragraph 7 of Ex. P. 4 and also Ex. P. 3 counter affidavit filed by the wife make this position very clear. In spite of this knowledge if the complainant had failed to take steps to prevent sexual intercourse between the accused and his wife, such conduct on the part of the complainant would give rise, it is claimed, to the presumption that he had connived at the accused having sexual intercourse with his wife, though, in my opinion, such presumption does not seem to be necessary at all in a criminal case where the onus is laid on the complainant to prove the ingredients of the offence against the accused.

(10) Mr. Nambiar has referred to a number of events which have preceded the filing of the complaint by the complainant to show that the complainant had connived at the sexual intercourse of his wife with other persons like Mr. G. P. during a long period of time and to the various proceedings which were instituted by and against the complainant in connection with the conduct of his wife and that of the complainant himself respectively. These facts might be quite relevant and necessary in a case where the complainant sought to have a divorce between himself and his wife. But in a criminal case I do not think that the connivance by the complainant at acts of sexual intercourse which the wife of the complainant might have had with persons other than the accused would be material or relevant to the particular complaint with which the complainant goes to the criminal Court for vindicating his socalled rights. In my opinion, it is essential that the complainant should show against the particular person who is made the accused that his sexual intercourse with the complainant's wife was without the complainant's consent or connivance, notwithstanding the fact that the complainant might or might not have consented or connived at the sexual intercourse which other persons might have had with the complainant's wife earlier or later than the complaint. In order to make the accused liable to punishment, the complainant must show that that particular accused had sexual intercourse with his wife without his consent or connivance. All the English cases cited by the learned counsel on both sides have relevance only to the civil proceedings in matrimonial cases and they do not have much bearing on the requirements laid down by the express language of section 497, I. P. C. In the present case as has been observed by my learned brother while the complainant has failed to discharge the onus laid down on him to prove the absence of consent or connivance at the sexual intercourse of the accused with the complainant's wife, the petitioner-accused has shown by evidence on record that the complainant had connived at the sexual intercourse of the accused with the complainant's wife though it was absolutely unnecessary on his part to prove such consent or connivance. In this view the petition must be allowed and the conviction will have to be set aside, as has been rightly held by my learned brother.

B/K.S. Conviction set aside.

A.I.R. 1953 MADRAS 424 (Vol. 40, C. N. 162)

RAGHAVA RAO J.

J. D. Lobo, Petitioner v. Marajal Doggu, Respondent.

Civil Revn. Petn. No. 704 of 1950, D/- 5-9-52.

Stamp Act (1899), S. 19 — Foreign promissory note — Properly stamped according to Indian Law — It must be stamped over again under S. 19. AIR 1941 Mad 868, Foll

(Paras 2, 3)

Anon: Stamp Act, S. 19 N. 3 Pt. 3.

A Narayana Pai, for Petitioner.

REFERENCE..... /Para.

('41) 1941-2 Mad LJ 301: (AIR 1941 Mad 868) 2

ORDER: The question raised in this case is whether a foreign promissory note duly stamped in accordance with the Indian Stamp Act, is to be stamped again before the actual endorsement of the promissory note in favour of a person who thereafter files a suit on the promissory note. The view taken by the Court below is that under S. 19, Indian Stamp Act it is incumbent upon the first holder of the promissory note to affix a proper stamp to the promissory note, before its negotiation in favour of the present plaintiff. The suit in the Court below failed on this construction of S. 19, Indian Stamp Act.

(2) What Mr. Narayana Pai urges is that S. 19 does not provide that in the case of foreign instruments duly stamped in accordance with the Indian law, there must be a re-stamping of such instruments over again by virtue of S. 19, Indian Stamp Act. The point raised is one of first impression and there are no doubt considerations of leniency to the subject which may well support this view contended for by Mr. Narayana Pai. But there is a ruling of a learned Judge of this Court sitting singly reported in — 'Sivasubramania v. Kalankarayan', 1941-2 Mad LJ 301, which is adverse to the submission of the present petitioner. In the interests of judicial comity, quite apart from any consideration of the correctness of the decision, I am prepared in this case to follow the judgment reported in — 'Siva Subramania v. Kalankarayan', 1941-2 Mad LJ 301.

(3) I am not also satisfied that the language of S. 19 is in the qualified form which Mr. Narayana Pai contends for on a proper interpretation of the language of the section. Mr. Narayana Pai, as I have already stated, is raising the point that if the instrument was already properly stamped according to our law, when it happened to lie in the hands of the first holder, it does not stand to reason that to such an instrument S. 19 should be applied so as to entail the obligation on the later holder of the promissory note to have it affixed with a stamp once again before he can found himself upon the negotiation of such a promissory note in his favour. That may be, but for the reasons that I have given, I have to dismiss this revision petition but in the circumstances without costs.

B/K.S. Revision dismissed.

A.I.R. 1953 MADRAS 425 (Vol. 40, C. N. 163)

BASHEER AHMED SAYEED J.

Mukkattumbrath Ayisumma, Petitioner v. Vayyaprath Pazhae Bangalayil Mayomoothy Umma and others, Respondents.

Civil Revn. Petn. No. 1116 of 1950, D/- 24-4-1952.

Marumakathayam Law — Muslim Personal Law (Shariat) Application Act (1937) — Mapilla Marumakathayam Act (17 of 1939) — Effects of, on rights and interests of members of Muslim tarwad and his heirs.

Plaintiffs 1 to 5 brought a suit for partition of Mopla Tarwad property governed by Marumakathayam law. The petitioner was a widow of a member of the tarwad who died before filing of the suit. He had expressed no intention to separate from tarwad. He had died after the Muslim Personal Law (Shariat) Application Act (1937) came into operation but before the Mapilla Marumakathayam Act (17 of 1939) was passed. The petitioner applied for being impleaded in the suit on the ground that she was entitled to the share of her deceased husband.

Held that under the law as it stood after the Muslim Personal Law (Shariat) Application Act, 26 of 1937 whether the husband of the petitioner had declared his intention to get himself separated or not, on his having died intestate, his right in the property would be available to his heirs to devolve according to the Muslim law and the petitioner was entitled to be brought on record as a party to the suit for partition in order that she might put forth her claim to her deceased husband's right or interest in the tarwad property left by him. Case law discussed. (Para 24)

(Evolution of Muslim Personal Law (Shariat) Application Act (1937) and Mapilla Marumakathayam Act (17 of 1939) traced). (Paras 14, 15, 18, 19, 20)

B. Pocker, for Petitioner; Atchuthan Nambiar, for Respondents.

REFERENCES: Courtwise/Chronological/ Paras

('40) ILR (1940) 2 Cal 464: (AIR 1940 Cal 501) 22
('81) 3 Mad 169 16
('83) 6 Mad 27 16
('87) 10 Mad 322 16
('03) 13 Mad LJ 499 16
('18) 35 Mad LJ 509: (AIR 1919 Mad 677) 16
('19) 37 Mad LJ 402: (AIR 1919 Mad 538) 16
('36) 70 Mad LJ 114: 59 Mad 693: AIR 1936 Mad 155 21
('45) ILR (1945) Mad 631: (AIR 1946 Mad 32) 22
('49) 1949-2 Mad LJ 268: (AIR 1951 Mad 561) 21

JUDGMENT: This civil revision petition is against the order of the learned Subordinate Judge of Tellicherry, dismissing the application of the petitioner, a third party, filed by her to get herself impleaded in the suit on the ground that the rights of Mappilla Tarwads stand unaffected even after the passing of the Muslim Shariat Act and that no individual member would have any heritable right in the tarwad properties unless he himself volunteered to become a divided member during his lifetime.

(2) Plaintiffs 1 to 5 in O. S. No. 35 of 1949 on the file of the Subordinate Judge's Court, Tellicherry, brought a suit for partition of Mopla Tarwad property said to be governed by the Marumakathayam law. The petitioner is the widow of a member of the tarwad, namely, Kuttiatha Musaliar, who had died sometime before the filing of the suit for partition. It is alleged that before the suit had been filed, he had expressed no intention to separate from the tarwad. This Kuttiatha Musaliar died in July 1938, i.e., long prior to the coming into force of the Mapilla Marumakathayam Act (Madras Act 17 of 1939). Before this Act was passed by the Madras Legislature, the Central Legislature had passed an Act called the Muslim Personal law (Shariat) Application Act, (India Act 26 of 1937). It is common ground that the husband of the present petitioner died after the Muslim Personal law (Shariat) Application Act came into operation and before the Mapilla Marumakathayam Act (Madras Act 17 of 1939) was passed. The suit itself having been filed in 1949, the petitioner made an application to the court for being impleaded in the suit on the ground that she was entitled to the share of her deceased husband in the tarwad properties which were being partitioned at the instance of five of the members of the tarwad.

(3) The Muslim Personal law (Shariat) Application Act did not apply to agricultural lands; and, in order to remove the disability, the Madras Legislature passed Act 18 of 1949 which extended the scope of the Muslim Personal law (Shariat) Application Act to agricultural lands as well within the then province of Madras. Prior to this amending Act, there were two other Acts which had been enacted by the Madras Legislature. The first of them was Mapilla Succession Act, (Act 1 of 1918), which was enacted to amend and define the rules of law applicable to intestate succession among Mapillas governed by the Marumakathayam or the Aliyasanthana Law of Inheritance. There was also another Act called the Mapilla Wills Act, (Act 7 of 1928), intended to define the law relating to testamentary dispositions by Mapillas governed by the Marumakathayam or Aliyasanthana law of inheritance.

(4) For consideration of the points that arise in this petition, it is necessary to briefly state the development of the law governing Mappillas of Malabar until it reached its final stage as evidenced by the amending Act, (Act 18 of 1949). Before the Mapilla Succession Act, (Act 1 of 1918) was enacted, any property owned by a member of a Mapilla tarwad belonged to the tarwad, whether it was self-acquired or otherwise and succession to such property was by right of survivorship. The tarwad property remained impartible although the members of the tarwad had a proprietary interest in the property and therefore entitled to maintenance. The general Islamic law by which Muslims were governed in the rest of the country was not in force among the Mapillas of North Malabar and some parts of South Kanara, where Mapillas predominate. The customary law prevailed in the Mapilla society of North Malabar and parts of South Kanara. This system of inheritance, according to Marumakathayam law, is a deviation from the original Islamic law and had been adopted by the Mapillas by reason of a custom which had developed out of certain historic conditions and factors which it is not necessary now to go into.

(5) When such was the position, in order to amend the law of intestate succession among the Mapillas governed by the said Marumakathayam or Aliyasanthana law of inheritance, the Mapilla Succession Act, (Act 1 of 1918) was enacted. It was made applicable to Mapillas domiciled in the Presidency of Madras who were governed by the Marumakathayam or Aliyasanthana law of inheritance and also in respect of immoveable properties situated within the presidency of Madras to Mapillas domiciled outside the presidency of Madras who were governed by the customary law. It defined the property in respect of which a deceased Mapilla should be considered to have died intestate. While so defining, it included all properties in respect of which the Mapilla who died had not made any testamentary disposition and also excluded the tarwad property, unless the person dying intestate was exclusively entitled to such tarwad property.

(6) This Act, further defined that all such property shall, notwithstanding any custom to the contrary, devolve upon his heirs in the order and according to the rules of Muhammadan law. The effect of Mapilla Succession Act was that the self-acquired property of a Mapilla governed by the Marumakathayam or the Aliyasanthana law could thenceforth devolve on their heirs on his dying intestate and also by implication gave power to the Mapilla to alienate such property 'inter vivos'. This Act did not intend to legislate in respect of the tarwad property was left intact, but confined itself only to the self-acquired property of the Mapilla and it made it clear that such self-acquired property could devolve upon the heirs according to Islamic rules of succession and not according to the rules of survivorship which applied to the tarwad property. In one sense, this Act may be considered to be a mild revolt against the Marumakathayam law which was governing the Mapillas until then in respect of all properties and this Act might be considered also to be a deviation from the customary law of Marumakathayam which was till then applicable to Mapillas of North Malabar and South Kanara.

(7) Then Madras Act 7 of 1928 called the Mapilla Wills Act was enacted to define the law relating to testamentary dispositions by Mapillas governed by the Marumakathayam law or Aliyasanthana law of inheritance. It extended to the whole presidency of Madras and was made applicable to testamentary dispositions by Mapillas governed by the Marumakathayam or the Aliyasanthana law of inheritance in respect of property which, but for such testamentary dispositions would devolve in accordance with the provisions of the Mapilla Succession Act, 1918. Section 3 of this Act further provided that testamentary dispositions to which this Act applied should be governed by the Muhamadan law relating to Wills and not by the Malabar Wills Act, 1898. The purpose of this Act was to exclude Mapillas, to a further extent from the scope of the general law governing will that was prevalent then in Malabar which applied to all communities living there and to bring into effect the Islamic law governing the Wills so far as the Mapillas, who were then governed by the Marumakathayam or the Aliyasanthana law, were concerned.

(8) In October 1937, the Muslim Personal law (Shariat) Application Act, (Act 26 of 1937), was enacted by the Central Legislature and the preamble to that Act states that it was enacted to make provision for the application of the Muslim Personal law (Shariat) to Muslim in British India, the term "British India" having subsequently been amended into the provinces of India by the Amending Ordinance of 1948. Section 2 of that Act provided that:

"Notwithstanding any custom or usage to the contrary, in all questions (save questions relating to agricultural land), regarding intestate succession, special property of females, including personal property inherited or obtained under contract of gift or any other provision of personal law, marriage, dissolution of marriage, including Talaq, ila, zihari, lian, khula and Mubaraat maintenance, dower, guardianship, gifts, trusts and trust properties and wakfs (other than charities and charitable institutions and charitable and religious endowment), the rule of decision in cases where the parties are Muslims shall be the Muslim Personal law (Shariat)."

(9) The third section of this Act gave power to make a declaration to any Muslim that he desires to obtain the benefit of the provisions of S. 2 of this Act and that therefore the provisions of that section should apply to the declarant and his descendants. It is not necessary to deal with that section in the present context. The fourth section gives power to the Provincial Government for making rules to carry into effect the purposes of the Act and it is not necessary to refer to that section either.

(10) The material section of the said Act is S. 6. which repealed some of the legislations which enabled courts to apply rules of Muhammadan law, where the parties were Muslims in so far as they were inconsistent with the provisions of the Muslim Personal law (Shariat) Application Act. One of the sections that was repealed by this S. 6, Muslim Personal law (Shariat) Application Act, was S. 16 of the Madras Civil Courts Act, 1873. Section 16 of the Madras Civil Courts Act, 1873, was in the following terms:

"Where, in any suit, or proceedings, it is necessary for any court, under this Act to decide any question regarding succession, inheritance, marriage or caste or any religious usage or institution,

(a) the Muhammadan law in cases where the parties are Muhammadans and the Hindu law in cases where the parties are Hindus or;

(b) any custom (if such there be) having the force of law and governing the parties or property concerned shall form the rule of decision, unless such law or custom has, by legislative enactment, been altered or abolished;

(c) in cases where no specific rule exists, the court shall act according to justice, equity and good conscience.

(11) It will be seen that the whole of S. 16 of Act 3 of 1873 is sought to be repealed by S. 6, Muslim Personal law (Shariat) Application Act, (Act 26 of 1937), in so far as that section was inconsistent with the provisions of the said Muslim Personal law (Shariat) Application Act. If this S. 16 is analysed, it will be seen that sub-cl. (a). S. 16 is not inconsistent with the provisions of Muslim Personal law (Shariat) Application Act, for that sub-clause only states that the Muhammadan law in case where the parties are Muhammadans should be

the rule of decision, unless such law had, by legislative enactment, been altered or abolished, and therefore, it is in consonance with the provisions of S. 2 of Act 26 of 1937. But sub-cl. (b) of S. 16 which says that "any custom (if such there be) having the force of law and governing the parties or property concerned, shall form the rule of decision", cannot be said to be consistent with S. 2, Muslim Personal law (Shariat) Application Act (Act 26 of 1937), and therefore, that sub-clause should be considered to be repealed by S. 6 of the said Act 26 of 1937; for S. 2 of Act 26 of 1937 enacts that "notwithstanding any custom or usage to the contrary in all matters set out in the section, the rule of decision in case the parties are Muslims shall be the Muslim Personal law". It is not necessary to deal with sub-cl. (c), S. 16, for that sub-clause only says that where no specific rule exists, the court shall act according to justice, equity and good conscience. That clause can be said to be affected only if it is inconsistent with the provisions of the Muslim Personal law (Shariat) Application Act. It is clear, however, that if there is any specific rule, then the decision will have to be according to that rule or law governing the Muslims and not according to equity, justice and good conscience.

(12) As this Muslim Personal law (Shariat) Application Act excluded from its scope, questions relating to agricultural lands and as it was felt necessary that the Muslim Personal law (Shariat) Application Act should be made applicable also to agricultural lands in the province of Madras, the Madras legislature amended S. 2 of Act 26 of 1937 by Act 18 of 1949 by which the words "save questions relating to agricultural lands" were omitted and in consequence thereof so far as the Province of Madras was concerned, the Muslim Personal law (Shariat) Application Act was made applicable to all properties owned by Muslims including the agricultural lands. A further amendment was also made by Madras Act 18 of 1949 by which the words found in the original S. 2 of Act 26 of 1937, namely, "other than charities and charitable institutions and charitable and religious endowments" were also omitted, so that the Muslim Personal law (Shariat) Application Act was made applicable even to wakfs which included charities, charitable institutions and charitable and religious endowments in the province or State of Madras.

(13) A reading of the original Act 26 of 1937 and the amendment made by Madras Act 18 of 1949, would go to show that the intention and the object of this enactment was, so far as at any rate the State of Madras was concerned that the Muslim Personal law (Shariat) Application Act should govern the Muslims in all matters without any reservation.

(14) The question that arises now for consideration is, whether after S. 16 of the Civil Courts Act and particularly sub-cl. (b) thereof had been repealed by Act 26 of 1937 as being inconsistent with the provisions of that Act, the application by Courts of any custom or usage having the force of law, was still possible, and whether it could be made the rule of decision between the parties who were Muslims after the enactment of Act 26 of 1937 (The Muslim Personal law (Shariat) Application Act). Though Mapillas were Muslims, the customary rule of inheritance by survivorship was applied to them under S. 16(b), Civil Courts Act, 3 of 1873. In that S. 16(b) is repealed by S. 6 of the Muslim Personal law (Shariat) Application Act, it is beyond question that, after 1937, the customary rule of inheritance by survivorship cannot be made applicable by courts of law in this country. It is the contention of the learned counsel for the petitioner that after the Muslim Personal law (Shariat) Application Act came into force, all customs and usages contrary to the Muslim personal law became inapplicable as a rule of decision in cases where the parties were Muslims and that all customary law stood abolished and the Muslim personal law took its place in all matters enumerated in S. 2 of the said Act (Act 26 of 1937). Applying the provisions of S. 2 of Act 26 of 1937, it is further contended by the learned counsel for the petitioner, that the proprietary interest of a member of the Mapilla tarwad, if such member dies intestate, would devolve upon his heirs according to the Muslim law and that the heirs would be entitled to inherit the same according to the rule of Muslim law and that all the rights and interests that attach to the properties belonging to a Muslim, who dies intestate, would also attach to the member of a Mapilla tarwad. A gradual evolution in the application of the Muslim Personal law to the members of the Mapilla tarwad which commenced with the enactment of the Mapilla Succession Act (Act 1 of 1918) culminated in the passing of the Muslim Personal law (Shariat) Application Act of 1937 as it was finally amended by the Madras Act 18 of 1949 and after the enactment of the Muslim Personal law (Shariat) Application Act of 1937, the courts had no more jurisdiction to apply any custom or usage to Muslims who were parties to any suit or proceedings in respect of the several matters enumerated in S. 2 of the said Act 26 of 1937 and the Mapillas of Malabar, being Muslims, from 1937 onwards, came within the scope of the same Muslim Personal Law (Shariat) Application Act without any exception.

(15) In the present case, the Mapilla member of the tarwad died after the Muslim Personal Law (Shariat) Application Act came into force, but before Act 17 of 1939 was enacted. As already pointed out, Act 17 of 1939 was enacted to define and amend in certain respects the law relating to family management, partition and succession amount (about?) the Mapillas following the Marumakathayam law. Under S. 13 of this Act, any individual member of a tarwad may claim to take his or her share of the properties of the tarwad over which the tarwad has power of disposal and separate from the tarwad. Section 14 provided:

> "Two or more members belonging to the same tavazhi, may claim to take their share of the properties of the tarwad over which the tarwad has power of disposal, separate from the tarwad and enjoy the same jointly with all the incidents of tarwad property."

Section 18 is as follows:

> "Succession to the property obtained by an individual member on partition shall be governed by the Islamic law of inheritance."

It is under this Act that the suit for partition has been laid by the plaintiffs and the sections referred to above enable any member of the tarwad or tavazhi to claim partition of the property and that once that partition is effected and any member obtains any property under such partition, succession to that property

is governed by the Islamic law of inheritance. It is curious that at the time when this law was enacted, no notice appears to have been taken of the existence of the Muslim Personal Law (Shariat) Application Act enacted by the Central Legislature. It appears to me that, on a strict interpretation of Act 26 of 1937, when this Act became applicable to all Mapillas from the date when it was enacted there was no need nor necessity for the enactment of the Mapilla Marumakathayam Act (Madras Act 17 of 1939). However, in so far as that Act has been only an enabling measure giving the right to the members of the tarwad family to claim partition of their share in the property belonging to the family, it may not be said to be inconsistent with the Central Act, (Act 26 of 1937) and it is also not necessary in the present context for me to examine the repugnancy or otherwise of this measure to the provisions of the Central Act. In so far as the customary law of survivorship was abolished by the Muslim Personal law (Shariat) Application Act and in so far as Marumakathayam Act (Act 17 of 1939) enabled any member of the Mapilla tarwad family to claim partition of the property belonging to the family, it is clear that the right of succession to the property or any proprietary interest that any member of the Mapilla tarwad possessed in the joint family when the succession was intestate, became governed by the Muslim Personal Law (Shariat) Application Act and not by any custom or usage after 1937. Therefore, it is clear that intestate succession of the property belonging to the Mapillas after 1937 could not be governed by any other rule of law except that of the Muslim Personal Law (Shariat) Application Act governing the Muslims.

(16) In this connection, the question has been raised by the learned counsel for the respondents, Mr. Achuthan Nambiar, that no member of a Mapilla tarwad has any separate proprietary interest in the tarwad, and, unless and until there was a proprietary interest in the tarwad, there was nothing that could devolve on his heirs on his dying intestate. He has relied upon the decision in — 'P. P. Kunhamod Hajee v. P. P. Kuttiah Hajee', 3 Mad 169. The question that arose in that case was the grant of a very improvident lease following on a course of conduct pursued for some years, in which the interests of a tarwad were persistently disregarded and it was held that such a grant was sufficient ground for removing a karnavan from the management of the tarwad property. The passage appearing at p. 175 in this decision relied upon by the learned counsel for the respondents is that a junior member cannot will away his share in the property belonging to the tarwad, that he is incompetent to alienate the estate and he asserts that the individual member in a Mapilla tarwad has no separate interest in the tarwad property and therefore nothing could devolve on his heirs on his death. I do not think that this decision is authority for the proposition set forth by the learned counsel for the respondents. This decision was long prior to the various enactments which had the purpose of slowly taking out the Mapillas from the application of the customary Marumakathayam law in matters of succession, Wills and partition. The learned counsel for the respondents has also relied upon the decision in 'Moidin Kutti v. Krishnan', 10 Mad 322. In that decision the suit was for a declaration that the debt for which the decree was obtained was not a debt properly due by the plaintiffs' tarwad and it appeared that the plaintiffs and defendants 1 and 2 alone of the members of the tarwad were parties to the suit and that there were several members of the tarwad not parties to the suit. It also appeared that the plaintiffs did not in their plaint purport to sue on behalf of the tarwad. On p. 327, Kernan J. observes as follows:

> "The members of the tarwad not parties to this suit, are not bound thereby. In these circumstances I am of opinion that individual members of the tarwad, as regards tarwad property have no rights vested in them separate from the tarwad, and that they can only sue as regards tarwad property in a suit, when all the members of the tarwad are either joined as plaintiffs or are made parties as defendants to the suit. Members of a tarwad can consent to partition. It is the tarwad alone, as a body that can sue and this only for the tarwad not for the benefit of any individual. The question was thus referred to a Bench composed of Muthuswami Aiyar, Brandt JJ. and myself, whether the two plaintiffs being members of a tarwad, are entitled to maintain this suit in the absence of the other members of the tarwad. See — 'Arunachala v. Vythialinga', 6 Mad 27. I am not able to agree in the opinion of my learned colleagues that the plaintiffs, in the absence of the rest of the tarwad, have any right of suit as regards tarwad property. The tarwad is a quasi-corporation & the individual members have no separate right to or in respect of tarwad property, save right of maintenance. A karnavan may sue to be declared a karnavan, but all the members of the tarwad should be parties. The right of a karnavan is not separate from the right of the tarwad. He represents in many instances the tarwad, and manages for the tarwad. I do not think that this is a question of procedure. It is one that goes to the root of the plaintiffs' title."

These observations have been relied upon by the learned counsel for the respondents to show that the junior member's right is only to maintenance and therefore, the Muslim Personal Law (Shariat) Application Act cannot apply to Marumakathayam tarwad, because the junior member has no separate right in the tarwad to devolve on his intestacy. Except the right to maintenance, he has no separate right or interest in the tarwad property. I do not think that in the light of the subsequent enactments referred to above regulating the succession and inheritance to the property of Mapilla, who is a member of the tarwad, this decision is of any avail in the present context. On the other hand, I am inclined to agree with the learned counsel for the petitioner that the rule of decision in — 'Achuthan v. Kunjunni Nair', 13 Mad L J 499, where it has been held that a claim by the junior members of a tarwad against the karnavan to enforce their rights to participate in the joint enjoyment of the tarwad property according to a family Karar is not "a suit relating to maintenance" within the meaning of Art. 38, Sch. II to Act 9 of 1887 but is "a suit for the enforcement of a right to or interest in immoveable property" and is not cognizable by a court of small causes under Art. 11, Sch. II, Act 9 of 1887, applies to the

facts of the present case. In that suit, the difference between the claim of a female member of a joint Hindu family under the Mitakshara law to separate maintenance and the right of a junior member of tarwad to enforce his right to participate in the joint enjoyment of the tarwad property has been clearly brought out. Even so, in — 'Ammini Ammal v. Padmanabha Menon', 35 Mad L J 509 a Bench of this court has held that it is clear that the right of a member of a tarwad for an allowance is an incident of co-proprietorship in the property of the tarwad and that consequently that right could not be denied, unless circumstances show that the tarwad is not in a position to give separate allowance. It has been held further that the claim for the separate allowance by a junior member of a tarwad is an indicia of proprietorship and not founded upon moral or quasi-legal obligations or on inability to maintain himself or herself. The various decisions in which the right to allowance was recognised to be based on the right of co-ownership of the property have been referred to in this decision. In — 'Seshappa Heggede v. Chandayya Heggade', 37 Mad L J 402, a Bench of this court has again held that the right to maintenance which a member of an Aliyasanthana family or a junior member of a tarwad property possesses is property and therefore the first portion of S. 6, T. P. Act is complied with. The various decisions relating to the point have been again reviewed in this decision and it was observed that the T. P. Act was not opposed to the assignability of the maintenance of a member of a Malabar tarwad or a member of an Aliyasanthana family; and it was finally held that if it is in the nature of a right in property and a right to maintenance that has been purchased, it cannot be the subject-matter of a suit in a Small Cause court. Besides these the learned counsel for the petitioner has referred to "A Treatise on Malabar and Aliyasanthana law" by Mr. P. R. Sundara Aiyar, late Judge of the Court, p. 133 of 1922 Edn. The learned Author states as follows:

> "The word 'maintenance' is loosely applied to designate the right of the junior members to participate in the enjoyment of the family property. It is not a 'jus in re aliena' like that of a widow. It is an incident to and a mode in which the proprietary right of each individual member of the Malabar tarwad is enjoyed. To such a claim Art. 227 and not Art. 128 of the Limitation Act applies. Unlike mere claims for maintenance, their right when defined may be assignable. A suit for maintenance of this sort does not fall within the clause relating to maintenance in the schedule to the Small Cause Courts Act. The right of the junior member is ordinarily restricted to his being maintained in the family house. In other words, no junior is ordinarily entitled to claim separate maintenance, if the karnavan does not choose to allow it. There is nothing to prevent the Karnavan from allotting a separate maintenance to one member and refuse to do so to another. It is not open to an Anandravan to claim separate maintenance for himself merely on the ground that it is allowed to another. In consequence of the absence of the right to partition, the question as to circumstances under which a junior member is entitled to claim separate maintenance is of great importance in the Marumakathayam law."

(17) It must be observed that at that time the Malabar tarwad was impartible and it is only later that the right to partition was vested in the members of the tarwad property under the later enactments. Therefore, I do not see any point in the learned counsel for the respondents contending that when the junior member of the tarwad is entitled to is not a proprietary interest in the tarwad property but that he is merely entitled to maintenance, in the sense in which such maintenance is available to women in the Mitakshara family.

(18) In this case when the husband of the petitioner died he had a proprietary interest in the tarwad property and on his death, that proprietary interest did not become merged or extinct but devolved on his heirs under the Personal Law (Shariat) Application Act; and under Madras Act 17 of 1939 a junior member of the tarwad had a right to ask for partition of his share in the tarwad property. Even if the Mapilla Marumakathayam Act, Madras Act 17 of 1939 was not enacted, the position would not have been different, for under the Muslim Personal law (Shariat) Application Act, it would have been still open to a junior member of the tarwad or his heirs to apply for a partition of the property of the tarwad under the Muslim Personal law (Shariat) Application Act. For, it cannot be denied that the object of the Muslim Personal Law (Shariat) Application Act was to put an end to all the anti-Islamic customs and rules that had obtained the force of law and in their stead to apply the original principles of Islamic law itself. Therefore, when the customary law had to give way to the principles of Islamic law governing inheritance and such other subjects so far as Muslims were concerned and which were equally applicable to Mapillas as to Muslims of other parts of the country, there can be no substance in saying that what has been sought to be repealed by S. 6 of the Muslim Personal Law (Shariat) Application Act was not the Marumakathayam law of inheritance, but only a custom. The Marumakathayam law of inheritance is based on a custom which was prevalent in the parts of the country where the Mappillas lived and it is that custom which has gained the force of law and it was that custom that was being applied to Mapillas under S. 16(b) of the Civil Courts Act, III of 1873. But for the fact that that customary rule of inheritance, which is known as Marumakathayam law had obtained the force of law, the courts would have had no jurisdiction to apply that custom to Mapilla families which lived as tarwad families. This distinction that is made between custom and Marumakathayam or Aliyasanthana law by the learned counsel for the respondents is without substance and meaning. "Custom" recognised by courts of law have obtained the force of law without any further proof, and therefore it is such customs which have gained the force of law that are sought to be put an end to by the Muslims Personal Law (Shariat) Application Act and the application by S. 6 of the said Act, 26 of 1937. Custom happens to be the basis of customary law and therefore, all customs contrary to the Islamic Personal Law, cannot have any force or validity after enactment of the Muslim Personal Law (Shariat) Application Act.

(19) The learned counsel for the respondent has, however, contended that in S. 6 of Act 26 of 1937, Madras Act 1 of 1918 is not repealed but only S. 16, Civil Courts Act, has been repealed and that, because S. 2 of the said Madras Act 1 of 1918 and the explanation thereof exclude the tarwad property from intestate succession, it is contended that Muslim Personal Law (Shariat) Application Act does not apply to tarwad properties. I am unable to follow the force of this argument. Madras Act 1 of 1918 itself had the effect of deviation from the then existing customary law applied to the Mapillas of North Malabar who were governed by the Marumakathayam customary law and took the self-acquired properties of the Mapillas out of the scope of Marumakathayam rule of inheritance.

(20) Therefore, it cannot be said that this Act 1 of 1918 required to be repealed because, in substance, it was in consonance with the aims and objects of the Muslim Personal Law (Shariat) Application Act. Though that enactment (Act 1 of 1918) did not touch the tarwad property as such, still in so far as customary succession to the tarwad property gets repealed by the Muslim Personal (Shariat) Application Act, there is no meaning in saying that Act 1 of 1918 should also have been repealed by S. 6 of Act 26 of 1937. Even so, Act 7 of 1928 which relates to the Wills of Mapillas as already set out made the Muslim law applicable to such wills made by Mapillas and the Muslim Personal Law (Shariat) Application Act has not made any reference to Act VII of 1928. As a matter of fact S. 2 of the Muslim Personal law (Shariat) Application Act does not deal with testamentary succession, but primarily concerns itself with intestate succession.

(21) A further point has been raised by the learned counsel for the respondents that unless the individual member of the tarwad had claimed partition during his lifetime, he could not be deemed to have left anything to devolve on his heirs on his death. In the present case, the husband of the petitioner not having claimed the partition himself and not having expressed any intention to separate from the tarwad, the learned counsel contends that on the death of such a member of the tarwad no question of inheritance or succession by his present heirs would arise. The learned Subordinate Judge would appear to have accepted this contention when he observes in the last portion of para. 4 of his judgment that:

> "The rights of Mapilla tarwad stand unaffected even after the passing of the Mussalman Shariat Act and no individual member would have heritable right in the tarwad properties unless he himself volunteered to become a divided member during his lifetime. So it would appear that the petitioner would have no claim to any share in the tarwad properties."

I do not think that this contention has any substance. I cannot agree with the learned Subordinate Judge in his view that the member through whom the petitioner claims a right to be impleaded as a party should have himself claimed partition during his lifetime, for as I have already observed, the interest of a junior member of a Mapilla tarwad is a proprietary interest in the property of the tarwad and that proprietary interest on his demise must be available to be succeeded to or inherited by the heirs or successors. When once the right to succession by the customary law of survivorship has been repealed by the Muslim Personal law (Shariat) Application Act and the Muslim personal law has been made applicable to all Muslims including Mapillas, there can be no force in the argument that the junior member of the tarwad should have claimed partition before his death in order that his heirs might claim a right to his proprietary interest in the tarwad properties. Whether the junior member did or did not claim a right during his lifetime to partition when his proprietary interest becomes heritable under the Muslim Personal law (Shariat) Application Act, then, on his demise, his heirs would become automatically entitled to claim the right which has been left by him in so far as it has not been disposed of by any testamentary disposition. He would be deemed therefore to have died intestate in respect of his proprietary right or interest in the tarwad property and the surviving heirs of the deceased junior member would be entitled to claim partition of the property and have their share or shares separated from the property. It is not necessary, in my view, that this proprietary interest of a junior member of a tarwad should have been already separated in order to make it available to his heirs on his dying intestate. The proprietary interest or right whether separated or not during his lifetime, would enure for the benefit of his heirs according to the law that was enacted in 1937 and the devolution of that right in the tarwad property owned by any member jointly with others would according to the law, devolve on his heirs when the junior member dies intestate. Prior to the enactment of Act 26 of 1937 the position might have been different, but after the enactment of Act 26 of 1937, the devolution based on custom having been put an end to by the said Act, Act 26 of 1937, the only method by which the right of the junior member in the property would now devolve is, according to the Muslim Personal law (Shariat) Application Act. That portion of the Marumakathayam Customary law which was till then in force having been repealed by the Muslim Personal Law (Shariat) Application Act, the jurisdiction of the courts to administer any such customary law in cases where the parties are Muslims having been taken away, it will be only proper and right that courts should now administer the Muslim personal law between Muslims in accordance with the provisions of the Muslim Personal Law (Shariat) Application Act. The mere fact that the Madras Legislature enacted a subsequent measure, viz., Act 17 of 1939 by which it was sought to regulate the partition of tarwad properties, cannot be said to militate in any way against the provisions of the Muslim Personal law (Shariat) Application Act, nor could it be said that this provincial measure resuscitates or continues in existence the customary law which has been repealed by the provisions of the Central Act (Act XXVI of 1937). I do not see any substance in the observation of the learned Subordinate Judge that the Mapilla Marumakathayam Act, (Act XVII of 1939) recognises the legal existence of Mapilla Marumakathayam tarwads owning properties even after the Muslim Shariat Act. He has relied upon the decision in — 'Katheesumma v. Beechu', 1949-2 Mad LJ 268. In that decision

Satyanarayana Rao J. on a difference of opinion between himself and Panchapagesa Sastri JJ. observed,

"In the case of Mapillas governed by the Marumakathayam law an indefeasible right to claim partition by a member of the tarwad was conferred for the first time by the Mapilla Marumakathayam Act, 1938, Act XVII of 1939. The provisions of the Nayar Marumakathayam Act and the Mapilla Marumakathayam Act being analogous, there is no reason for not applying the principle of — 'Kunchi Amma v. Minakshi Amma', 70 Mad L J 114: 59 Mad 693 to members of Moppla tarwads".

In this case, the point that has been considered was whether a member of a Mitakshara Hindu joint family or a member of the tarwad governed by the Marumakathayam law can become divided in status by issuing a notice of intention to separate, to the manager of the joint family or the karnavan of the tarwad without issuing notice to the other members. Viswanatha Sastri J. answered the question in the affirmative on a difference of opinion between Satyanarayana Rao and Panchapagesa Sastri JJ.

(22) The question that has now arisen in this petition was not the subject-matter of any discussion in the said decision, nor is there any reference to the Muslims Personal Law (Shariat) Application Act, in the course of the judgment of Viswanatha Sastri J. on the point as to whether the customary law of devolution by survivorship as it obtained under the Marumakathayam system was or was not repealed by the Muslim Personal law (Shariat) Application Act. I do not think that this decision is of any assistance or avail to the learned counsel for the respondents. It must be remembered that this suit in which the petitioner applied for being impleaded as a party is itself one for partition by five of the members of the tarwad and when once five such members have expressed their intention to get themselves separated from the tarwad and want separate possession of their shares nothing could prevent the petitioner to come on record to claim that share which she became entitled to on the demise of her husband, who died intestate and who was entitled to a right of share in the same property. The said husband having died, the Muslim Personal Law (Shariat) Application Act having come into effect which in turn repealed the customary law of survivorship and left the right of the deceased husband intact to be succeeded to and inherited by his heirs.

(23) The learned counsel for the respondents has invited my attention to two other decisions which he has relied upon in the course of his arguments. The first of them is the decision in — 'Mohiuddin v. Sofia Khatun', ILR (1940) 2 Cal 464. The learned counsel for the respondents contends on the basis of this decision, that the effect of S. 2 of the Muslim Personal Law (Shariat) Application Act was only to repeal the decisions according to equity and good conscience. That was a case in which the question of wakf was considered and has no material bearing on the question now at issue. Section 7 of the Muslim Personal Law (Shariat) Application Act repeals the whole of S. 16, Civil Courts Act, in so far as that section is inconsistent with the Muslim Personal Law (Shariat) Application Act. It cannot be contended that the customary law of succession by survivorship was left intact by S. 6 of the Muslim Personal Law (Shariat) Application Act. Where the customary right of succession by survivorship was enforced by courts in India by virtue of clause (b) or clause (c) of S. 16 of the Civil Courts Act, in so far as such decisions were inconsistent with the provisions of the Muslim Personal Law (Shariat) Application Act, they should be deemed to have been repealed. Therefore, if there is any rule of law which has been in force by virtue of the courts having acted under clause (c) of S. 16 of the Civil Courts Act, if that rule of law is inconsistent with the provisions of Act 26 of 1937, then certainly to that extent that rule of law would also stand repealed. I do not think, therefore, that this decision relied upon by the learned counsel for the respondents is of much assistance to him. The second decision which has been referred to by the learned Counsel for the respondents in this connection is the one in — 'Kunhi Pathujma v. Sundara Iyer', ILR (1945) Mad 631. This decision was on the question of guardianship and it was held that the question of guardianship shall be governed by the Marumakathayam customary law. But it should be noted that the question arose in respect of agricultural lands and agricultural lands at the time when this case came up for decision were excluded from the scope of S. 2 of the Muslim Personal law (Shariat) Application Act. Therefore, no reference in the said decision was made to the said Act (Act 26 of 1937), and the decision proceeded on the basis of the law then existing in regard to agricultural lands which had been excluded from the operation of S. 2 of Act 26 of 1937. It was only in 1949 by the amending Act, (Madras Act 18 of 1949) that agricultural lands were brought within the scope of S. 2 of the Act 26 of 1937. This decision therefore has no relevancy to the facts of the present case. Therefore, not much reliance can be placed on the subsequent enactment of Act 17 of 1939 the Mapilla Marumakathayam Act, which only prescribes the method of securing partition of the estate which was impartible formerly, and it cannot by any means be assumed that this later Provincial Act has the effect of nullifying or invalidating what has already been declared to be the law applicable to Muslims by virtue of Act 26 of 1937.

(24) Therefore on a consideration of the entire circumstances of the case and for the reasons that I have already given, I do not think that the learned Subordinate Judge was right in the approach he has made to the question at issue. I am of the opinion that under the law as it now stands after the Muslim Personal Law (Shariat) Application Act whether the husband of the petitioner had declared his intention to get himself separated or not, on his having died intestate, his right in the property would be available to his heirs to devolve according to the Muslim law and that the petitioner was entitled to be brought on record as a party to the suit for partition in order that she might put forth her claim to her deceased husband's right or interest in the tarwad property left by him.

(25) The learned counsel for the respondents has urged that in view of the fact that this petition has raised some important questions of law the matter should be posted before a Bench for decision. I do not think that this is a sufficient reason for me to direct this matter to

be posted before a Bench. The matter appears to be plain and simple. The petition is allowed with costs.

B/H.G.P. Petition allowed.

A.I.R. 1953 MADRAS 432 (Vol. 40, C. N. 164)

MACK J.

T. Vinayaka Mudaliar, Appellant v. Mindala Pottiamma, Respondent.

A. A. O. No. 118 of 1951, D/- 16-9-1952.

Workmen's Compensation Act (1923), Ss. 2 (1)(n) and 3 — Employment for purposes of business.

Where a person invests capital in building a number of houses with a view to obtain profits by letting the houses on rent the employment of workmen directly by him in the construction of those houses is for the purpose of his business. He cannot avoid his liability to compensate a workman engaged in the construction merely because construction of houses is only his subsidiary business and his main business is something else: AIR 1933 Cal 63; (1910) 2 KB 903 and AIR 1929 Bom 179, Disting. (Para 4)

Anno: Workmen's Com. Act, S. 2(1)(n) N. 3, S. 3 N. 1.

K. R. Krishnaswami for T. K. Rangaswami, for Appellant; R. Thirumalaiswami Naidu and S. Mohan Kumaramangalam, for Respondent.

REFERENCES: Courtwise/Chronological/ Paras
('29) 53 Bom 203: (AIR 1929 Bom 179) 3
('33) 60 Cal 24: (AIR 1933 Cal 63) 3
(1910) 2 KB 903: (79 LJ KB 1168) 3

JUDGMENT: This appeal under the Workmen's Compensation Act raises for determination an interesting point which does not appear to have been specifically decided in any reported case. The appellant is one Vinayaka Mudaliar who claims to be by vocation a printer. He engaged one Munuswami a cooly, as a mason along with another Munuswami P. W. 2 to construct a house without engaging the services of any contractor. The former Munuswami died on 18-12-1948 as a result of being engulfed in earth. His widowed mother filed an application, it would appear, on 11-4-1950 for compensation, under the Workmen's Compensation Act. The Commissioner awarded her Rs. 2400 under sch. IV negativing the contention of the employer that the deceased was not at the time of the accident a workman within the meaning of S. 2(1)(n) of the Act.

(2) According to P. W. 2 he and the deceased Munuswami were each paid Rs. 3 a day by the appellant who used to build houses and let them on rent. They had constructed or were constructing three houses for him. This has not been specifically denied in the witness-box by Vinayaka Mudaliar, who took the position that the deceased Munuswami was employed by the maistry who was supervising the work and was paid by him.

(3) The definition of a workman under S.2(1)(n) excludes a person whose employment is of a casual nature and who is employed otherwise than for the purpose of the employer's trade or business. The simple point for determination in this appeal is this: Did Vinayaka Mudaliar employ this deceased mason for the purpose of his trade or business? Mr. K. R. Krishnaswami for the appellant has relied on some decisions under S. 12, Workmen's Compensation Act, which casts upon the principal who contracts with another person for the execution of the whole or any part of any work which is ordinarily part of the trade or business of the principal, liability under the Act if a workman engaged by the contractor sustains injury. In— 'Kavnani Industrial Bank Ltd. v. Ranjan', 60 Cal 24, it was held that house building was not ordinarily part of the trade or business of a bank and a bank which had contracted with different people to do different parts of house-building work was held to be not liable as a principal, under section 12. There was reference in that decision to — 'Skates v. Jones & Co.', (1910) 2 K. B. 903, in which two shopkeepers who also kept a billiard room joined in running a skating rink and entered into a contract with a person to remove and re-erect the iron structure which they purchased. It was held that the two shopkeepers were not liable as principals as the work in which the workman was injured was not part of their trade or business. Another decision to the same effect is — 'Rabia Mahomed v. Agent G. I. P. Rly.', 53 Bom 203, in which the G. I. P. Railway entered into a contract with a company to construct a transmission line to carry electric power to various sub-stations on the railway. The deceased workman was employed by the contractors and died in the course of such employment. It was held that the railway were not liable as the setting up of overhead electric cables for the purpose of transmitting electric power to the railway was not ordinarily part of the trade or business of the principal, i.e., the railway under S. 12.

(4) This is not a case coming within the scope of S. 12, there being no principal and no one under any contractual relationship with the principal who actually employed the workman. The point arising for determination must be answered with reference to the definition of workman in S. 2(1)(n) of the Act. In the present case the deceased workman's employment was admittedly not of a casual nature. The point is whether he was employed for the purpose of Vinayaka Mudaliar's "trade or business". The evidence shows that Vinayaka Mudaliar had built three houses by directly employing masons without resort to a contractor. If he had engaged a contractor he would quite clearly not be liable as a principal under S. 12 of the Act. Not having engaged any contractor and himself having engaged workmen directly to build the houses in which presumably he had invested capital with a view to obtaining profit and gain to himself, it is extremely difficult to hold that he did not employ this workman for the purposes of his business. It is urged that his main business was printing. I do not think that liability to compensate a workman can be avoided by an employer having several businesses, say of printing, house construction and also manufacture other than printing. The position may be quite different if a person in the construction of a house for his own residence directly employs workmen. In such a case it would not be possible to hold that the workman was employed for the purposes of the employer's "business". But when a person employs a workman to build a number of houses, as in the present case, without the service of any contractor, he must be deemed to have employed him for the purpose of his business. There is such a thing as a subsidiary business as apart from a main business. Otherwise if a different view were to be taken it would mean that the liability to compensate a bona fide workman as defined in S. 2(1)(n) of the Act can be defeated by employers on the pretext that they have more than one business. I think the Commissioner has rightly held that the deceased Munuswami was a workman under S. 2(1)(n) whose widowed mother was entitled to compensation under the Act.

(5) Another point has been taken, namely, that this claim was filed after nearly 16 months, on 11-4-1950, whereas under S. 10 of the Act a limitation period of one year is prescribed. The proviso, however, gives the Commissioner full discretion to decide any claim to compensation notwithstanding that notice has not been given or the claim has not been preferred in due time if he is satisfied that the failure was due to sufficient cause. The applicant in this case gave an explanation, namely, that notice of the accident was not served by reason of the applicant having applied to the opposite party for payment of compensation on several occasions and to his giving her Rs. 40/- for funeral expenses and putting her off by all sorts of evasive replies. This point does not appear to have been taken before the Commissioner, and I can only presume that he was satisfied that the failure to make the claim in time was due to sufficient cause. The appeal in the result is dismissed with costs.

B/M.K.S. Appeal dismissed.

A.I.R. 1953 MADRAS 433 (Vol. 40, C. N. 165)

KRISHNASWAMI NAYUDU J.

N. M. Shanmughasundaram Mudaliar, and another, Appellants v. Chidambaram Pillai and another, Respondents.

Appeals Nos. 454 and 455 of 1949, (Transferred appeals) and C. R. Ps. Nos. 1903 to 1906 of 1947, D/- 8-9-1952.

(a) **Contract Act (1872), S. 25 — Agreement to pay — Credit entries in debtor's account books alleged — Non-production raises adverse presumption.**

Bonus as such would mean 'ex gratia' payment and there cannot be an action to enforce the payment of such an 'ex gratia' payment but if it is established that in fact there was an arrangement to pay a certain sum as bonus and that it would be part of the contract of service between the parties, such a contract is enforceable. It cannot, therefore, amount to a promise without consideration, the consideration being the plaintiffs' services to the defendants on an express agreement that they were to be paid two sums, one described as salary and the other as bonus. AIR 1925 Mad 192, Foll. (Para 4)

(b) Limitation Act, S. 19 — Balance sheet — (Contract Act, S. 25).

The entries in Balance sheet could not be taken as acknowledgment in writing under S. 19 nor could they be held to amount to a contract to pay a barred debt under S. 25 of the Contract Act the entries being not in the handwriting of the defendants, admittedly having been written by one of the plaintiffs. AIR 1928 Mad 27, Not foll. (Para 6)

(c) Limitation Act, Arts. 64 and 85 — Scope.

Mere credit entries in the books of account of the debtor would not be sufficient to either constitute a contract to pay a barred debt or to enable a trust to be implied therefrom, and neither Art. 64 nor Art. 85, Limitation Act, could be made applicable. AIR 1953 Mad 16, Disting. (Paras 7, 8)

(d) Limitation Act, Art. 102.

Wages may generally be applied to all kinds of payments, which are made periodically so long as services of the employee are at the disposal of the master. AIR 1918 Mad 366, Rel. on. (Para 9)

Anno: Contract Act, S. 25 N. 1, 10; Lim Act, S. 10 N. 7, S. 19 N. 18, 46a; Art. 7 N. 1, 2; Art. 64 N. 2; Art. 85 N. 2; Art. 102 N. 2, 4.

V. Seshadri and K. S. Ramamurthy, for Appellants; R. Gopalaswami Iyengar, for Petitioners; R. Ramamurthy Iyer, for Respondents.

REFERENCES: Courtwise/Chronological/ Paras

('44) 1944-2 Mad LJ 29: (AIR 1944 PC 78) 7
('18) 41 Mad 528: (AIR 1918 Mad 366) 9
('24) 47 Mad LJ 791: (AIR 1925 Mad 192) 4
('28) AIR 1928 Mad 27: (106 Ind Cas 229) 5, 6
('45) 1945-2 Mad LJ 164: (AIR 1945 Mad 473) 7
('52) 1952-2 Mad LJ 308: (AIR 1953 Mad 16) 7

JUDGMENT: The appellants are the defendants in O. S. Nos. 165 of 1947 and 164 of 1947 and in S. C. S. Nos. 133, 187, 119 and 186 of 1947 filed in the District Munsif's Court, Erode. The plaintiffs in those suits were employed under the defendants as accountants, clerks, and cloth-holders in their cloth business. The common case of the plaintiffs in all the suits is that they were employed under the defendants, that their salary was fixed inclusive of bonus and that while the salary was being paid, the bonus has not been paid, in some cases fully and in some cases partially. The suits, therefore, were instituted for the recovery of the amount of the bonus, which remained unpaid. The defendants contended that there was no agreement to pay the plaintiffs any bonus and as bonus depends upon one's sweet will and pleasure and it is a mere gift, no suit could be filed in respect of the same. They also pleaded bar of limitation to the suits. The lower Court passed decree in all the suits. The defendants filed appeals against O. S. No. 165 of 1947 and against O. S. No. 164 of 1947 in the Subordinate Judge's Court, Coimbatore, but the appeals were transferred to the High Court to be heard along with C. R. P. Nos. 1903 to 1906 of 1947, which were revision petitions filed by the defendants against the decree in S. C. S. Nos. 133, 187, 119 and 186 of 1947.

(2) Two contentions were urged before me: (1) That no suit is maintainable for recovery of bonus which is an 'ex gratia' payment and that, in any event, there was no agreement for payment of such a bonus, and (2) The claims are barred by limitation.

(3) These payments of salary and bonus are stated to have been agreed to be paid annually and the amounts claimed in the several suits are based on the agreement to pay the bonus every year at differing rates in several suits. The plaintiffs have examined themselves and also relied on the account books maintained in the business which were stated to have been written by Chidambaram, the plaintiff in O. S. No. 165 of 1947. These account books are not forthcoming but it is stated that there are in the accounts of every year credit entries in the ledger pages of each of these plaintiffs of not only the amount of salary but also the amount of bonus stipulated for. Chidambaram filed Ex. A. 1, which is a copy of the balance sheet for the year 1943-44 and the balance sheet shows the amounts credited to four of the six plaintiffs, which they claim in these suits and which amounts are

stated to be the balance due in respect of bonus. Ex. A. 1 does not give particulars as to the nature of the amounts to which credit has been given but there is the evidence of the plaintiffs that these amounts represent the balance due for bonus agreed upon.

The explanation for the non-production of the account books, of which the defendants must be in possession, is that they have been filed with the income-tax authorities to whom income-tax returns for the years 1942-43, 1943-44 and 1944-45 have been submitted and pending scrutiny, it is stated the books have not been returned. The 2nd defendant examined himself as D. W. 1. He is unable to say whether Ex. A. 1 is a true copy of the accounts and states that the account books were filed by the defendants about five months prior to the date of his examination, with the Excess Profits Tax authorities and that they did not attempt to get the account books after the suit. He does not know whether defendant 1 made any attempt to get them. The 1st defendant is apparently not taking any interest in the suit as he has not examined himself, leaving defendant 2 to face the trial. The 2nd defendant further says that he did not verify the balance-sheet and that he does not know if they deducted the bonus amounts from the gross-profits earned by them and showed the balance as net profits to the income-tax authorities.

(4) In view of the specific allegation in the plaint that credit has been given from time to time for the respective amounts of salary and bonus due to the respective plaintiffs, it is incumbent on the defendants to produce the account books and prove that the state of the accounts does not support the plaintiffs' contention. Except taking a subpeona for their production, the defendants did not apparently take any serious steps to have them produced as evidence and their failure to do so would justify an adverse inference to be drawn, viz., that by their production the case of the defendants would not receive any support. There is no reason to disregard the genuineness and the truth of the entries in the balance sheet, Ex. A. 1 and that would be sufficient to show that the course of business and the nature of the accounts must have been what is stated by the plaintiffs, viz., that there was an arrangement to pay not only salary but bonus every year. This would be amply proved by the fact of credit entries being made from time to time in the books of account maintained on behalf of the defendants. Bonus as such would mean 'ex gratia' payment and there cannot be an action to enforce the payment of such an 'ex gratia' payment but if it is established that in fact there was an arrangement to pay a certain sum as bonus and that it would be part of the contract of service between the parties, there is no reason why such a contract should not be enforceable.

This aspect was dealt with by a Bench of this Court in the decision reported in — 'Kanakasabapathi v. Hajee Oosman', 47 Mad LJ 791, and as observed by one of the learned Judges, the claim of the plaintiff should be deemed to be based on a contract, apart from any question whatever of a contemplated gift or a completed gift and apart from any relationship between the parties of depositor and depositee or creditor and debtor and the plaintiff had a case on the footing of a contract which was clearly sustainable. It cannot, therefore, amount to a promise without consideration, the consideration being the plaintiff's services to the defendant on an express agreement that they were to be paid two sums, one described as salary and the other as bonus. In this case, such an agreement has been proved both by the evidence of the plaintiffs and by Ex. A. 1. The lower Court rightly held that the defendants are liable to pay the bonus. There is no dispute as to the amount due and, therefore, the decree of the lower Court would be sustainable.

(5) But there is the further question that requires to be considered as to whether the suits are within time. It is urged on behalf of the appellants that the payments agreed upon as salary or bonus are wages and Art. 7, Limitation Act, would be the proper article that would be applicable and as such all the claims made by the plaintiffs would be barred by limitation. The lower Court held relying on a decision reported in — 'Chinnan Chetti v. Vilathan', AIR 1928 Mad 27, that where the wages instead of being paid then and there to the servant are credited to his account in the account books, the law of limitation applicable is not that under Art. 7, but the ordinary rule of limitation between a creditor and a debtor. In this case, i.e., in — 'Chinna Chetti v. Vilathan', AIR 1928 Mad 27, where a domestic servant sued for wages, it was found that where the master instead of paying the salary to the servant then and there gives credit in his account book and treats the servant as his creditor, Art. 7 does not apply. The learned Judge observes as follows:

> "Both the lower Courts have relied upon these entries as saving the bar of limitation. The suit for wages as a domestic servant no doubt must be brought within one year after the same became due. But it is open to a master instead of paying the salary then and there to give credit in his account books and treat the servant as his creditor. It would make no difference whether the master gives a pronote for wages or whether he gives credit in his account books and treats him as his creditor. If the master does that, then the law of limitation applicable is not that under Art. 7 but the ordinary rule of limitation as to debtors."

Whether by a mere credit entry in the book of the debtor, the creditor would be entitled to rely upon it as forming a contract between the creditor and the debtor appears to me to be rather difficult to hold.

(6) In the present case, in so far as Ex. A. 1 is concerned, it could be relied upon in support of the plaintiffs' case that there was originally an agreement between the parties for the payment of bonus as part of the remuneration but whether Ex. A. 1 could be further relied upon as saving the bar of limitation is what has to be determined now. The entries in Ex. A. 1 could not be taken as acknowledgment in writing under S. 19, Limitation Act, nor could they be held to amount to a contract to pay a barred debt under S. 25, Contract Act. It is very difficult to hold that a mere entry would by itself be sufficient to constitute a contract between the creditor and the debtor. The entries in Ex. A. 1 are not in the handwriting of either of the defendants, admittedly having been written by Chidambaram, one of the plaintiffs in one of the suits. Either to constitute an acknowledgment under S. 19, Limitation Act, or to be a contract under S. 25, Limitation Act, it must be in writ-

ing and signed by the person who makes himself liable under the contract. None of these conditions are satisfied in the present case. I find it very difficult to agree with the learned Judge who decided — 'Chinnan Chetti v. Vilathan', AIR 1928 Mad 27, that there is no difference between an entry in an account book and a promissory note for wages. A promissory note would certainly stand on a different footing and a credit entry in an account book cannot have the same effect.

(7) It is urged on behalf of the respondents that when once an entry appears in an account book maintained by a debtor, there is a relationship of creditor and debtor created and either Art. 64 or Art. 85, Limitation Act, can be made applicable. In so far as Art. 64 is concerned, it is for money payable to the plaintiff for money found to be due from the defendant to the plaintiff on accounts stated between them and time begins to run from the date when the accounts are stated in writing signed by the defendant or his agent duly authorised in this behalf, unless where the debt is, by a simultaneous agreement in writing signed as aforesaid, made payable at a future time and then when that time arrives. Art. 85 relates to the balance due on a mutual, open and current account, which certainly can have no application in this case. None of these articles would be of any assistance to the appellant. The learned Counsel urged further that when once the amounts, which are stated to be due to the plaintiffs, have been mentioned in the account books from time to time and there is a course of transaction to show that the defendants intended to divest themselves of this amount pointing out the persons who should be benefited by them, a trust could be implied from such entries in the account books and that, therefore, the question of limitation would not arise.

Reliance was placed on a decision of Basheer Ahmed Sayeed J. in — 'Devar and Co. v. Radhakrishna Naidu', 1952-2 Mad LJ 308, where it was held that,

> "Where the employer has credited the employee in his accounts with the dearness allowances and bonuses and represented to the income tax department that those amounts so set apart have been paid over to the employees from year to year it would certainly constitute a trust in favour of the employee especially when loans to the employee have been debited and repayments and loans and also salaries have been credited in such accounts. The cash has been sufficiently allocated and separated from the general funds of the employer."

Applying the principles laid down in the Privy Council decision — 'Chambers v. Chambers', 1944-2 Mad LJ 29 (PC) and — 'Ramanathan Chettiar v. Palaniappa Chettiar', 1945-2 Mad LJ 164, the learned Judge observed that he was inclined to hold that the action of the defendants in having made not merely the entries in the account books but also in having represented to the income-tax department that these amounts have been set apart for the plaintiff and the other employees and that they have been paid over to the employees from year to year would certainly constitute a trust in favour of the plaintiff.

Further the learned Judge notes with reference to the case before him that

> "the credit entries do not stand by themselves as mere credit entries in favour of the plaintiff. A reading of the exhibits containing the credit entries would show that this is something like a running account wherein there are also debit entries against the plaintiff."

On the facts of the case, the learned Judge held that a trust was created and it was, therefore, open to the employees to enforce the recovery of the amounts as on the basis of a trust. This decision may be helpful to the case of the plaintiffs but the difficulty arises owing to the paucity of evidence as to whether, in fact these amounts were taken into account in the income-tax returns, i.e., whether the defendants had claimed credit for these amounts in the return submitted to the income-tax department. In the absence of the features, which are present in the case referred to, viz., about the course of transaction which would only be ascertained from the account books which unfortunately have not been produced in this case and for which, in my view, the defendants are really responsible, I am unable to apply the principle of trust to the case before me.

(8) In the view I have taken that mere credit entries in the books of account would not be sufficient to either constitute a contract to pay a barred debt or to enable a trust to be implied therefrom, it is further necessary to determine whether the suit claim comes within any of the articles of the Limitation Act. Article 7, which was relied upon on behalf of the appellants refers to claims relating to the wages of a household servant, artisan or labourer where one year's period is provided from the time when the wages accrue due. The plaintiffs belong to none of the categories mentioned in Art. 7. The only other article which relates to wages is Art. 102.

(9) Article 102 deals with wages not otherwise expressly provided for by the schedule and three years period of limitation is provided from the time when wages accrue due. The question still remains whether the pay of the plaintiffs could be treated as wages. Wages, though they may be restricted to the remuneration for mechanical or muscular labour or to such amounts as are usually paid at short intervals, may be held to include payments to any kind of employee where a remuneration is provided for his services. Wages means according to the Concise Oxford Dictionary "amount paid periodically especially by the day or week or month for time during which workman or servant is at an employer's disposal." It can be held in the present case that wages may generally be applied to all kinds of payments, which are made periodically so long as his services are at the disposal of the master. In — 'Bharadwaja Mudaliar v. Arunachala Gurukkal', 41 Mad 528, Art. 102 was held to be applicable to a suit instituted by an archaka against a trustee as regards the pay and perquisites and it was held that the suit was not barred as regards such a claim, the same having been instituted within three years from the date from which the pay had become due.

(10) In my view, therefore, the proper article that would be applicable to the present case would be Art. 102. The plaintiffs would not then be entitled to the full amount of the decree passed by the lower Court. The suits were instituted in April 1947 and they will be entitled only to the bonus claimed in all the suits except in S. C. S. No. 186 of 1947 for the years 1943-44, and 1944-45. In S. C. No. 186 of 1947 the claim is from 1941 to 1944 i.e., 1941-42,

1942-43, 1943-44 and they will be entitled to the bonus due for the year 1943-44.

(11) The decrees will, therefore, be modified by excluding the amounts for the years 1941-42 and 1942-43. Subject to this modification, the appeals and petitions are dismissed. If for the period prior to 1942-43 any amounts have been received by the plaintiffs, they will be permitted to appropriate it for the period from 1941 to 1943. There will be no order as to costs.

B/D.H. Order accordingly.

A.I.R. 1953 MADRAS 436 (Vol. 40, C. N. 166)

RAMASWAMI J.

Nandipi Nagi Reddy, Petitioner v. Vadde Venkatappa, Respondent.

Criminal Revn. Case No. 188 of 1951 and Criminal Revn. Petn. No. 187 of 1951, D/- 21-2-1952.

(a) Criminal P. C. (1898), S. 145 — Continuation of proceedings.

Proceedings under S. 145 should not be readily continued in the following cases viz., where there is ample time for the obtaining of a civil remedy, criminal action is injustice; where, in the circumstances of the case, proceedings under S. 107 have become more appropriate; where the object is to drive the other party to a suit as a plaintiff with responsibility for a burden of proof which otherwise would not be his. Where both the parties had submitted their difference to an arbitrator and an award had been passed and one of the parties resiled from it, the proper thing is to go to the civil Court and not ask to be relegated to a previous state of things simply to jockey for a favourable position in the criminal Court and compel the other party to file a suit. (Para 13)

(b) Criminal P. C., S. 145 (5) — Effect of order — When order is passed, the Magistrate ceases to have jurisdiction, notwithstanding that by mistake he omitted to withdraw the order of attachment previously passed by him. 15 Cal WN 271, Foll. (Para 12)

Anno: Cr. P. C., S. 145 N. 5, 56.

(c) Criminal P. C. (1898), S. 145 — Magistrate dropping proceedings does not become 'functus officio' — He can pass further orders for winding up. AIR 1952 Mad 531; AIR 1924 Mad 795 and AIR 1925 Mad 1252, Ref. (Para 14)

Anno: Cr. P. C., S. 145 N. 48.

G. K. Venkatanarasimhan, for Petitioner; A. Bhujanga Rao, for Respondent; and Public Prosecutor, on behalf of the State.

REFERENCES: Courtwise/Chronological/ Paras
('11) 15 Cal WN 271 12
('24) 47 Mad 713: (AIR 1924 Mad 795: 25 Cri LJ 978) 14
('26) 49 Mad 232: (AIR 1925 Mad 1252: 27 Cri LJ 95) 14
('52) 1952 Mad WN (Cr.) 1: (AIR 1952 Mad 531: 1952 Cri LJ 1145) 14

ORDER: This is a criminal revision case which has been filed against the order made by the Sub-Divisional Magistrate of Dhone in M. C. No. 2 of 1950 on 21-12-1950.

(2) The facts are: The dispute in this case relates to two items of lands situated at Dharmavaram, hamlet of Dhone. On 12-6-1947 the A party put in a petition before the then Sub-Divisional Magistrate of Dhone alleging that in respect of four items of lands shown in the schedule annexed thereto there was a dispute between him and the B party respondents likely to cause a breach of the peace and praying that action should be taken against the B party respondents under S. 145, Criminal P. C. This petition was forwarded to the Sub-Inspector of Police, Dhone. On the report of the Police dated 20-6-1947, the learned Magistrate passed a preliminary order on 25-6-1947 directing both sides to put in written statements of their respective claims. Both sides, after this preliminary order, put in their respective written statements.

In the course of the enquiry that followed it was discovered that the real dispute between the parties was not with regard to the four items of land described in the A party respondent's petition dated 12-6-1947 in respect of which properties the preliminary order dated 25-6-1947 was issued but with regard to only two other lands viz., an extent of 1.50 acres within specified boundaries of S. No. 755/A of a larger extent bearing the name of Mulakonda chenu 'alias' Chendiah chenu and an extent of 2.50 acres within specified boundaries in S. No. 753 of a larger extent bearing the name of Namagiriah chenu 'alias' Bapana Ramiah Chenu. On the discovery of this error the Additional First Class Magistrate of Nandyal to whom the case had been sent for disposal passed a second preliminary order on 24-12-1947 in respect of these two items of properties. Both parties filed fresh written statements. The learned Magistrate passed an order on 31-3-1948 under sub-s. (6) of S. 145 declaring the second respondent of the B party to have been in possession and entitled to possession of the two items until evicted therefrom in due course of law.

(3) In the meanwhile after the first preliminary order dated 25-6-1947, the learned Magistrate on a petition put in by the A party ordered attachment of the properties and appointed the Sub-Inspector of Police, Dhone, as Receiver with a direction that the Receiver should take possession and lease the lands for 1947. The Sub-Inspector of Police took possession and has been cultivating the lands.

(4) The final order dated 31-3-1948 to which reference has been made just now was taken up in revision to the High Court and my learned brother Somasundaram, J. by his order dated 18-3-1949 in Criminal Revision Case No. 577 of 1948 set aside the order of the lower Court and remanded the entire matter for disposal according to law, in the light of the following observations, by some Magistrate other than the Magistrate whose order was set aside:

"The case of the petitioner here is that he was dispossessed within two months prior to 25-6-1947. The properties were admittedly leased out and the lessees were in possession from 16-7-1947. In the circumstances the Court must find who was in possession on 24-12-1947. That the respondent was in continued possession could not be correct, as lessee was in possession from 16-7-1947."

(5) Thereupon both parties filed the following petition in the Court of the Additional First Class Magistrate Kurnool:

"The parties to the above case beg to state that they referred their dispute to arbitrators who have passed the award. For the

fulfilment of the conditions of the award 15 days time is wanted. It is prayed that your honour may be pleased to adjourn the case to some day after 15 days from this date."

(6) On 19-1-1950 the respondent herein Vadde Venkatappa filed a petition in the following terms:

"(According to our petition) arbitrators were appointed and they gave their award about 3 months ago. But the award was not only inequitable and obviously unjust but also beyond the terms of reference to the arbitrators. The petitioner did not therefore consent to the terms of the award and the award does not bind the petitioner. The petitioner therefore prays that this Court be pleased to go on with the enquiry into the above M. C. and dispose it of on merits."

(7) The other party viz., the B party Nadipi Nagi Reddy naturally protested against this and filed a petition that this should not be done because not only had an award been passed but that the Court granted an adjournment and stayed the proceedings on that footing and that the A party having agreed to abide by the award after a lapse of time could not be allowed to revive the proceedings in this fashion and that the periodical adjournments and stay of this case attracted the provisions of sub-s. (5) of S. 145, Criminal P. C.

(8) The other party, namely, Vadde Venkatappa filed a rejoinder that on the failure of the settlement of the dispute by arbitration the parties became relegated to the position in which they had been placed by the order of the High Court on remand and that it followed that the dispute between the parties still existed and it has to be decided by the Court and that the enquiry should be proceeded with.

(9) The learned Additional First Class Magistrate of Kurnool passed an order on 24-4-1950 that the trial of the case should be proceeded with.

(10) In pursuance of the aforesaid order the trial of the case was proceeded with by the Sub-Divisional Magistrate, Dhone, who had succeeded the previous Magistrate under the separation scheme and he passed an order in M. C. 2 of 1950 that he accepted the care of the A party viz., Venkatappa and found that he was forcibly and wrongfully dispossessed of the lands by the B party respondents on or about 9-6-1947, a date within two months prior to 16-7-1947 when the Court took possession of the properties through the Receiver appointed by it, and that A party should be treated as in possession by 24-12-1947. The Magistrate therefore made a declaration in favour of the A party and made the consequential order that the A party will be restored to possession after the crop of 1950 had been removed by the purchaser in the auction held by the Sub-Inspector of Police, Dhone, under the orders of Court during the pendency of the proceedings and that the A party respondent will be paid out the sale proceeds of the crop of the lands in dispute lying in Court and that the B party respondent should pay Rs. 75 to the A party respondent by way of his costs in these proceedings. This criminal revision case has been filed against this order.

(11) The grounds for interference with this order are as follows, viz., that the learned Magistrate should not have acted on the evidence recorded by the previous Magistrate without further enquiry; that two important witnesses who had been summoned by an order dated 26-7-50 who could have thrown material light were not examined in spite of request; that when the High Court directed the Magistrate to find out who was in possession on 24-12-1947 the date of the subsequent preliminary order the Magistrate has found out only who was in possession two months prior to 16-7-1947; that when on this finding the respondent was dispossessed even on 9-6-47 the order giving possession to Venkatappa is unsustainable; that even this alleged dispossession on 9-6-47 is contradicted by the petitioner's own statement that immediately after 30-4-47 he was prevented from harvesting; that the petitioner went behind the written statement and the oral testimony by stating that subsequent to Ex. P. 1 that is to say, 30-4-47, he sowed and the respondents spoiled it and that the lower Court erred in view of the fact that the parties had referred the whole matter to the arbitrators on 6-8-49 and the arbitrators had given in award and in these circumstances the proceedings could not be continued unless there was a present apprehension of the breach of the peace and that this allegation of apprehension of breach of the peace could not be deduced simply because one of the parties long after the passing of the award chose to repudiate it; and that the alleged finding as to possession itself is vitiated by the facts set out in paras 11 to 15 of the grounds of appeal.

(12) To my mind there is one fatal irregularity which has vitiated the entire proceedings of the learned Sub-Divisional Magistrate and it is concluded by authority. On similar facts it has been held by a Bench of the Calcutta High Court in — 'Kalananda Singh v. Rameshwar Singh', 15 Cal WN 271, that, where proceedings started in respect of a disputed ferry in September 1908 were stayed owing to the dispute having been referred to the Commissioner of the Division for arbitration but the arbitration having failed the Magistrate on 24-5-1910 purported to revive the proceedings and called upon the parties to appear with evidence on 19-6-1910, the Magistrate acted without jurisdiction in reviving the proceeding merely because the arbitration proved ineffectual without being satisfied that there were at a time sufficient grounds for proceeding under the section and without drawing up fresh proceedings for that purpose and that fresh proceedings should, if necessary, be drawn up on the basis of present circumstances and not on what existed in 1908; and it should not be assumed that the causes which existed in 1908 or 1909 still continued to exist.

It was also further held in that case that when the dispute was referred to arbitration the trying Magistrate recorded an order "further proceedings are unnecessary and they are therefore stayed", that the said order was in terms one under S. 145(5), Cr. P. C. and directly it was passed the Magistrate ceased to have jurisdiction, notwithstanding that by mistake he omitted to withdraw an order of attachment previously passed by him. This is precisely what has happened here and for ferry we have to substitute lands in Dharmavaram, hamlet of Dhone, for 1908 we have to substitute 1947 and for 19-6-1910 we have to substitute 1950.

(13) In addition to these the lower Court should also have pondered over other considerations before proceeding with these proceedings under S. 145, Cr. P. C. The object of

S. 145, Cr. P. C. is to prevent disturbance of public tranquility and protect the realm from riots and commotions. The orders under S. 145, are merely Police orders to prevent breaches of the peace and it follows therefore that proceedings under S. 145 should not be readily continued in the following cases, viz., where there is ample time for the obtaining of a civil remedy, criminal action is injustice; where, in the circumstances of the case, proceedings under S. 107 have become more appropriate; where the object is to drive the other party to a suit as a plaintiff with responsibility for a burden of proof which otherwise would not be his. In this case both parties had submitted their differences to an arbitrator and an award had been passed and one of the parties resiled from it. The proper thing is to go to the civil Court and not ask to be relegated to a previous state of things simply to jockey for a favourable position in the criminal Court and compel the other party to file a suit. Therefore looked at from these points of view also the lower Court should have dropped the proceedings and raised the attachment.

(14) The Magistrate need not feel even now that because his order has been set aside and the proceedings are dropped under S. 145, Cr. P. C. he has no authority to deal with the attachment and the leasing out of the properties by the Sub-Inspector. On the other hand, it has been held recently by me in — 'Velur Devasthanam v. State', 1952 Mad WN (Cr.) 1 following — 'Suryanarayana v. Ankineed Prasad', 47 Mad 713 and — 'Narasayya v. Venkiah', 49 Mad 232 that a Magistrate dropping proceedings does not become 'functus officio' but has jurisdiction to pass further orders for winding up the proceedings.

(15) In the result, the order of the lower court is set aside and the proceedings under S. 145, Cr. P. C. are dropped and the learned Sub-Divisional Magistrate is directed to dispose of the attachment proceedings according to law.

B/R.G.D. Order accordingly.

A.I.R. 1953 MADRAS 438 (Vol. 40, C. N. 167)

SATYANARAYANA RAO AND RAJAGOPALAN JJ.

R. S. Balasubramania Mudaliar, Applicant v. Commr. of Income-tax Excess Profits Tax, Madras, Respondent.

Regd. Case No. 51 of 1950, D/- 9-4-1952.

(a) Income-tax Act (1922), S. 66(1) — Evidence of partnership.

The mere fact that there was a deed of partnership, and the fact that the account books consistently with the recitals in the partnership deed showed contributions of capital and allocation of profits may not be sufficient to establish the truth of a particular partnership. (Para 3)

Anno: Income-tax Act, S. 66 N. 16.

(b) Income-tax Act (1922), S. 66(1) — Jurisdiction of High Court.

That it is possible on a review of the entire evidence on record by another Judicial Tribunal to come to a different conclusion is certainly no justification for finding that there was no material on record on which the Tribunal could hold that the alleged partnership was not a true one. (Para 4)

Anno: Income-tax Act, S. 66 N. 20.

T. V. Viswanatha Aiyar, for Petitioner; C. S. Rama Rao Sahib, for Respondent.

RAJAGOPALAN J.: The two questions that were referred to us for our decision under S. 66(1), Income-tax Act, were:

(1) "Whether there was any material for the Tribunal to hold that the business at Madurai did not belong to a partnership consisting of R. S. Balasubramania Mudaliar and Chidambaram, and

(2) Whether there was any material for the Tribunal to hold that business at Chennimalai, Jaffna and Batticola did not belong to a partnership consisting of R. S. Subramania Mudaliar and Krishna Mudaliar."

The assessee, Balasubramania Mudaliar, was carrying on business in cloth from the year 1936-37, in partnership with Mariappa Mudaliar. Balasubramania Mudaliar had a nine annas share and Mariappa Mudaliar, a seven annas share. The Head Office was at Chennimalai, and there were branches at Madurai, Coimbatore, Batticola and Jaffna. The claim of the assessee was that the partnership except for the Head Office at Chennimalai came to end at the end of 1943-44. The assessee further claimed that subsequent to 13-4-1943 he entered into a partnership with Chidambaram for running the business at Madurai. In the subsequent year Mariappa retired from the partnership at Chennimalai also, and Balasubramania claimed that he entered into a partnership for running the business at Chennimalai, Jaffna and Batticola, with Krishna Mudaliar. The Income-tax Officer found that the two alleged partnerships were really fictitious, and that after Mariappa had retired from the business, the business at Chennimalai and also at all the branches constituted the proprietary concern of Balasubramania alone. This was confirmed on appeal by the Assistant Commissioner, and on further appeal, by the Appellate Tribunal. It was subsequent to that, that these questions were referred to us for decision under S. 66(1) of the Act.

(2) Both the questions really raised questions of fact and practically none of law. If the assessee, that is, Balasubramania Mudaliar could establish that there was no material at all on record for the taxing authorities or for the Appellate Tribunal to come to a conclusion, that the partnership between Balasubramania Mudaliar and Chidambaram and the later partnerships between Balasubramania and Krishna Mudaliar were fictitious, then, of course, the assessee could claim that those findings of fact, not supported by an evidence on record at all, should not prevail. During arguments before us learned counsel for the assessee could only urge that on considering the entire evidence on record the points tabulated by the taxing authorities and by the Tribunal against the view, that the partnerships were real, should not be given any undue weight, and that taking all the evidence together it was more reasonable to hold that the partnerships were not fictitious but were real. On merely establishing that position, quite obviously the answer to the question, whether there was any material at all for the Tribunal to hold that the partnerships were fictitious, could not be answered in the negative.

(3) No doubt, the Tribunal found that Mariappa did leave the partnership after ill-feelings

had developed between himself and Balasubramanian. The Tribunal also found that the department conceded that Balasubramania Mudaliar had always done business in partnership with others. But there were also factors which the Tribunal considered, which militated against the truth of the two partnerships pleaded by the assessee. One of the points taken by the Tribunal was that with reference to the Rs. 3000/- alleged to have been contributed as his share of the capital by Chidambaram to the partnership between himself and Balasubramania, there was really no acceptable evidence that the Rs. 3,000/- had been found or could have been found by Chidambaram. The assessee claimed that this Rs. 3,000/- had been contributed by Chidambaram on the date of the partnership, 13-4-1943. The explanation as to the source from which Chidambaram got Rs. 3,000/- was that he got it from money lying to his credit in fixed deposit with Arunachalam Nidhi. That money was shown to have been drawn not on 13-4-43 but on 2-7-1943. The further explanation offered was that Chidambaram borrowed money in the first instance on 14-4-1943 from one A. P. Swami, and that after withdrawing the money from Arunachalam Nidhi, Chidambaram repaid A. P. Swami. To support that claim, there was practically no evidence, and the taxing authorities and subsequently the Tribunal refused to believe that portion of the assessee's story, that any money had been advanced in April 1943, by A. P. Swami. Yet another factor the Tribunal took into account was that, while Chidambaram, who was admittedly an employee before April 1943 at Madurai, drew a little over Rs. 300/- a year as remuneration before April 1943, he was credited with a sum of Rs. 9,024-4-2 on 12-4-1944 and Rs. 4,666-10-1 on 12-4-1945 as his one-third share of the profits of the business at Madurai. But though those sums stood to his credit, his drawings were Rs. 885-14-9 in one year and Rs. 628-8-6 in the next year, sums which bore a closer relation to the remuneration paid prior to April 1943, than to the sums with which he was credited in the account books as his share of the profits.

Thus, the real position was that the authorities and the Tribunal were not satisfied that Chidambaram contributed any capital; they were not satisfied that Chidambaram drew any portion of the profits qua profits. We are unable to hold that these were not materials which the Tribunal could take into account in deciding the question at issue, whether the alleged partnership between Balasubramania and Chidambaram was fictitious or was real. The mere fact that there was a deed of partnership, and the fact that the account books consistently with the recitals in the partnership showed contributions of capital and allocation of profits may not be sufficient to establish the truth of that partnership.

(4) We have to answer the first question in the affirmative and against the assessee.

The case of the second partnership was slightly worse, if anything, than that of the alleged partnership between Balasubramania and Chidambaram. The deed of partnership did not stipulate for any contribution of capital by the alleged partnership, Krishna Mudaliar, but the claim was that Rs. 4000/- had been found by Krishna Mudaliar as his share of the capital of that partnership. On investigation, the taxing authorities found that this sum of Rs. 4,000/-, alleged to have been borrowed from Sri Dandapani Nidhi Ltd., Chennimalai, on 5-9-1944 was really money found by Balasubramania himself. It was incredible, the Tribunal held, that Krishna Mudaliar could have got Rs. 4,000/- from Dandapani Nidhi on his own personal security. Thus, as in the previous case, the position was that, though a claim was made that Krishna Mudaliar had contributed his share of the capital to the partnership, the evidence did not satisfy the taxing authorities that any contribution as such had been made; and in arriving at this finding, the fact that no contribution of the capital was provided by the deed of partnership was also taken into account. The Tribunal also found that there was no separate bank account in respect of this business. It also found that the other circumstances mentioned in connection with the claim, that Chidambaram was a partner of the Madurai business, were also present in this alleged partnership between Subramania Mudaliar and Krishna Mudaliar. Here again, as in the case of the alleged Madurai partnership, we are unable to hold that there was no material on record on which the Tribunal could hold that the alleged partnership of Subramania Mudaliar and Krishna Mudaliar was not a true one.

That it is possible on a review of the entire evidence on record by another Judicial Tribunal to come to a different conclusion is certainly no justification for finding that there was no material for holding that either of these two partnerships were fictitious ones.

The answer to the second question is also in the affirmative and against the assessee. As the assessee has failed, he should pay the costs of the respondent, the Commissioner of Income-tax, Rs. 250/-.

B/D.R.R. Reference answered accordingly.

A.I.R. 1953 MADRAS 439 (Vol. 40, C. N. 168)

RAMASWAMI J.

Yelchuri Ranganayakalu Chetty and another, Petitioners v. K. Gopala Chetty, Respondent.

Criminal Misc. Petn. No. 1361 of 1952, D/- 3-10-1952.

(a) Criminal P. C. (1898), Ss. 344, 561 A — Stay of Criminal proceedings — (Constitution of India, Art. 227).

The High Court has jurisdiction to stay criminal proceedings. Case law rel. on. (Para 11)

Anno: Cr. P. C., S. 344 N. 11, S. 561A N. 1, 5.

(b) Criminal P. C. (1898), Ss. 344, 561A — Stay of Criminal proceedings — (Constitution of India, Art. 227).

Regarding stay of a criminal proceeding pending the issue of a civil suit, the matter is entirely one of discretion of the Court to be exercised having regard to the merits and all the circumstances of the case, the only general rule to be adumbrated being that every Court should be left as far as possible to dispose of the case on its file with the utmost expedition and the only general assumption to be made is that in either Court justice will be done. Case law discussed. Chitaley and Annaji Rao's Criminal P. C. cited with approval. (Paras 12, 13)

Anno: Cr. P. C., S. 344 N. 11, S. 561A N. 1, 5.

V. Rajagopalachari and P. V. Subramaniam, for Petitioners; V. T. Rangaswamy Ayyangar, for Respondent; The State Prosecutor, for the State.

REFERENCES: Courtwise/Chronological/ Paras

('05) 2 All LJ 747: 2 Cri LJ 798 12
('22) 65 Ind Cas 436: (23 Cri LJ 84 (All)) 12
('33) AIR 1933 All 818: (35 Cri LJ 224) 12
('43) AIR 1943 All 14: (44 Cri LJ 278) 12
('12) 17 Ind Cas 720: (13 Cri LJ 848 (Bom)) 12
('28) 29 Cri LJ 1053: 112 Ind Cas 477 (Bom) 12
('31) 33 Bom LR 1518: (AIR 1932 Bom 57: 33 Cri LJ 317) 12
('33) AIR 1933 Bom 307: (34 Cri LJ 900) 12
('33) 35 Bom LR 1054: (AIR 1933 Bom 485: 35 Cri LJ 311) 12
('42) AIR 1942 Bom 330: (44 Cri LJ 100) 12
('94) 2 Weir 415 12
('94) 2 Weir 260 12
('04) 31 Cal 858: (1 Cri LJ 852) 12
('24) AIR 1924 Cal 634: (26 Cri LJ 65) 12
('29) AIR 1929 Cal 563: (31 Cri LJ 211) 12
('41) ILR (1941) 2 Cal 366: (AIR 1942 Cal 230) 11
('50) 54 Cal WN 626: (AIR 1950 Cal 536) 11
('50) 54 Cal WN 445: (AIR 1950 Cal 379) 11
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('33) AIR 1933 Lah 37: (34 Cri LJ 96) 12
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('07) 30 Mad 226: (6 Cri LJ 131) 12
('14) AIR 1914 Mad 143(2): (15 Cri LJ 568) 12
('16) AIR 1916 Mad 1123: (16 Cri LJ 637) 12
('27) 52 Mad LJ 80: (AIR 1927 Mad 308: 28 Cri LJ 181) 12, 13
('27) 50 Mad 839: (AIR 1927 Mad 778: 28 Cri LJ 812) 12, 13
('37) 1937 Mad WN 21: (1937 Mad WN Cr 5) 12
('32) AIR 1932 Nag 86: (34 Cri LJ 119) 12
('33) AIR 1933 Nag 78: (34 Cri LJ 519) 12
('16) AIR 1916 Pat 7(2): (18 Cri LJ 125) 12
('17) AIR 1917 Pat 621: (18 Cri LJ 771) 12
('21) AIR 1921 Pat 484 12
('25) AIR 1925 Pat 619: (26 Cri LJ 1179) 12
('31) AIR 1931 Pat 411: (33 Cri LJ 147) 12
('34) AIR 1934 Pat 113: (36 Cri LJ 496) 12
('37) AIR 1937 Pat 8: (38 Cri LJ 264) 12
('42) AIR 1942 Pat 45: (42 Cri LJ 804) 12
('35) AIR 1935 Rang 487: (37 Cri LJ 261) 12
('34) AIR 1934 Sind 143: (36 Cri LJ 94) 12
('33) AIR 1933 Sind 358: (35 Cri LJ 517) 12
('35) AIR 1935 Sind 187: (36 Cri LJ 1350) 12
('43) AIR 1943 Sind 10: (44 Cri LJ 167) 12
('45) AIR 1945 Sind 32: (46 Cri LJ 437) 12

ORDER: This is an application for stay of trial of C. C. No. 8277 of 1952 on the file of the 8th Presidency Magistrate, George Town, Madras, pending disposal of C. S. No. 158 of 1952 on the file of the High Court on the original side.

(2) The facts are: The two petitioners before us Y. Ranganayakalu Chetty and Doraisami Ayyangar constituted a partnership along with the respondent K. Gopala Chetty & K. Lakshminarayana Chetty and K. Satyanarayana Chetty under the style and name of Sri C. P. V. Kotiah Chetty and Company, carrying on business as commission agents in pulses, coriander, chillies, etc. at No. 21, Chinnathambi Mudali Street, George Town, Madras. The partnership agreement is dated 25-7-1951. It provides that each of these petitioners is to contribute Rs. 25,000/- and the partners were to share the profits in the following proportion: the first petitioner 0-5-9, the second petitioner 0-5-3, the complainant 0-3-0, Lakshminarayana Chetty 0-4-0 and Satyanarayana 0-2-6, out of a total of 1-4-6. The agreement also provided that no partner shall be at liberty to draw any amount which would reduce at any time the amount to his credit in the firm to less than the amount of the capital subscribed by him. The actual working of the partnership was in the hands of Ranganayakalu Chetty and Doraisami Ayyangar. The complainant, Lakshminarayana Chetty, and Satyanarayana Chetty were advancing considerable capital. Therefore the complainant and the two others were alone given the power to operate on the bank accounts, to accept cheques etc. for and on behalf of the partnership while Ranganayakalu Chetty and Doraisami Ayyangar had no such right. There was a further stipulation that while the complainant and the two others could carry on other businesses apart from the partnership business, the petitioners could not do so.

(3) It is in these circumstances that this partnership came to grief in 1952.

(4) In regard to this partnership coming to be on the rocks and which has given rise to the criminal complaint and the suit, two opposing versions are given

(5) The version of the complainant and the two others is as follows: The petitioners had as between themselves conspired to collect the moneys due to the partnership and misappropriate the same to themselves for their personal use without any justification and in pursuance of the conspiracy the second petitioner left Madras on or about 27-5-1952 taking with him all the bills, etc., and called upon the various constituents to make payments not by cheque but in cash and also intimated to the constituents that the dues to the company should be paid up urgently, and having made these collections kept this complainant in the dark about such collections and even went to the extent of making it appear that the collections in some quarters were not made while it subsequently transpired that the moneys had been in fact collected. The complainant became aware of the fraud practised by the petitioners in collusion with one another on or about 8-6-1952 and started collecting information regarding the misappropriation, whereafter the petitioners wanted to make it appear as if the collection of about Rs. 65,000/- was to be debited against the personal account of the first petitioner.

The complainant contends that this ruse was entirely an afterthought when the petitioners came to know that the game was up and in fact the first petitioner could not claim to be debited with this large amount inasmuch as they had already overdrawn the moneys considerably from the partnership with ulterior object during 1951 and 1952, and in fact the accounts show that on 3-6-1952 the amounts standing to the credit of the first petitioner was only Rs. 27,120-4-6 while the amount that was standing to the credit of the second petitioner was only Rs. 18857-10-10 while according to the argument, as stated above, there should be a minimum advance of Rs. 25,000/- against each of the petitioners and so no claim could be set up for debiting the first petitioner with as much as Rs. 65,000/-. The complainant also contends that on the very admissions made by the petitioners they have misappropriated a sum of about Rs. 65,000/- for the personal benefit of the first petitioner in purchasing a house in his own name without bringing the same into the partnership accounts and a clear

case of criminal misappropriation had been made out for which he (complainant) has filed a complaint on 14-6-1952.

(6) The version of Ranganayakalu Chetty & Doraisami Ayyangar is as follows: The cash balance as per the firm's books for the first week of June 1952 of over Rs. 55,000/- was in the hands of the complainant while a sum of Rs. 15,000/- was in the Banks. There were besides considerable outstandings and stocks on which the firm had made large advances, both amounting to about four lakhs of rupees. A sum of Rs. 60,000/- was collected by the second petitioner in the usual course of business during the latter part of May and beginning of June 1952 which he handed over to the first petitioner, and a further sum of Rs. 4,000/ had been collected by the first petitioner himself and the entire aggregate sum of Rs. 64,151-6-0 was in the hands of the first petitioner. The complainant was duly informed of the collections by the second petitioner by letter dated 9-6-1952. On or about 19-5-1952 the first petitioner entered into an agreement for the purchase of premises No. 48, Strotten Muthia Mudali Street, Madras, for Rs. 42,000/-. The complainant also competed for the purchase of the said property, but as the first petitioner's offer was higher, the bargain was struck in favour of the first petitioner.

An advance of Rs. 2500/- was paid by the first petitioner for the purchase of the said house from and out of the amounts to his credit in the firm, and the first petitioner, to the knowledge of all the partners, requested the complainant on or about 25-5-1952 to make available the balance of the sum required for the purchase of the property from and out of the firm's cash in his hands and to debit the same to the first petitioner's account. The complainant with ulterior motives failed to do so. On 10-6-1952 the first petitioner wrote to the firm that he had Rs. 64,151-6-0 being the amount collected in his hands and asked that the sum of Rs. 64,000/- out of it be debited to his account, as the chitta books in which entries had to be made had not been sent to him for posting the entries. Thereupon the three other partners including the complainant sent a telegram on 12-6-1952 charging the petitioners with criminal misappropriation of the said amount and imputing to them dishonest motives to which the first petitioner sent a reply telegram the same day repudiating the allegations. The second petitioner also wrote a letter the same day to the other partners setting out the real position and in view of the hostile and wholly untenable attitude of the other partners in charging him with dishonesty, he gave notice of dissolution of the firm and for settlement of accounts, the partnership being terminable at will.

(7) K. Gopala Chetty thereupon filed the complaint on 14-6-1952 & Lakshminarayana Chetty filed a suit for dissolution of partnership on 24-6-1952.

(8) The case for Lakshminarayana Chetty for filing the suit is that it had to be filed as the petitioners had intimated a desire to dissolve their partnership and brought the business to a standstill and that the large stocks which had got freezed by this move of the petitioners had to be dealt with and third parties had to be satisfied by the appointment of a Receiver and the business had to be kept going on and wound up normally.

(9) It is in these circumstances that the present petition has been filed by Ranganayakalu Chetty and Doraisami Ayyangar for the stay of the criminal trial pending the disposal of the civil suit on the foot that the controversy between them can be adjudicated upon only by looking into the accounts and on ascertainment of the amounts due to these petitioners and that then only it could be stated whether the offences of dishonest misappropriation, etc., have been made out and that the proper forum for disposing of this controversy is the civil Court wherein the civil suit is filed by a partner and not the criminal Court. On the other hand, the contention of the complainant is that the case of misappropriation referred to in the complaint would not form the subject-matter of the civil suit and the criminal complaint which has been filed earlier should not be stayed pending the disposal of the civil suit which may legitimately take some years in the High Court itself, both in the original side and as a regular first appeal, not to speak of the matter going up to the Supreme Court to which it is bound to go up on account of the heavy financial interest involved and that the same acts or omissions may give rise to a tort as well as a criminal offence and that the proper view to take in such cases is that each Court must expeditiously dispose of the matter coming before it.

(10) On the allegations the points for consideration are (a) jurisdiction and (b) principles which should guide the stay of criminal proceedings and applicable to the instant case.

(11) Section 344, Criminal P. C., authorises only the postponement or adjournment of criminal cases from time to time and does not contemplate the stay of proceedings for an indefinite period. But a civil Court has an inherent power to stay a case pending on its file where it is necessary for the ends of justice to do so. The power of the High Court in this respect is expressly recognised by S. 561-A, Criminal P. C. The High Court had also, independent of S. 561-A, power under S. 107, Government of India Act, 1915, to stay proceedings in subordinate Courts in the exercise of its powers of superintendence over inferior Courts. But under S. 224, Government of India Act, 1935, which corresponds to S. 107 of the Act of 1915 the High Court was held to have no power to interfere with the judicial orders of the lower Courts: see sub-s. (2) of S. 224 and the two undermentioned cases — 'Sakkal v. Issurdas', ILR (1941) 2 Cal 366 and—'Jahnabi v. Basudeb', 54 Cal W N 626. Under the Constitution of India, in Art. 227, which is a reproduction of S. 224, Government of India Act, 1935, sub-s. (2) of S. 224 has been omitted. This omission of sub-s. (2) of S. 224 in Art. 227 shows that the Constitution of India has restored the power which the High Court had under the Government of India Act of 1915: — 'Abdul Rahim v. Abdul Jabbar', 54 Cal W N 445; and — 'Bimala Prosad v. State of West Bengal', AIR 1951 Cal 258 (SB). Therefore we have jurisdiction to stay criminal proceedings.

(12) It is often stated that a criminal proceeding should be stayed during the pendency of civil proceeding in respect of the same or substantially the same subject-matter. The type-design arguments on the foot of which this plea is rested invariably have been examined in a decision of this court by Jackson, J. in

—'Ghanasigamani Nadar v. Vedamuthu Nadar', 32 Mad L J 80:

"For instance, to take the argument most usually advanced in these cases, can it be said that where there is a common issue, it must first be finally decided in the Civil Court before it is examined in the Criminal Court. A Criminal Court is in every way as competent as a Civil Court to examine questions of possession or questions involving the genuineness of documents, and there is no particular reason for giving priority to the Civil Court.

Then can it be said that trials cannot be allowed to proceed simultaneously upon the same issue in different Courts because simultaneity is essentially wrong and one trial either the civil or the criminal must, therefore, be stayed. Simultaneous trials may have their disadvantages, but when in any circumstances the two several Courts must try the same issue, there is no reason to prefer consecutive trials. It is not as though the trial which is taken first would absorb or govern the other. A Criminal Court cannot decline to examine a question of forgery, because the forged document has been admitted as genuine in a Civil Court; it must try the case sooner or later and on the general principle that judicial work should not be retarded the sooner the better.

* * * *

Moreover there is special disadvantage in delaying a Criminal trial.

'A grave charge has been made against a gentleman and it is desirable for his own sake and for everybody concerned that it should be disposed of as quickly as possible, and if the proceedings be postponed, until the final decision of the Civil suit, witnesses may not be available 'Taj-ud-din v. Taj Muhammad Nasir', 69 Ind Cas 380 (2) (Lah).

If delay would avoid conflicting decisions there might be more to be said for it; but it cannot do that. Conflicting decisions are the inherent risk of the division of causes into civil and criminal. The risk is probably much less than the arguments in this type of case might lead one to suppose. Ordinarily the same evidence will result in the same finding and if there are divergent views they ultimately flow in the ordinary course of procedure to the same channel. If the District or High Court has upheld or quashed a criminal conviction, that Court is unlikely to confirm a divergent finding in a civil suit. Nor need it be held that one Subordinate Court will be prejudiced by the opinion of the other. Apart from the fact that Judges may be trusted to be masters of their own minds, the Criminal and Civil Courts are never trying precisely the same issue. In the Criminal Court guilt must be established beyond all possibility of doubt, but the Civil Court weighs probability. An acquittal of forgery in a Criminal Court does not mean that the party will necessarily succeed in the Civil Court—the authenticity of the document may still be doubtful: and if evidence is conclusive enough for conviction in the Criminal Court, apart from any question of prejudice there must be every likelihood that the accused will be unsuited in the Civil Court. And anyhow if a case is delayed, since the Court is not relieved from the ultimate duty of trying it, what danger there may be of conflicting decisions and prejudice is a factor in consecutive as well as in simultaneous trials.

It is sometimes argued that if the trials are consecutive at least the parties are not hampered by having to conduct two causes at the same time. This is a question of fact and is chiefly relevant to those cases where the accused in the criminal is defendant in the Civil Court. In the present case where accused himself has elected to institute civil proceedings subsequent to the criminal complaint he can hardly claim that his resources are unduly strained. And even where the accused is also defendant the harassment must be actual and something more than inconvenience.

* * * *

That it must be fought out is inevitable, and it must be fought out in both Courts. If the civil case is stayed pending the criminal case, it will have practically the same result as staying neither case: for ordinarily the criminal case will be finally concluded in three to six months, and the civil case in three to six years; so that delaying the civil case will have little effect and, in my opinion, will do no good. If the criminal case is stayed pending the civil case, then, as pointed out above a person presumably innocent, is left for years with a criminal case hanging over him; and if ultimately proved to be guilty he will have successfully stayed off his well-merited punishment for an equal period. In either view the stay of the criminal proceeding is objectionable. Therefore the less undesirable course is to adhere to the main principle and to let both cases proceed with all possible dispatch.

It is sometimes argued that one or other proceeding is an abuse of justice, that the complainant has filed the criminal case in order to overawe his civil antagonist; or that the latter has filed the civil case to hamper the former. There may be cases in which such motives are clearly apparent, but ordinarily speaking Courts should be chary of imputing wrongful motives for rightful actions. If the law allows a legal process, it should not be condemned as unjust."

There is, therefore, now a consensus of judicial opinion that there is no invariable rule that a criminal proceeding should be stayed pending the issue of a civil suit, but that the matter is entirely one of discretion of the Court to be exercised having regard to the merits and all the circumstances of the case, the only general rule that can be adumbrated being that every Court should be left as far as possible to dispose of the case on its file with the utmost expedition and the only general assumption that can be made is that in either Court justice will be done — per Jackson, J. in — 'C. Ramiah v. N. Ramiah', 50 Mad 839; — 'Jagannath Acharya v. Rajagopalachari', AIR 1931 Pat 411; — 'Rewatmal Udhomal v. Sajanmul Mehrumal', AIR 1934 Sind 143; — 'Kanhai Lal v. Baij Nath Mahesri', AIR 1933 Nag 78. There is no hard and fast rule in this matter. The Court should consider the circumstances of each particular case and decide on grounds of justice and expediency whether it is proper that the criminal proceedings should be stayed or that the civil proceedings should be stay-

ed or that both should be allowed to take their course — per Broomfield, J. in — 'Dias v. Mahadev', 35 Bom L R 1054. In exercising the discretion in the matter of stay the following ten principles deducible from the plentiful and not always reconcilable case-law on the subject may be borne in mind and for which compilation I must here acknowledge my indebtedness to Chitaley & Annaji Rao's encyclopaedic, upto date, and accurate excellent commentary on the Criminal Procedure Code, 4th Edition, at page 1920 and following.

(i) Is the accused likely to be prejudiced if the criminal proceeding is not stayed until the disposal of the suit? I have already dealt with the general type-design objections which are put forward and the observations of Jackson, J. in regard thereto. Therefore, the kind of prejudice which we have to consider is the particular prejudice in certain types of cases where the non-stay of criminal proceedings would be hurtful to the accused. The following are some of the instances. In — 'Sankarayya v. Kerala Subba Aiya', 2 Weir 260 it was held that where there was a complaint of forgery of document and the question of genuineness of this document was pending in a civil court, criminal proceedings should be stayed. In — 'Anna Ayyar v. Emperor', 30 Mad 226 petitioners 2 to 4 filed under S. 77, Registration Act, a civil suit for the registration of a will alleged to have been made by their sister S and written by petitioner 6 and attested by Nos. 7 to 9. While the suit was pending the counter-petitioner without obtaining sanction preferred a complaint before the Magistrate against the petitioners alleging that they had forged the said will of S. Petitioners applied to the Magistrate to stay proceedings in the criminal case until the civil suit should be decided. The High Court in these circumstances directed that the criminal proceedings be stayed pending the trials of the suit.

In — 'Md. Ibrahim v. Kattayyan', AIR 1916 Mad 1123 the facts were: There was refusal to register a document alleged to be forged. There was a suit to compel registration. There was a criminal trial for forgery. The High Court held that the criminal trial must be stayed pending disposal of the civil suit to compel registration. In — 'Jhummaklal v. Sunderlal', AIR 1932 Nag 86, where the very constitution of committee of trustees which authorised a particular individual from amongst them to lodge on its behalf a criminal complaint against the manager of the trust property was challenged as invalid in a previously instituted suit, held, the criminal trial should be stayed pending decision of civil suit. In — 'Khobhari Rai v. Bhagwat Rai', AIR 1917 Pat 621 there was a suit in regard to property and there was a charge of theft of such property. It was held that the criminal case should be stayed. In — 'Debi Mahto v. Emperor', AIR 1916 Pat 7 (2) proceedings were instituted as a result of an order under S. 476, Criminal P. C. This order was appealed against. It was held that the criminal Court proceedings should be stayed pending appeal. These cases are not exhaustive but only afford illustrations of the particular prejudice that might be caused to the accused necessitating stay of criminal proceedings.

(ii) Is the matter in issue of such a complicated kind for the decision of which civil Courts are preferred as peculiarly qualified as, for example, the genuineness of a will or other document, the validity of a will, the 'bona fides' of the civil claim, and the examination of complicated accounts; but even here it cannot be assumed that there will be a manifest and irreparable injustice done in the criminal Court when the integrity of that Court is not questioned. It is in this connection that reliance is placed by the learned advocate for the petitioners before me on the decision of — 'Dias v. Mahadev', referred to above. In this decision it was pointed out that some cases are obviously more suitable for determination by a civil Court and that for instance it is not uncommon in Bombay for complaints of breach of trust by one partner against another and that such cases often involve the examination of complicated accounts for which the civil Courts have better means at their disposal than criminal Courts and that indeed it may often be impossible to say whether any criminal offence has been committed until the accounts of the partnership had been taken and the civil rights of the parties had been determined.

The learned Judge Broomfield, J. referred to in this connection to — 'Emperor v. Jagannath Raghunath Das', 33 Bom L R 1518. But the learned Judge was careful to add that there is no hard and fast rule in this matter and the Court has to consider the circumstances of each particular case and decide on grounds of justice and expediency whether it is proper that the criminal proceedings should be stayed. In fact he has laid down other circumstances where by weight of the same the mere fact that a civil case of this nature is pending is not by itself a sufficient ground for staying criminal proceedings.

(iii) Is the criminal proceeding instituted with the motive of hampering the conduct of the civil proceeding? Because, if it is so the criminal proceeding may be ordered to be stayed: — 'Jehangir v. Framji', 29 Cri L J 1053: 112 Ind Cas 477 (Bom); — 'Anna Ayyar v. Emperor', 30 Mad 226; — 'In re Subramanya Chetty', 2 Weir 415; — 'in re Ramchandra Babaji', AIR 1933 Bom 307. This, however, will not apply in the case of public prosecutions such as prosecutions under S. 195 or S. 476, Criminal P. C. These principles are embodied in — 'Gopal Chandra v. Suresh Chandra', AIR 1929 Cal 563; — 'Dwarka Nath Rai v. Emperor', 31 Cal 858; — 'Anrudh Kumar v. Emperor', 65 Ind Cas 436 (All) and — 'In re Keshav Narayan', 17 Ind Cas 720 (Bom).

(iv) Is the civil proceeding filed for the purpose of delaying or the conduct of which would result in a long delay of the trial of the criminal case? If the answer is that criminal litigation has been started to prejudice civil litigation then a stay should be granted — ('In re Ramachandra Babaji', AIR 1933 Bom 307) and the answer is that the conduct of the suit would result in long delay of the criminal trial naturally no stay should be granted. The latter ratio was laid down by Jackson J., in — 'C. Ramiah v. N. Ramiah', 50 Mad 839, who cites with approval a Patna ruling that it is the policy of the law to go on immediately with the enquiry: — 'Ramsaran Singh v. Nikhad Narain Singh', AIR 1925 Pat 619 founded on — 'Sheikh Bahatar v. Nobadali', AIR 1924 Cal 634. See also — 'Emperor v. Dinal Shah Rajanshah', AIR 1933 Sind 358. Broomfield, J. in — 'Dias v. Mahadev', 35 Bom L R 1054 has pointed out that the point that civil proceed-

ings normally take longer than criminal and it is not difficult to find the means of delaying a decision is one of the matters to be borne in mind in deciding whether the ends of justice require that criminal proceedings should be stayed, echoing as it were the observations of Jackson, J., in — 'Gnanasigamani Nadar v. Vedamuthu Nadar', 52 Mad L J 80. Thus in — 'Pedda Balliah v. Venkatasami', AIR 1914 Mad 143(2), in view of the suit being a summary one and which on the normal course would get disposed of without delay criminal proceedings were stayed.

(v) Has the Civil suit been filed 'before' the institution of the criminal proceedings and does it appear that the decision in the former will be of value in arriving at the truth in the criminal case? Thus in — 'Thakorlal Vadilal v. Ambalal Bhikabhi', AIR 1942 Bom 330 a criminal complaint was filed during the pendency of the civil suit between the parties alleging criminal trespass and wrongful restraint in relation to a portion of the suit property by one of the parties to the suit, and it was held that the criminal trial should be stayed pending hearing of the suit. In — 'Molhu Rai v. Emperor', AIR 1937 Pat 8, a civil suit was based on a hand-note and the defendant alleged that the hand-note was the outcome of fraud on him and the defendant filed a complaint against the plaintiff and the plaintiff applied for stay of criminal proceedings till the decision of his prior civil suit. Held, stay should be granted. In — 'Faiz Muhammad v. Abbas Jafferali', AIR 1935 Sind 187, where disputes in criminal proceeding and civil suit were intimately connected and the civil suit was prior in time and common issues were capable of being decided more properly in civil suit, held, criminal case should be stayed.

(vi) Has a civil suit been filed 'after' the criminal case and is there a possibility of its being decided soon? Because, if it were not so, a stay should not ordinarily be granted. It has been held in — 'Basheshar Nath v. Ratan Chand', AIR 1933 Lah 37, and later in — 'Chhanno Prasad Singh v. Sakhichand Sahu', AIR 1942 Pat 45 that where a civil suit is likely to be delayed the Magistrate is justified in holding that all the prosecution evidence should be recorded before the question of staying the criminal case can be considered. If the law allows a legal process it should not be condemned as unjust. Where the accused chooses to file a civil suit during the pendency of a criminal action against him he should not be denied that right. His action only becomes questionable when he tries by virtue of the suit to set up other rights to which he is not entitled: — 'Gnanasigamani Nadar v. Vedamuthu Nadar', 52 Mad L J 80.

(vii) Does the criminal prosecution in any way arise out of the civil suit and would the decision in the civil Court necessarily affect the decision in the criminal Court?: — 'Mathura Kunwar v. Durga Kunwar', 2 All L J 747: 2 Cri L J 798. Otherwise, it would be unreasonable and speculative to order stay of proceedings in the criminal Court. In — 'U. Tha Zan v. U Pyant', AIR 1935 Rang 487, it was rightly pointed out that it is no doubt undesirable that a criminal prosecution connected with a civil suit should be proceeded with until the civil suit is decided; but such cases are usually those where the criminal prosecutions arise directly out of the proceedings of the civil Court such as for instance the prosecutions for perjury or forgery in relation to documents put in evidence in the civil Court. It would, therefore, be unreasonable and speculative to order stay of proceedings in the criminal Court on the offchance that there might be some decision in the civil Court which might have some bearing on the criminal prosecution: see — 'Mt. Sudeshara v. Emperor', AIR 1933 All 818; — 'Molhu Rai v. Emperor', AIR 1937 Pat 8 and — 'Palani Goundan v. Emperor', 1937 Mad W N 21.

(viii) Are the parties and points for decision in the criminal and civil cases identical? If they have no such identity stay will not be granted: — 'Jodhi Singh v. Emperor', AIR 1921 Pat 484; — 'Taj-ud-din v. Tajmuhammad', and — 'Mansharam v. Chetanram', AIR 1945 Sind 32; — 'Madanlal Brijulal v. Emperor', AIR 1934 Pat 113; — 'Motiram Jasmal v. Emperor', AIR 1943 Sind 10; — 'Panna Lal v. Emperor', AIR 1943 All 14.

(ix) Is it a case of disputed title to land where it is difficult to draw a line between a 'bona fide' claim and a criminal trespass? In such a case stay would be granted. The judgment of a civil Court on the other hand on actions in 'personam' is not relevant to the same issue in a criminal Court and hence there is no justification for staying a criminal case pending the decision of the civil Courts: — 'B. N. Kashyap v. Emperor', AIR 1945 Lah 23 (FB).

(x) Wherein does the public interest lie and not merely the supposed interest of the particular complainant? In considering this aspect of the matter we have to take into consideration of the foregoing factors and we must not merely regard the matter as a sort of competition between the civil and the criminal Courts: — 'Thakorlal Vadilal v. Ambalal Bhikabhi'.

(13) Now applying these principles to the instant case we find that no case has been made out for staying the criminal proceedings pending disposal of the suit which has been subsequently filed by one of the partners. It cannot be stated for the reasons mentioned in — 'Gnanasigamani Nadar v. Vedamuthu Nadar', 52 Mad L J 80 that any prejudice would be caused to the accused in this case if the criminal trial is proceeded with. It will be open to these accused to put forward all the matters which would be open to them in the civil suit and probably within a shorter compass and repel the accusations against them. The complainant will be obtaining no particular or unfair advantage over the accused persons if the subject-matter of the accusations in the criminal trial is gone into independently of and prior to the adjudication in the suit. The accusations are not of such a complicated kind that it can be stated that a civil Court is more peculiarly qualified to adjudicate upon them. The points involved are simple and can be satisfactorily disposed of by the Presidency Magistrate. This criminal proceeding has not been instituted with the motive of hampering the conduct of the civil proceeding. On the other hand, if the criminal proceeding is stayed it would result in a long delay of the trial of the criminal case, which would not be even in the interests of the accused as pointed out by Jackson, J. in — 'Gnanasigamani Nadar v. Vedamuthu Nadar', 52 Mad L J 80, and — 'Ramiah v. Ramiah', 50 Mad 839. The civil

suit has been filed not before but after the criminal case. It cannot be stated that the criminal prosecution in this case arises out of the civil suit and the decision of the civil Court will necessarily affect the decision of the criminal Court. In any event the decision of the civil Court will not constitute 'res judicata' and the criminal Court will have to independently investigate the accusation material against the accused.

In the civil suit the issues involved are not identical with those arising in the criminal case. The criminal case is confined to the question of criminal misappropriation. Public interests require that criminal Court proceedings should be expeditiously disposed of and I need not add that the spectacle of a criminal trial pending for years till the civil suit has undergone the weary waiting period of 3 years in the original side of the High Court and then a period of three years in appeal and then another appeal in the Supreme Court, involving another 3 or 4 years is not calculated to raise public morale in the efficacy and efficiency of the administration of justice.

(14) In these circumstances there are no good grounds for granting stay of the criminal proceedings asked for and this petition is dismissed.

A/D.H. Petition dismissed.

***A.I.R. 1953 MADRAS 445 (Vol. 40, C. N. 169)**

KRISHNASWAMI NAYUDU J.

Syed Unnisa, Appellant v. Rahimuthunissa and others, Respondents.

Second Appeal No. 2349 of 1946, D/- 29-8-1952.

***Civil P. C. (1908), O. 41 R. 33 — Duty of appellate Court to apply law as it stands on date of hearing appeal — Applicability to pending case of Muslim Personal Law (Shariat) Application Act (26 of 1937), S. 2 (as amended by Mad. Act 18 of 1949).**

A Court of Appeal has not only power but a duty to apply the law as it stands on the date of the hearing of the appeal. But it must be noted that in applying the law so as to govern the rights of the parties which was not law on the date of the institution of the suit but became law subsequently the Court must take care not to disturb settled or completed transactions which certainly cannot be reopened by reason of a change in the law. 1912 AC 788; (1882) 9 QBD 672, Foll.

(Para 7)

Anno: C.P.C., O. 41 R. 33 N. 4.

B. Pocker, for Appellant; S. Azizuddin and R. P. M. Ghani, for Respondents.

REFERENCES: Courtwise/Chronological/ Paras

('39) AIR 1939 FC 74: (ILR (1939) Kar 165)

('50) AIR 1950 Mad 321: (1950-1 Mad LJ 63) 6

('52) C R P No 1116 of 1950: (AIR 1953 Mad 425) 6

(1912) AC 788: (82 LJ Ch 45) 4

(1882) 9 QBD 672: (52 LJ QB 44) 6

JUDGMENT: This second appeal mainly raises the question of the scope and applicability of the Muslim Personal Law (Shariat) Application Act, Act No. 26 of 1937. The plaintiffs claiming to be the daughter and widow of one Fakruddin instituted the suit for a declaration that they are entitled to enjoy the properties mentioned in the plaint, manage the durgah, perform the Urs festival and receive all the incomes, endowments and perquisites thereof once in every eight years according to their turn on the ground that the properties originally belonged to four Mussalmans and they have been enjoyed from time immemorial for a number of generations in four equal shares by the respective descendants of four persons mentioned and that the plaintiffs and the defendants are the descendants of one Shaikh Mohammed. Their case is that their turn comes once in every eight years. In 1926 during their turn they performed the Urs festival and in April 1934 when arrangements were made for the celebration of the Urs festival there was objection by the defendants and therefore they sued for the declaration and injunction. Defendants denied the allegations as to the plaintiffs taking part in the Urs celebrations in 1926 and it was contended that the properties having been endowed as inams for the purpose of the maintenance of the suit Durga and rendering of religious services, the surplus income after meeting all the expenses was to be taken by the office-holder, and that the terms of the grant and immemorial custom governing institutions of this kind and the rules of Mohammadan law governing the parties prohibited the plaintiffs who are female members taking part or participating in the management of such institutions and enjoying the perquisites of the office. Both the Courts below have found against plaintiffs on the question of the custom pleaded and rejected their claim.

(2) A great volume of evidence has been adduced in proof of the custom which has been elaborately dealt with by the trial Court and considered with approval by the learned Subordinate Judge who held that it has been established by unimpeachable evidence that the custom pleaded by the defendants was true. I am not persuaded to hold a different view other than that taken by the Courts below as regards the existence of the custom pleaded. Long course of events for nearly over a century and oral and documentary evidence have, in my view, established the essential attributes of a legally binding custom. But for the custom, it is not suggested that the Muslim Personal Law (Shariat) would debar the female members from taking part in the management of such institutions.

(3) During the hearing of the appeal the attention of the learned Subordinate Judge was drawn to a piece of legislation which became law relating to Succession and Inheritance governing Muslims (viz.) the Muslim Personal Law (Shariat) Act 26 of 1937. The learned Subordinate Judge disposed of the question by observing that the Act cannot apply to the present case as the suit was instituted prior to the Act taking effect. The appeal was disposed of on 29-6-1946 and by that time, Act 26 of 1937 had not been amended. Section 2 of the unamended Act is as follows:

"Notwithstanding any customs or usage to the contrary, in all questions (save questions relating to agricultural land) regarding intestate succession, special property of females, including personal property inherited or obtained under contract or gift or any other provision of Personal Law, marriage, dissolution of marriage, including

talaq, ila, zihar, lian, khula and mubaraat, maintenance, dower, guardianship, gifts, trusts and trust properties, and wakfs (other than charities and charitable institutions and charitable and religious endowments) the rule of decision in cases where the parties are Muslims shall be the Muslim Personal Law (Shariat)."

This section was amended by the Madras Act 18 of 1949 and the amended section is as follows :

"Notwithstanding any custom or usage to the contrary, in all questions regarding intestate succession, special property of females, including personal property inherited or obtained under contract or gift or any other provision of personal law, marriage, dissolution of marriage, including tallaq, ila, zihar, lian, khula and mubaraat, maintenance, dower, guardianship, gifts, trusts and trust properties and wakfs the rule of decision in cases where the parties are Muslims shall be the Muslim Personal Law (Shariat)."

(4) There is no doubt that if the Act is applicable to the parties custom will cease to have any force and their personal law being applicable the plaintiffs would be entitled to participate in the management and to enjoy the emoluments of the trust properties and the prohibition of the female members taking part by reason of custom ceasing to have any effect. Basheer Ahmed Sayeed J. in — 'M. Ayisumma v. Mayomoothy Umma', C R P No 1116 of 1950 (Mad) in a case relating to the Moplah Muslims whose rights to property were governed by the Marumakatayam law and with reference to a contention that the Marumakathayam Aliyasanthana Act governed the rights of the parties held that by reason of the repeal of S. 16 of the Civil Courts Act by S. 6 of Act 26 of 1937 after 1937 the customary rule of inheritance by survivorship which was still then applicable to Mappillah Muslims cannot be made applicable by Courts of law in this country and that all customs and usages contrary to the Muslim Personal Law became inapplicable as a rule of decision in cases where the parties were Muslims and that all customary law stood abolished and that the Muslim Personal Law took its place in all matters enumerated in S. 2 of Act 26 of 1937 and it may be added as amended by the Madras Act 18 of 1949.

(5) The question, however, that requires to be considered is whether in respect of pending actions where the rights to properties are of the nature that are the subject-matter of these proceedings the Muslim Personal Law (Shariat) which is applicable also to trusts and trust properties and wakfs and other religious institutions by reason of the Amending Act, Madras Act 18 of 1949 could be made applicable so as to govern the rights of parties. It is urged on behalf of the respondents that the Act is not retrospective in its operation and unless there is any specific provision in the enactment the further amendment should be construed only as prospective and not retrospective in effect. A passage from Maxwell's "The Interpretation of Statutes" Edn. 9, page 223 is quoted which is as follows :

"Every statute, it has been said, which takes away or impairs vested rights acquired under existing laws, or creates, a new obligation, or imposes a new duty or attaches a new disability in respect of transactions or considerations already past, must be presumed, out of respect to the Legislature, to be intended not to have a retrospective operation. Where vested rights are affected 'prima facie', it is not a question of procedure. There is nothing intended to alter past rights which became vested before the new Act came into operation by reason of the parties acting upon and being entitled to act upon the law as it stood before the new Act came into operation."

With reference to this enactment Mullah in his "Principles of Mahomedan law" (13th Edn.) at page 4 observes as follows :

"The Act does not purport to disturb settled transactions or to dispossess persons who have lawfully obtained possession in the past. Whether it would be applied in cases which were pending at the commencement of the Act is doubtful."

(6) Before considering whether by reason of a declaration and injunction granted in favour of the appellants, plaintiffs, the vested rights of the respondents would be affected it will be necessary to consider what the powers of an appellate Court are under the Civil Procedure Code, and whether when a suit comes up for appeal and before it is finally determined it would not be open to the appellate Court to take note of subsequent events not only with regard to the facts but also in regard to laws enacted and make them applicable to the facts coming up before the Court before a final decision is given in appeal. In — 'Attorney General v. Birmingham Tame and Rea District Drainage Board', (1912) AC 788, it was held by the House of Lords that an appeal to the Court of appeal is by way of rehearing, and the Court may make such order as the Judge of first instance could have made if the case had been heard by him at the date on which the appeal was heard. Lord Gorell in his judgment after referring to the Judicature Acts and Rules stated that the hearing of an appeal from the judgment of a Judge is by way of rehearing and the Court has power to give any judgment and to make any order which ought to have been made, and to make such further or other order as the Court may think fit (See O. 58, Rules 1 and 4). The Court also has power to take evidence of matters which have occurred after the date of the decision from which the appeal is brought (see O. 58, Rule 4). It seems clear, therefore, that the Court of Appeal is entitled and ought to rehear the case as at the time of hearing, and if any authority were required for this proposition it is to be found in the case — 'Quilter v. Mapleson', (1882) 9 Q. B. D. 672. 'Quilter v. Mapleson', (1882) 9 QBD 672 is a case where a new enactment came into operation after the institution of the suit and the appeal was filed and before it came up for hearing in appeal. It was held that assuming the judgment of the Court below to have been correct according to the law as it then stood, the Court of appeal could grant to the tenant the relief to which he was entitled according to the law as it stood at the hearing of the appeal, since the general orders provide that appeals shall be by way of rehearing, and give power to the Court of appeal not merely to make any order which ought to have been made by the Court below but to make such further order as the case may require. Bowen L. J. observed :

"The only remaining question is, whether the Court of Appeal can give relief where a judgment has been obtained by the landlord be-

fore the Act came into operation. I think we should be misreading the judicature rules if we held that it could not when the landlord has not obtained possession. The rules were intended to enable the Court of Appeal to do complete justice. If the law has been altered pending an appeal, it seems to me to be pressing rules of procedure too far to say that the Court of Appeal cannot decide according to the existing states of the law. I think that such is not the true construction of the rules for O. 58, Rule 5 does not merely enable the Court of Appeal to make any order which ought to have been made by the Court below, but to make such further or other order as the case may require."

The provisions of S. 107 and O. 41, Rule 33, Civil P. C. practically incorporate O. 58, Rule 5 of the Judicature rules which were relied on by the learned Judges in both the cases cited. Therefore it is not only permissible but in my view it is necessary in the interests of justice to apply to the case, the law as it stands on the date when the matter comes up before Court whether in trial or in appeal and before the final determination of the case. With respect to Bowen L. J., I agree with the observations quoted above which correctly represent the attitude which Courts should adopt in taking notice of subsequent change of events either of fact or in law. Gwyer C. J. Sulaiman and Varadachariar JJ. in — 'Shyamakant v. Rambhajan', AIR 1939 FC 74 and Viswanatha Sastri J. in — 'Lakshmi Ammal v. Narayanaswami', AIR 1950 Mad 321 adopt and approve the view taken by the law Lords in the above cited decisions.

(7) Therefore it goes without saying that this Court in appeal has not only power but a duty to apply the law as it stands on the date of the hearing of the appeal. But it must be noted that in applying the law so as to govern the rights of the parties which was not law on the date of the institution of the suit but became law subsequently Courts must take care not to disturb settled or completed transactions which certainly cannot be reopened by reason of a change in the law. In the present case, however, it is for consideration whether there were any such settled or completed transactions whereby the rights of the plaintiffs have become extinguished or properties in which they had a right have passed into the hands of third parties or are not available for them to manage and enjoy. The first plaintiff was 19 years old on the date of the institution of the suit and it is not in dispute that both the plaintiffs are the heirs under the personal law they being the daughter and the widow of Fakruddin Sahib and having become entitled in accordance with their respective shares, in the other properties excepting those to which by virtue of custom they have been considered not to be entitled to claim the right to manage the Durga, perform the Urs festival and also to enjoy the surplus income if any. It cannot be said that the defendants have acquired vested rights which require to be divested by reason of the application of the new enactment. Nor could it also be said that by reason of the new enactments any final judgments or settled transactions are sought to be reopened. Plaintiffs as heirs of the late Fakruddin Sahib who died in 1922 have become entitled to share in his property but in respect of a particular item which was endowed for charity their right was only to manage and to participate in the surplus income. The plaintiffs who are female members by virtue of custom were excluded from the right to manage the Durga and to perform the Urs festival. There is force in the argument of Mr. Poker Sahib, learned counsel for the appellant that the right to manage came to be vested in the hands of the defendants male members not by virtue of custom but by virtue of their being the sharers but custom deprived the plaintiffs of their rightful share to participation in the management and to their rightful share in the surplus income and since the new Act has abrogated any such custom the plaintiffs could be governed by the Act. Moreover would it be open to the defendants to contest the claim of any female member who might come forward after the enactment of the legislation under which personal law is held to override any custom and to deny such a female member her right to manage the charities and participate in the income? The only answer is there could be no such prohibition or disqualification of the female members under the existing law.

(8) It will not be open to the defendants to plead that they have acquired vested rights since the rights of the female members would not depend upon whatever rights the defendants might claim to have acquired but on the rights which they are entitled to under the new legislation. It must, however, be noted that in the present case the first plaintiff was 19 years old on the date of the suit. The suit having been instituted on 2-4-1937, in no view could it be said that her rights have been taken away or have become vested in the defendants. Her claim to establish such rights can be enforced within three years of her attaining majority and the suit having been instituted within a year of her attaining majority the defendants cannot also raise any plea of limitation or prescription. This question as to limitation was neither raised nor considered by the lower appellate Court and there is no substance in the plea of limitation.

(9) Under these circumstances I consider that the provisions of the Muslim Personal Law (Shariat) Act are applicable to the present case and that the plaintiffs are entitled to a decree as prayed for. The appeal is allowed. There will be no order as to costs. No leave.

A/V.S.B.

Appeal allowed.

A.I.R. 1953 MADRAS 447 (Vol. 40, C. N. 170)

SUBBARAO J.

A. N. Rangaswami and another, Petitioners v. The Industrial Tribunal, Fort St. George, Madras and others, Respondents.

Writ Petn. No. 591 of 1951, D/- 29-9-1952.

(a) Industrial Disputes Act (1947), S. 36(4) (as amended by Industrial Disputes (Appellate Tribunal) Act (1950) — Lawyer's right to practise before Tribunal — (Bar Councils Act (1926), Ss. 9 (1) and 14 (1) — (Constitution of India, Art. 19 (1) (g)).

A lawyer's right to practise is subject to the limitations contained in the Bar Councils Act. Section 36 (4), Industrial Disputes Act is a law limiting his right to practise before a Tribunal as contemplated by S. 14 (1), Bar Councils Act. A lawyer's right to practise, i.e. the right circumscribed by the provisions of the Act whereunder he is enrolled, is not infringed

by the provisions of S. 36 (4), Industrial Disputes Act. There is, therefore, no violation of his fundamental right under Art. 19 (1) (g) of the Constitution of India.

(Para 2)

Anno: Bar Councils Act, S. 9 N. 1; S. 14 N. 1.

(b) Industrial Disputes Act (1947), Ss. 7 and 36 (4) (as amended by Industrial Disputes (Appellate Tribunal) Act (1950) — Classification in S. 36 (4) — (Constitution of India, Art. 14).

The discrimination made between a litigant in an ordinary Court of law and before the Tribunal can easily be justified on the basis of reasonable classification. The classification is not arbitrary but is based upon the nature of the tribunal and the purpose for which it is constituted.

(Paras 3 and 4)

† (c) Industrial Disputes Act (1947), S. 36 (4) (as amended by Industrial Disputes (Appellate Tribunal) Act (1950)) — Constitutional validity — (Constitution of India, Art. 14).

Section 36 (4), Industrial Disputes Act is constitutionally valid and does not violate the fundamental right guaranteed under Art. 14 of the Constitution. (Para 6)

D. Narasaraju and K. B. Krishnamurthi, for Petitioners; Srinivasamurthi, for Govt. Pleader, for the State; A. Ramachandran of Row and Reddy, for Respondents.

REFERENCES: Courtwise/Chronological/ Paras

('52) AIR 1952 Bom 296: (ILR (1952) Bom 766) 2
('52) 1952-1 Mad LJ 208: (AIR 1952 Mad 395) 2
('52) Writ Petn. No. 537 of 1952 (Mad) 2
('52) W. P. No. 296 of 1951, D/- 13-8-1952: (AIR 1953 Mad 326) 3
(1911) AC 179: (80 LJKB 796) 6
(1915) AC 120: (84 LJKB 72) 6
(1924) 69 Law Ed 767: (267 US 517) 6
(1932) 77 Law Ed 158: (287 US 45) 6

ORDER: This is an application under Art. 226 of the Constitution of India for issuing a 'Writ of Certiorari' to quash the order of respondent 1 dated 24-9-1951. Petitioner 2 is the Liberator Ltd, represented by its Secretary. Petitioner 1 is an advocate. By G. O. No. 3167 dated 10-7-1951, the Government of Madras referred the industrial dispute between petitioner 2 and its employees to respondent, 1 the Tribunal constituted by respondent, 2 the State of Madras. On 11-9-1951, petitioner 1 sought to file his 'vakalat' on behalf of petitioner 2 before the Tribunal. The representative of the labourers objected to petitioner 1 appearing for petitioner 2. On 24-9-1951, afer hearing the parties, the Tribunal held, relying upon the provisions of section 36 (4), Industrial Disputes Act, 1947, that it had no power to grant leave to petitioner 1 to appear on behalf of the company, petitioner 2. Section 36 (4), Industrial Disputes Act, 1947, as amended by the Industrial Disputes (Appellate Tribunal) Act, 1950, reads as follows:

"In any proceeding before a Tribunal, a party to a dispute may be represented by a legal practitioner with the consent of the other parties to the proceeding and with the leave of the Tribunal".

The provisions of this section are clear and unambiguous. Before a Tribunal a legal practitioner cannot appear unless the Tribunal gives its leave and other parties to the proceedings give their consent. Learned counsel for the petitioners, therefore, contended that the provisions of section 36 (4) are constitutionally void viewed from two different aspects. From the standpoint of petitioner 1, i. e., the advocate, it is argued that the section violated his fundamental right to do business guaranteed to him under Art. 19 (1) of the Constitution of India. From the view point of petitioner 2, i. e., the employer, it is pointed out that the section infringes the rule of equality embodied in Art. 14 of the Constitution. Learned counsel further adds that the prohibition to be represented by an advocate before the Tribunal except with the consent of the other side is against all principles of natural justice.

(2) The constitutional validity of the section from the standpoint of the advocate mainly depends upon the nature of his right. Learned counsel for the petitioner would say that every person has a right to practise in a Court or before a tribunal and the section which unreasonably restricts that right is void under Art. 13 of the Constitution of India. The question therefore is, what is the nature of the petitioner's right to practise before a Court or tribunal. This question was raised and answered in this High Court as well as the Bombay High Court. Before the cases are noticed, the relevant provisions of the Bar Councils Act may be read:

"Section 9 (1): The Bar Council may, with the previous sanction of the High Court, make rules to regulate the admission of persons to be advocates of the High Court:

Provided that such rules shall not limit or in any way affect the power of the High Court to refuse admission to any person at its discretion.

S. 14(1): An advocate shall be entitled as of right to practise:— (b) save as otherwise provided by sub-s. (2) or by or under any other law for the time being in force in any other Court in British India and before any other tribunal or person legally authorised to take evidence; and

(c) before any other authority or person before whom such advocate is by or under the law for the time being in force entitled to practise.

In — 'Mulchand v. Mukund', AIR 1952 Bom 296, Chagla C. J. and Gajendragadkar J. defined the scope of the right of a person to practise having regard to the aforesaid provisions in the following words:

"Therefore, his right to practise is controlled by this important provision that any other law for the time being in force may restrict or take away his right. Therefore, if the Co-operative Societies Act were to provide that an advocate of the High Court of Bombay shall not practise before the arbitral tribunal set up under that Act, then the right of the Advocate will be circumscribed by the provisions of that law. It should be remembered that it is not the fact that a man has passed a law examination or has acquired a law degree that entitles him to practise in Courts of law; his right to practise depends upon his being enrolled as an advocate and he is enrolled as an advocate on terms and conditions laid down in the Bar Councils Act. Therefore, as I said before, his very charter which entitles him to practise lays down conditions and limitations, and one of the conditions and limitations is that he can only practise before such tribunals as the law permits him and he may not practise before such tribunals as the law lays down as being prohibited to lawyers."

After considering similar provisions in the Legal Practitioners Act, the learned Judges proceeded to say:

"It is a right subject to the provisions of any law for the time being in force. Therefore, the

only right of a lawyer that has been safeguarded under the Constitution is tne right to practise his profession. Now, that right not being an absolute right, no absolute right is conferred upon the lawyer by the provisions of the Constitution. The Constitution guarantees to the lawyer such right as he has under his charter. If any such right is affected or contravened, then undoubtedly he can rely upon the provisions of Art. 19(f). But if tne right given to him is a limited right and that right is not in any way affected, he cannot claim a wider right or a larger right under the Constitution."

Much the same view has been expressed by Rajamannar C. J. and Venkatarama Aiyar J. in — 'S. Ananthakrishnan v. State of Madras', 1952 1 Mad LJ 208. The question in that case was whether the Madras Stamp Amendment Act (6 of 1922) which prescribed a fee of Rs. 625 for making an entry in the rolls of the High Court was not constitutional or an infringement of the provisions of Art. 19(1) (g) of the Constitution. At page 218 the learned Chief Justice observed:

"Taking the profession of law, what does this right consist in? Is the effect of Art. 19(1) to confer on every person who may be otherwise qualified the right to practise in any court in the land? I see nothing in Art. 19 (1) (g) to justify the conclusion that this court or any other High Court or Supreme court cannot lay down rules for the admission of advocates who alone will be permitted to represent the suitors before them. On the other hand the clauses in the Letters Patent granted to the Chartered High Courts to which reference was made earlier in this judgment clearly confer on the High Courts the power to virtually prevent even qualified persons other than the advocates on their rolls to plead and act before them on behalf of suitors.

This power of the High Court has been continued under Art. 225 of the Constitution. The Bar Councils Act recognises this right and lays down that only the persons enrolled as advocates of a particular High Court have certain rights of audience ..... Besides acting & pleading in Courts there are many ways in which a lawyer can pursue his profession and he is free to so practise his profession. If any one wants the additional privilege of being entitled as of right to act and plead in the High Court he has got to be enrolled in the rolls of that Court. Enrolment consists in making an entry in the roll. So far it was not suggested that there was anything unconstitutional."

In Writ Petn. No. 537 of 1952 (Mad) I expressed my view as follows:

"From the aforesaid rules it is obvious that there is no absolute right to be an advocate. A person enrolled as an advocate has a privilege to practise subject to certain limitations. This privilege to practise, therefore, is conditioned by the limitations imposed on him under the provisions of the Bar Councils Act and the rules framed thereunder."

If so petitioner 1's right to practise is subject to the limitations contained in the Bar Councils Act. One of such limitations is that he shall be entitled to practise save as otherwise provided by or under any other law for the time being in force in any other Court in British India and before any other Tribunal or persons legally authorised to take evidence. Sec. 36(4), Industrial Disputes Act is certainly a law limiting his right to practise before a Tribunal. He cannot accept the privilege or right to practise before tribunals and at the same time reject the limitations subject to which that right was conferred on him. If so understood, his right to practise, i.e. the right circumscribed by the provisions of the Act whereunder he is enrolled, is not infringed by the provisions of Sec. 36(4), Industrial Disputes Act. There is, therefore, no violation of his fundamental right under Art. 19(1)(g) of the Constitution of India.

(3) It was then contended from the standpoint of petitioner 2 that the section violated the fundamental right guaranteed under Art. 14 of the Constitution of India. Under Art. 14

"The State shall not deny to any person equality before the law or the equal protection of the laws within the territory of India."

It is said that a party to a dispute before Courts and other tribunals is entitled to be represented by an advocate, and the said right is practically denied to him before the Industrial Tribunal. Such a discrimination, it is argued, violated the fundamental right embodied in the equality clause. Adverting to the provisions of this Article I summarised the law on the subject in — South India Bank Ltd. v. T. D. Pichuthayappan', WP No. 295 of 1951 (Mad) as follows:

"All persons are equal before the law is fundamental of every civilised Constitution. Equality before law is a negative concept, equal protection of laws is a positive one. The former declares that every one is equal before law, that no one can claim special privileges and that all classes are equally subjected to the ordinary law of the land; the latter postulates an equal protection of all alike in the same situation and under like circumstances. No discrimination can be made either in the privileges conferred or in the liabilities imposed. It has also been held for without that apparently just laws may in their application be so abused as to subvert the fundamental concept of equality before law — that the law should be applied by public authority without arbitrariness or discrimination.

The law though apparently fair contains inherent possibilities for discrimination and arbitrary action is in itself bad. But these propositions conceived in the interests of the public, if logically stretched too far may not achieve the high purpose behind them. In a society of unequal basic structure it is well nigh impossible to make laws suitable in their application to all the persons alike. So a reasonable classification is not only permitted but is necessary if society should progress. But such a classification cannot be arbitrary but must be based upon differences pertinent to the subject in respect of, and the purpose for which it is made."

To this I will add the statement of Professor Willis that

"If any state of facts can reasonably be conceived to sustain a classification, the existence of that state of facts must be assumed and that one, who assails a classification, must carry the burden of showing that it does not rest upon any reasonable basis."

The question, therefore, is whether the classification adopted in this case is arbitrary and is not based upon the differences pertinent to the subject, or in respect of and the purpose for which it is made. In my view the discrimination made between a litigant in an ordinary Court of law and before the Tribunal can easily be justified on the basis of reasonable classification. The object of the constitution of labour tribunals was to have an expeditious and just settlement of dis-

putes between the employers and employees in the interests of industrial peace. It was also apparently intended as a convenient device to avoid costly and prolonged litigation in Courts of law and to place the two categories of disputants, i.e, the employees and employers with obvious disparity in wealth and influence, as far as possible on an equal level. To achieve this object labour tribunals are constituted. The makers of the law might have thought that an unrestricted right to be represented by an advocate would defeat the aforesaid purpose. Such restrictions on the right of a party to be represented by an advocate before tribunals are not unknown in other parts of the world. In Poolard's "Administrative Tribunals at work" the following passage occurs at page 19 of the Introduction:

"Lawyers as a whole have never understood the reasons for the growth of administrative tribunals and in many cases have opposed or tried to limit them ..... The doctrine of precedents would be introduced, the law of evidence would hamper it, & its procedure become cumbersome, slow and costly. It is partly their freedom from rules of procedure and customs in advocacy which makes administrative tribunals adaptable to changing social needs and gives parties before them an ease and confidence never known in law Courts. It is for lawyers to adapt themselves to administrative tribunals but not try to twist the growth of these bodies into the pattern of the ordinary Courts.

At page 32 the learned author proceeded to state:

"If the propertied side were legally represented and the other party not, as has been in many county courts the Chairman would feel it incumbent on him to conduct the unaided man's case for him. If the professional advocate is admitted, there is the question of expense. Property can always command good brains versed in traditional law. The penniless man or wage-earner needs an advocate versed in human values, in the poor man's budget, in voluntary unenforceable industrial agreements, in the point of view of trade union and shop committee, and in the acts and orders regulating factories, mines, etc."

Similar considerations might have weighed with the Legislature in enacting the aforesaid provision prohibiting a party to be represented by an advocate unless with the consent of the presiding officer and the opposite party. The consent of the opposite party prevents one party from engaging an advocate unless the other party is also in a position to do so. The Tribunal in exercise of its jurisdiction, subject to the consent of the other side, may allow an advocate to appear in cases where it thinks the assistance is necessary to elucidate the questions of fact or law. But the rule is intended to prevent one party taking advantage of the other party's weakness and also to prevent the unnecessary prolongation of an amicable settlement between the parties.

(4) This is a problematical solution for the avoidance of the apprehended evils. It has always been my experience that a trained lawyer is of immense help in the disposal of cases. It is true that among advocates, just like in other classes of society, there are and will always be a few misfits who would obstruct rather than help the Court; but the remedy is not, on that account, to cut off the trained legal element from assisting the administrative tribunals, but appoint competent officers who could be expected and safely relied upon not to play into the hands of those few misguided ones. But the Parliament in its wisdom thought otherwise and it is entitled to have its view and to reflect the same in the laws made. The classification is, therefore, not arbitrary but is based upon the nature of the tribunal and the purpose for which it is constituted.

(5) Learned counsel then argued that the provisions of the section, if enforced, would offend the principles of natural justice. He would say that no person's rights can be affected unless a reasonable opportunity is given to him to show cause against the action proposed to be taken, and if a person is deprived of his right to be represented by an advocate, in a complicated dispute before the Industrial Tribunal it will be depriving him of such an opportunity. Tribunals cannot be equated to Courts of law. They can have their own procedure so long as the principles of natural justice are not violated. It is a common place axiom that no man can be deprived of his rights unless a reasonable opportunity is given to him to show cause before the Tribunal. What is a reasonable opportunity depends upon the content of the right, the nature of the tribunal, the scope of the enquiry, the object of the Legislature and similar other things. The cases cited at the Bar afford illustrations of the elastic term "reasonable opportunity."

(6) In —'Cooke v. United States', (1924) 69 Law. Ed. 767, the Supreme Court of America held that in a contempt case, before a person can be punished an opportunity should be given to him to show cause against his conviction. The nature of the opportunity is defined at page 774. Taft C. J. observed:

"Due process of law, therefore, in the prosecution of contempt, except of that committed in open Court, requires that the accused should be advised of the charges and have a reasonable opportunity to meet them by way of defence or explanation. We think this includes the assistance of counsel, if requested, and the right to call witnesses to give testimony, relevant either to the issue of complete exculpation or in extenuation of the offence and in mitigation of the penalty to be imposed."

In —'Ozie Powell v. State of Albama', (1932) 77 Law Ed. 158, it was ruled that the right of one charged with crime to be represented by counsel included a fair opportunity to secure counsel of his own choice. The Supreme Court held that the failure to give reasonable time and opportunity to secure counsel prior to trial, to ignorant and illiterate youth, away from their families and friends, charged with a crime punishable with death, against whom popular hostility was so aroused that it was necessary to keep them closely confined and under military guard, infringed the due process clause of the fourteenth amendment.

The aforesaid two decisions deal with the proceedings in courts of law. The second judgment deals with a case of homicide and the first with contempt proceedings in the nature of criminal proceedings. But the same rules have never been applied to administrative tribunals. In —'Board of Education v. Rice', (1911) A. C. 179, the facts were: a local education authority refused to pay salaries to teachers in a non-provided school at the same rate as it paid the teachers in provided schools. The managers of the non-provided school complained, and the Board of Education directed an inquiry. The Board purported to give its decision in a document which failed to deal with the matters in issue. In dealing with the nature of enquiry, Lord Loreburn L. C. observed at page 182 as follows:

"Comparatively recent statutes have extended, if they have not originated, the practice of imposing upon departments or officers of State the

duty of deciding or determining questions of various kinds. In the present instance, as in many others, what comes for determination is sometimes the matter to be settled by discretion, involving no law. . . . . I need not add that in doing either they must act in good faith and fairly listen to both sides, for that is a duty lying upon every one who decides anything. But I do not think they are bound to treat such a question as though it were a trial. They have no power to administer an oath, and need not examine witnesses. They can obtain information in any way they think best, always giving a fair opportunity to those who are parties in the controversy for correcting or contradicting any relevant statement prejudicial to their view. Provided this is done, there is no appeal from the determination of the Board. . . ."

In —'Local Government Board v. Arlidge', (1915) A. C. 120, Viscount Haldane L. C. in his instructive speech made the following observations at page 132:

"My Lords, when the duty of deciding an appeal is imposed, those whose duty it is to decide it must act judicially. They must deal with the question referred to them without bias, and they must give to each of the parties the opportunity of adequately presenting the case made. The decision must be come to in the spirit and with the sense of responsibility of a tribunal whose duty it is to mete out justice. But it does not follow that the procedure of every such tribunal must be the same. In the case of Court of law tradition in this country has prescribed certain principles to which in the main the procedure must conform. But what that procedure is to be in detail must depend on the nature of the tribunal.

In modern times it has become increasingly common for Parliament to give an appeal in matters which really pertain to administration, rather than to the exercise of the judicial functions of an ordinary Court, to authorities whose functions are administrative & not in the ordinary sense judicial. Such a body as the Local Government Board has the duty of enforcing obligations on the individual which are imposed in the interest of the community. . . . . When, therefore, Parliament entrusts it with judicial duties, Parliament must be taken, in the absence of any declaration to the contrary, to have intended it to follow the procedure which is its own, and is necessary if it is to be capable of doing its work efficiently."

The aforesaid decisions clearly bring out the distinction between the procedure before Courts and that before administrative tribunals. The fundamental principle, namely, a reasonable opportunity for explanation should be given before a person is condemned or his rights are affected applies to Courts as well as tribunals. But the scope of that opportunity varies with the character of the forum, the object of the Legislature in creating the forum and the nature of the rights decided in that forum. The Industrial Disputes Act, as I have already stated, was enacted for bringing industrial peace as expeditiously as possible. To effectuate that intention, the Parliament provided a machinery for giving a reasonable opportunity to the parties affected to represent their cases, under the Act the Govt. refers an industrial dispute to a Tribunal duly constituted thereunder. Invariably, the person appointed to the Tribunal is a retired Judicial officer.

The Tribunal proceeds with the enquiry in the prescribed manner. It has the same powers as are vested in a civil Court under the Code of Civil Procedure in respect of summoning and examining witnesses, compelling the production of documents, & issuing commissions. The parties file statements, issues are clarified, documents are filed, arguments are heard & the Tribunal submits its report on the material placed before it. Parties have the right to be heard personally or through their representatives. It is true a party cannot insist as of right to be represented by an advocate, but under S. 36 subject to the conditions laid down therein he may be allowed to be represented by an advocate. I cannot say that the opportunity given to a party under the Act and the rules framed thereunder are not reasonable. Nor can I find that the procedure prescribed is contrary to the principles of natural justice. I, therefore, for the aforesaid reasons hold that S. 36(4), Industrial Disputes Act is constitutionally valid. The petition fails and is dismissed with costs. Advocate's fee Rs. 100.

A/V.R.B. Petition dismissed.

A. I. R. 1953 MADRAS 451 (Vol. 40, C. N. 171)

SOMASUNDARAM J.

The State v. Ex Major P. K. Swamy and another, Accused-Respondents.

Case No. 15 of the Third Criminal Sessions of 1952, D/- 17-9-1952.

Criminal Law Amendment Act (1952), Ss. 7 and 10 — S. 7, retrospective effect —(General Clauses Act (1897), S. 6).

If an order had been validly passed committing a case to the Court of Sessions under the law then in force, a subsequent change in the law would not divest the Court of Sessions of its jurisdiction to try it and the accused acquires a vested right to have the case continued in that Court and tried according to the law in force on the date of the order of commitment. Case law discussed. (Paras 8, 9, 10 and 11)

Anno: G. C. Act, S. 6 N. 3, 4.

State Prosecutor, for the State; B. T. Sundararajan and F. Jagannathan, for Respondents.

REFERENCES: Courtwise/Chronological/ Paras

('43) 1943-5 FCR 39: (AIR 1943 FC 24) 4
('43) AIR 1943 Bom 169: (44 Cri LJ 616 FB)
('50) AIR 1950 EP 25: (51 Cri LJ 459 FB) 5, 6
('25) 6 Lah 262: (AIR 1925 Lah 446: 27 Cri LJ 421) 8
('83) 6 Mad 336: (7 Ind Jur 301) 5, 7
('43) AIR 1943 Pat 18: (44 Cri LJ 273 FB) 5
(1905) AC 369: (74 LJ PC 77) 6
(1850) 9 CB 551: (19 LJ CP 297) 4, 5

ORDER: The two accused in the case were committed by the Third Presidency Magistrate, Madras, to take their trial in the High Court Sessions, for offences under S. 120-B, I. P. C. and S. 5(2) read with S. 5 (1)(c) of Act II of 1947 and S. 477 read with S. 34, I. P. C. The offences under S. 5(2) read with S. 5(1)(c) of Act II of 1947 and S. 477 I. P. C. are offences triable exclusively by the Sessions Court. The order of commitment was passed on 8-7-1952 and the High Court became seized of the case immediately after the order of committal was passed on that day.

(2) On 28-7-1952, that is 20 days after the said order of committal, Act 46 of 1952 was passed by the Parliament in and by which, among other things, the forum D for the trial of certain offences, one

of which is the offence under S. 5(2) of Act 2 of 1947 was altered. S. 7 of the Act is as follows:

"1. Notwithstanding anything contained in the Criminal Procedure Code, 1898 (Act 5 of 1898), or in any other law, the offences specified in sub-s. (1) of S. 6 shall be triable by Special Judges only.

2. Every offence specified in sub-s. (1) of S. 6. shall be tried by the Special Judge, for the area within which it was committed, or where there are more Special Judges, than one for such area, by such one of them as may be specified in this behalf by the State Government.

3. When trying any case, a Special Judge may also try any offence other than an offence specified in S. 6 with which the accused may, under the Code of Criminal Procedure, be charged at the same trial."

It will thus be seen that the said offence under S. 5(2) of Act 2 of 1947 is triable by a Special Judge only, who is to be appointed by the State Government. Section 8 provides for the procedure and powers of Special Judges in the trial of such offences. Under that section a Court of the Special Judge shall be deemed to be a Court of Sessions trying the case without a jury or without the aid of assessors. Section 6 of the Act (46 of 1952) provides that the State Government may by notification in the official Gazette appoint as many Special Judges as may be necessary for such area or areas as may be specified in the notification. The State has accordingly by notification No. 918 dated 25-8-1952 in G. O. Ms. No. 3100 (Home) appointed the Sessions Judge of Chingleput as a Special Judge not only for the district of Chingleput but also for the area covering the local limits of the original jurisdiction of the High Court of Madras.

(3) It is now contended that S. 7 of the Act (46 of 1952) is retrospective in its operation and after the said enactment the High Court has no jurisdiction to try the offence under S. 5(2) of Act 2 of 1947 and that it is triable only by the Sessions Judge of Chingleput. It is well settled that

"no statute shall be construed to have retrospective operation unless such a construction appears very clearly in the terms of the Act or arises by necessary and distinct implication."

It is equally well-settled that a statute which affects the procedure only is retrospective and

"no one has any vested right in any course of procedure. He has only a right of prosecution or defence in the manner prescribed for the time being by or for the Court in which he sues and if an Act of Parliament alters that mode of procedure he has no other right than to proceed according to the altered mode."

(4) The question now is whether the trial of the accused in this Court relates to a vested right or a right in existence on the date of the enactment of Act 46 of 1952 or to a mere matter of procedure. In — 'Colonial Sugar Refining Co. v. Irwing', (1905) A. C. 369, the question was whether a suitor could be deprived of a right of appeal to the Privy Council which he had on the date he instituted the suit by a subsequent change in the law and it was held he could not be deprived. Lord Macnaughten observed:

"It seems to their Lordships that the question does not admit of doubt. To deprive a suitor in a pending action of an appeal to a superior tribunal which belonged to him as of right is a very different thing from regulating procedure. In principle their Lordships see no difference between abolishing an appeal altogether and transferring the appeal to a new tribunal. In either case, there is an interference with the existing rights contrary to the well known general principle that statutes are not to be held to act retrospectively unless a clear intention to that effect is manifested."

It will be seen that even the transferring of an appeal to a new tribunal is held to be an interference with the vested right. This decision has been followed in all the High Courts and the Federal Court of India. In — 'Venugopala v. Krishnaswami', 1943-5 F C R. 39, Varadachariar J. following the decision in — 'Colonial Sugar Refining Co v. Irwing', (1905) A. C. 369 observed:

"Their Lordships' decision recognised that from the date of the initiation of the action, the suitor had a right of appeal to a superior tribunal according to the state of the law as it stood at the time of the commencement of the proceeding. This necessarily involves the recognition of an equally valuable right that the proceedings should in due course be tried and disposed of by the tribunal before which it had been commenced".

The learned Judge further observed that:

"This principle that a statute should not be so interpreted as to take away an action which has been well commenced has been affirmed in various cases in different circumstances".

and quotes with approval the observations of Wilde C. J. in —'Marsh v. Higgins, (1850) 9 CB 551:

"It must have been well known to both branches of the legislature that strong and distinct words would be necessary to defeat the vested right to continue an action which has been well commenced."

The decision established that a right to continue an action which has been well commenced is a substantive right.

(5) The principle of these decisions has been extended to and applied in the trial of criminal cases. The question is when can a criminal case be said to have well commenced. It has been well established that once a criminal case is well commenced such rights as the accused has —such as the right to have a case tried with the aid of assessors, the right to have the case tried with the aid of jury, the right of appeal to a superior Court and even a right to bail — are substantive rights which cannot be affected by a change in the law vide —'Srinivasachari v. Queen', 6 Mad 336, — 'Emperor v. Fitzmaurice', 6 Lah 262 and — 'Shreekant Pandurang v. Emperor', AIR 1943 Bom 169 at p. 175 (FB). I would refer in this connection to one of the above cases, namely, the decision in — 'Emperor v. Fitzmaurice', 6 Lah 262. In that case, a European British subject was committed on 11-6-1923 to the Court of Sessions to take his trial for an offence under Ss. 420 and 477-A I.P.C. But the right to be tried by a Jury was taken away by Act 12 of 1923 which came into force on 1-9-1923. The accused appeared before the Sessions Judge in October 1923 and asked for trial by a mixed jury. It was held that the right of trial by Jury was substantive right and not a mere matter of procedure; and the accused who had this right when he was committed for trial could not be deprived of it by the amendment by Act 12 of 1923. Zafar Ali J. following the decision in — 'Colonial Sugar Refining Co v. Irwing', (1905) AC 369 held that "A person who had the right to be tried by a Jury when he was committed for trial, could not be deprived of it, it being a substantive right." Sir Henry Scott-Smith J. who agreed with Zafar

Ali J. observed that the right of trial by a Jury which was vested in Sergeant Fitzmaurice by the Criminal Procedure Code 1898, was a substantive right and not a mere matter of procedure.

(6) As I have already stated the question is when a criminal case can be said to have well commenced? In the Full Bench case in —'Banwari Gope v. Emperor', AIR 1943 Pat 18 (FB), Fazl Ali J. held that a criminal case must be deemed to have well commenced as soon as the Magistrate takes cognizance of the case and the accused acquired vested right to have his case tried according to the procedure on the date when the Magistrate takes cognisance of it. A slightly different view is taken in — 'Shreekant Pandurang v. Emperor', AIR 1943 Bom 169, where Divatia J. observed as follows:

"In cases which could be tried by a Magistrate, the trial may begin when cognizance was taken but in cases which are exclusively triable by a court of session, the trial does not begin unless and until an order of commitment is made. All the previous proceedings before the commitment are stages of enquiry at the end of which the accused may or may not be committed."

(7) The learned Judge was of the view that in cases exclusively triable by the Sessions the case can be said to have well commenced when the order of commitment is made and such rights as trial by jury etc. the accused had on the date of the order of commitment are rights vested in him and he could not be deprived of those rights by a change in the law. The observation in — 'Emperor v. Fitzmaurice', 6 Lah 262 is clear that if the accused had a right to have his case tried by a Jury on the date of the order of commitment he could not be deprived of it.

(8) I would here refer to the decision of the Full Bench in — 'Ram Singh v. Crown', AIR 1950 EP 25. In that case by notifications dated 20-3-1947 & 23-8-1947 issued by the Punjab Government under the Punjab Public Safety Act, the district of Ludhiana was declared to be a dangerous area within the meaning of the Act. Under the Act the declaration that the area is dangerously disturbed involved certain changes in the procedure for the trial of criminal cases. One such offence for which the trial under the Code was not to be followed but the one under the Act is to be followed was the offence under S. 302, I. P. C. Section 37 of the Act which lays down the procedure is as follows:

"For purposes of trials under this Act the Code shall be deemed to have been amended as follows:

(1) (i) For Ss. 208 to 220 inclusive the following shall be deemed to have been substituted, namely:

When it appears from the police report that the offence is one triable exclusively by a court of Sessions or one which in the opinion of the magistrate ought to be tried by such court, the magistrate shall, on perusal of the police report or when the accused appears or is brought before him, make over the accused to the Sessions court having jurisdiction and shall forward the accused if in custody and shall send all police reports relating to the case to that court, and that court shall thereupon proceed with the trial of the case following the procedure for the trial of summons case."

On 30-9-1948 the accused who was charged with the offence under S. 302, I. P. C. was committed to the Sessions at Ludhiana and the trial commenced on 18-11-1948. In the meantime, by a notification dated 22-10-1948 appearing in the gazette of 29-10-1948, the notification declaring the Municipal area of Ludhiana as dangerous was cancelled. The question arose whether the trial should proceed as in a summons case (in accordance with the provisions of S. 37 of the Punjab Public Safety Act) without the aid of assessors or jury or whether the trial should be in accordance with the provisions of the Criminal Procedure Code. The Full Bench held that the trial should proceed under S. 37 of the Act as in a summons case in accordance with the provisions of the law in force 'on the date of the order of committal' (underlining (here in ' ') is mine).

The observations of Achhru Ram J. who delivered the leading judgment are worth quoting:

"It is well settled that no one has any vested right in any procedural rule and that, therefore, any change in the procedural law has retrospective effect in the sense of being applicable even to judicial proceedings initiated before the change, provided of course this can be done without affecting any substantive rights acquired by any of the parties to the proceeding before the change. It is however equally well settled that the validity or operation of any order validly passed or any act validly done by a judicial tribunal in the procedural law for the time being in force cannot be affected by any subsequent change in the said law. It therefore follows that the action taken by the magistrate under the provisions of sub-sec. (1) of S. 37 on 30-9-1948, in making over the case to the Sessions Court cannot be affected by the subsequent cancellation of the notification in S. 2(b) in respect of Ludhiana district and the consequent change of procedure applicable to the trial of cases like the present in the said district. By reason of that action the learned Sessions Judge was properly and validly seized of the case on the day the provincial Government chose to make an order for the cancellation of the notification and he continued to be seized of the case even after the said Government had cancelled the notification."

This case establishes that if an order had been validly passed committing a case to the Court of Sessions under the law then in force, a subsequent change in the law would not divest the Court of Sessions of its jurisdiction to try it and the accused acquired a vested right to have the case continued in that court and tried according to the law in force on the date of the order of commitment, (Vide S. 6 of the General Clauses Act and the observations of Varadachariar J. in the decision cited above).

(9) It will be clear from the principles laid down in the above decisions that on the date of the order of commitment in this case the accused had a vested right to be tried in this Court with the aid of a Jury and he could not be deprived of that right.

(10) Assuming the Act to be retrospective, to what extent is it retrospective? Maxwell on Interpretation of Statutes, 9th Edn. page 222, says:

"A statute is not to be construed to have a greater retrospective operation than its language renders it necessary. Even in construing a section which is to a certain extent retrospective the maxim ought to be borne in mind as applicable whenever the line is reached at which the words of the section cease to be plain."

After enacting S. 7, the Act provides for pending cases in S. 10, which is as follows:

"All cases triable by a special Judge under S. 7 which immediately before the commencement of this Act were pending before any magistrate

shall, on such commencement be forwarded for trial to the Special Judge having jurisdiction over such cases."

It will be seen that the Act does not make provision for any cases which are pending before a Court other than that of a Magistrate, for example, a case pending before this Court. The legislature must be deemed to have been aware of cases pending before Courts other than Magistrates and yet it has refrained from making any provision for them. By necessary intendment it is reasonably plain that the trial of cases pending before Courts other than those pending before Magistrates is not affected. From the fact that the legislature thought fit to enact S. 10 it is clear that S. 7 is not intended to be retrospective and at any rate not to have greater operation than what is indicated in the said S. 10.

(11) I am of opinion that the High Court is the only Court competent to try this case and the Sessions Judge of Chingleput is not competent.

(12) Further, there is no provision of law under which a case pending before the High Court Sessions can be transferred to any other Court. The Letters Patent and the Criminal Procedure Code provide for the transfer of cases to the High Court from other Courts; and there is no provision for transfer of a case pending before it to any other Court. In the absence of any such provision, a case pending before the High Court Session cannot be transferred to any other Court.

(13) The result is that the trial will go on before this Court. The case is adjourned to November sessions.

B/D.H. Order accordingly.

A. I. R. 1953 MADRAS 454 (Vol. 40, C. N. 172)

GOVINDA MENON AND KRISHNASWAMI NAYUDU JJ.

Kode Seshamma, Appellant v. Mandana Rattayya and others, Respondents.

Second Appeal No. 661 of 1948, D/- 19-2-1952.

Debt Laws — Madras Agriculturists' Relief Act (4 of 1938), Ss. 23 and 24 — Decree-holder depositing balance due on auction — Setting aside of auction sale on application of debtor — Another creditor withdrawing it — Debtor getting benefit of deposit in execution of decree of the other creditor, cannot resist decree-holder's suit for refund. Case law discussed.

(Paras 6, 8, 9)

A. L. Narayana Rao, for Appellant; D. Munikanniah, for Respondents.

REFERENCES: Courtwise/Chronological/ Paras

('23) 44 Mad LJ 735: (AIR 1922 PC 269) 8
('33) 56 Mad 737: (AIR 1933 PC 167) 5
('35) AIR 1935 All 470: (57 All 690) 10
('14) 22 Ind Cas 946: (AIR 1915 Cal 297) 10
('43) 1943-1 Mad LJ 34: (AIR 1943 Mad 274) 7, 10a
('17) 37 Ind Cas 863: (AIR 1917 Pat 55) 8
(1873) 8 CP 350: (42 LJ CP 155) 5
(1871) 3 PC 465: (40 LJ PC 1) 8
2 Sm LC 13th Edn 140 5

GOVINDA MENON J.: In O. S. No. 84 of 1932 on the file of the Subordinate Judge's Court of Vijayawada, the present appellant obtained a decree against the respondents and their father for a sum of money on foot of a mortgage and the mortgaged properties were brought to sale. The appellant herself became the auction-purchaser and deposited the amount that remained after setting off the decree amount due to her, in Court. This balance amount was Rs. 995-12-0 and it stood to the credit of the judgment-debtors. A third party, one Tirupathiah, had a decree against the judgment-debtors in S. C. No. 107 of 1932 and in pursuance of that decree he attached the amount in Court to the credit of the judgment-debtors and drew out that sum in part satisfaction of his decree. Later on, the judgment-debtors applied under S. 23, "Madras Agriculturists Relief Act", 1938, to have the sale set aside and the same was accordingly set aside. The result was that the appellant, who had purchased the properties in court auction, lost them, but the decree which she had against the judgment-debtors respondents was executable.

(2) The suit out of which the present appeal arises was for recovery of the excess amount deposited by the plaintiff in Court to the credit of the judgment-debtors and taken over by Thirupathiah the decree-holder in S. C. No. 107 of 1932, on the ground that the judgment-debtors had benefit of that amount by reason of the fact that the claim against them in S. C. No. 107 of 1932 was satisfied by this amount being taken over by Thirupathiah. It has also to be stated that the respondents filed I. A. No. 379 of 1942 in S. C. No. 107 of 1932 alleging that by reason of the withdrawal of the sum of Rs. 995-12-0 by Thirupathiah, the decree-holder in S C No. 107 of 1932, more than double the principal amount had been paid up and that the decree in that suit must be entered up as satisfied. After enquiry, satisfaction of that decree was also entered up.

(3) Various contentions were raised by the defendants against the maintainability of the suit and the trial Judge found that though the suit is not maintainable under section 24 of the "Madras Act 4 of 1938", the appellant is entitled to equitable relief against the judgment-debtors, because the decree against them was satisfied by the withdrawal of this amount by the decree-holder Tirupathiah. The learned District Munsif went into the question and found that the respondents had the benefit to the extent of a sum of Rs. 683-1-5 and to that extent they are bound to repay the same to the plaintiff appellant. A decree for that amount with interest thereon was passed. The plaintiff not being satisfied with the decree for Rs. 683-1-5, preferred an appeal to the Subordinate Judge complaining that the decree should have been for the entire amount of Rs. 995-12-0 with interest etc., and the defendant filed a memorandum of cross-objections objecting to the decree of the District Munsif to the extent of Rs. 683-1-5. The lower appellate Court was of opinion that the plaintiff had no cause of action against the defendants and that the equitable relief granted was not sustainable. The appeal was therefore, dismissed and the memorandum of cross-objections allowed. The present second appeal by the plaintiff is against this decision of the Subordinate Judge.

(4) It has to be mentioned at the very outset that Tirupathiah, the decree-holder in S. C. No. 107 of 1932, was not made a party to the suit; nor was he made a party to the proceedings by which the plaintiff applied under S. 24, Madras Agriculturists Relief Act for a refund of the purchase money when the sale was set aside under section 23 of the Act. The order Ex. P. 4 shows that on the objection raised by the respondents when the plaintiff claimed refund of the purchase money, the executing Court held that the remedy of the plaintiff was a regular suit and not by means of execution proceedings. How far this order is correct need not be decided now though section

24 of Act 4 of 1938 lays down that where a sale is set aside under section 23, a purchaser shall be entitled to an order for repayment of any purchase money paid by him against the person to whom it has been paid. This contemplates an application and not a suit. But since between the parties it is now final that a suit is the only remedy, the question regarding the maintainability of the suit need not now engage our attention any further.

(5) Section 24 of Madras Act 4 of 1938 is practically identical with Order 21, Rule 93, Civil P. C. which says that where a sale of immovable property is set aside under Rule 92, the purchaser shall be entitled to an order for repayment of his purchase money with or without interest as the Court may direct, against any person to whom it has been paid. The concluding words of both the provisions are practicaly the same except that in section 24 of Act 4 of 1938 in qualifying the word "person" the definite article "the" is used whereas in Order 21, Rule 93, Civil P. C., the word "any" qualified "person". The argument put forward by the respondents, which found favour with the lower appellate Court is that the money has not been paid to them but that the same had been taken by Thirupathiah, the decree-holder in S. C. No. 107 of 1932, and that if at all the plaintiff is entitled to any remedy it is only against Thirupathiah, and this was accepted by the lower appellate Court despite the fact that in the application for scaling down the decree in O. S. No. 107 of 1932 the respondents have acknowledged and accepted the surplus amount deposited in Court by the decree-holder, i. e., the appellant, and attached by Thirupathiah as money belonging to them, and contended that since such money was received by the decree-holder Thirupathiah in payment of his decree — more than double the decree — amount had been paid over to him & the decree had therefore become completely satisfied.

The learned Subordinate Judge thinks that when once the sale was set aside under section 23 of Act 4 of 1938, the money which had been deposited in Court automatically becomes the money of the depositor and when Thirupathiah withdrew that money he should be deemed to have taken the money of the depositor, so that it cannot be said that the defendants-judgment-debtors had any use or ownership over that money. But this point of view has omitted to take note of the acceptance by the judgment-debtors of the deposited money as belonging to them and getting the decree against them satisfied on foot of such money being taken over by their decree-holder. This action of the judgment-debtors cannot be interpreted as disclaiming the right over the deposited amount or revesting the title in the money in the depositor plaintiff. The judgment-debtors under such circumstances will have to be estopped from thereafter contending that the deposited amount does not belong to them, or that they did not have the benefit of the amount.

It is well accepted principle of law that a party cannot both approbate and reprobate. In the words of Honyman J. in — 'Smith v. Baker', (1873) 8 C. P. 350 at p. 357 a party cannot

> "at the same time blow hot and cold. He cannot say at one time that the transaction is valid, and thereby obtain some advantage to which he could only be entitled on the footing that it is valid, and at another time say it is void for the purpose of securing some further advantage".

Similar observations were made by Lord Kenyon C. J. in — 'Smith v. Hodson', 2 Sm. L. C 13th Edn. 140, 146. See also the observations of the Privy Council in — 'Ambu Nair v. Kelu Nair', 56 Mad 737.

(6) On the footing that the deposited amount belonging to the judgment-debtors when the same was attached and taken away by Thirupathiah, the present respondents got the decree against them scaled down and satisfied, i. e., they have used the money in Court deposit for getting the decree against them satisfied and such being the case they have obtained an advantage by the use of that money. We, therefore, are of opinion that it is not open to the judgment-debtors now to contend that the money deposited in Court when once the sale was set aside, automatically reverts and becomes the money of the depositor and that the respondents have no interest or benefit in the same.

(7) The learned Subordinate Judge relied upon the decision in — 'Seshavatharam v. Ramayya', 1943-1-Mad. L. J. 34 as authority for the proposition that the plaintiff can have no cause of action against the judgment-debtors. The facts of that case cannot, by any means, be said to be similar to those in the present case. What happened there was that after a sale was set aside under section 23 of Madras Act 4 of 1938, the judgment-debtor applied for redelivery of the properties to him and the purchaser applied for repayment of the monies paid by him for purchasing the properties. The lower Court held that the judgment-debtor should not be entitled to obtain redelivery of the properties without paying to the court auction purchaser the whole of the amount which had gone in discharge of the decree.

On appeal, Wadsworth and Patanjali Sastri JJ. observed that no such conditional order can be made and say at page 35:

> ".....the satisfaction of the decree out of the purchaser's money is cancelled just as the sale is cancelled. The decree-holder has to give back the money which he has drawn and he remains at liberty to execute any amended decree which may be passed in fresh proceedings. There can be no question in such circumstances of the payment made by the auction purchaser having benefited the judgment-debtor. The decree towards which the payment was made is one that has been into the melting pot and as a result of the application of section 19 it may well disappear entirely. The decree-holder is not debarred by reason of his having drawn the proceeds of the sale from executing any revised decree which may be passed, but he is required to refund the sale proceeds to the auction purchaser. In such circumstances, there can be no question of any refund of the sale prices by the judgment-debtor. Nor is there any necessity to allow the auction purchaser to retain possession of the property pending a payment by the judgment-debtor of the amount due from him under the mortgage-decree".

We are not able to find how these observations can be said to fit in with the present case. It may be that when once the sale is set aside the money automatically becomes the money of the purchaser. But the difference is that whereas in the present case the judgment-debtors had claimed and accepted the money remaining in deposit as their own and obtained a benefit therefrom, in the case in — 'Seshavatharam v. Ramayya', (1943) 1 Mad. L. J. 34, there was no such acceptance. The decree-holder had taken away the money and the auction purchaser had after the sale was set aside, withdrawn the surplus amount in Court. The judgment-debtor there had nothing to do with any of these moneys. We

do not feel that this decision can really assist the respondents.

(8) A somewhat similar question was considered by their Lordships of the Judicial Committee in the case reported in — 'Jai Berham v. Kedar Nath', 44 Mad. L. J. 735 where the question arose whether the amount deposited by the auction purchaser and distributed among the creditors of the judgment-debtors can be restituted or recalled from the judgment-debtors who had the benefit of the money by their liability being discharged. Their Lordships held, following the principle laid down by Cairns L. C. in — 'Rodger v. Comptoir d'Escompte de Paris', (1871) 3 P. C. 465 at p. 475 that such restitution was possible. Lord Carson in delivering the judgment says at page 739:

"The auction purchasers have parted with their purchase money which they paid into Court on the faith of the order of confirmation and certificate of sale already referred to. This money has been distributed amongst creditors of the judgment-debtor who had attached the unencumbered property in question and could have realised their judgment-debtors by a sale of this property in execution and it would be inequitable and contrary to justice that the judgment-debtor should be restored to this property without making good to the auction purchaser the moneys which have been applied for his benefit".

The matter is made clear in the judgment of the Patna High Court from which the appeal was taken to the Judicial Committee in — 'Jai Berham v. Kedarnath', 44 Mad L. J. 735. The High Court judgment is reported in — 'Kedarnath v. Jai Berham', 37 Ind. Cas. 863 (Pat.) and in column 2 of paragraph 2 at p. 868 of the report we find the following observation:

"It is not denied that the money paid to the decree-holders was due to them from the judgment-debtors. The decree-holders applied to the Court for a rateable distribution of the purchase money and the Court directed the rateable distribution of the money. The decree-holders received the money from the Court and under the orders of the Court. The judgment-debtors are bound by the orders of the Court directing the payment. The auction purchasers paid the money in Court and they have nothing to do with how the money was disposed of. The judgment-debtors have been benefited by the payments, and the payments made by the decree-holders will be considered to have been made to the judgment-debtors. The judgment-debtors are, therefore liable to pay this money to the auction purchasers before they can recover possession of the property".

If, in restitution proceedings, though the party to whom money has been paid is different from the party who has received the benefit thereunder, it has been held that it is the party who has received the benefit that is to restitute, we do not see any reason why the same equitable principle should not be applied to a suit of the present nature. After all section 24 of Madras Act 4 of 1938 is a species of restitution specifically conferred upon a purchaser who has lost the fruits of his purchase by result of a compulsory setting aside of the sale not in accordance with the ordinary provisions of law but as a result of the special enactment of S. 23, Madras Agriculturists Relief Act.

(9) The learned counsel for the respondents stressed before us the point of view outlined in the judgment of the lower appellate Court that when the sale is set aside the auction purchaser's deposit becomes revested in him and that the judgment-debtors could not be said to have had any interest or right over such amount. We have already expressed our opinion that in the circumstances of this particular case the money must be deemed to have been paid over to the judgment-debtors because they have accepted and had the benefit of such deposit.

(10) In — 'Mangel v. Mathura Prasad', A. I. R. 1935 All 470, Sulaiman C. J. has held that under Order 21 Rule 93, Civil P. C., even though it is possible when the sale is set aside on account of the fact that the judgment-debtor had no saleable interest in the property, that the monies paid over, not to the decree-holder but to the creditors of the judgment-debtor, can be recalled in an application under that rule if made within time, a suit against persons to whom the deposited amount has been paid as being due from the judgment-debtor cannot be maintained. By implication it should be understood that the learned Judges intended to hold that a suit would lie against the judgment-debtor who had the benefit of the money by the decree against him being satisfied. The respondent contended that under O. 21 R. 93, Civil P. C. it would not be possible for third parties to be paid the monies in Court deposit until the sale has been confirmed, i. e., after thirty days of the completion of the sale and therefore O. 21 Rule 93, Civil P. C. does not contemplate payment to third parties, though the expression any person to whom the money is paid is found in that rule. Ordinarily it might be so, but there may be cases where even before the sale is confirmed monies are paid over to the decree-holders or the creditors of the judgment-debtors. See — 'Nafar Chandra v. Gopal Chandra', 22 Ind. Cas. 946 (Cal).

(10a) The view taken by the learned District Munsif seems to be more in accord with justice and equity rather than the legalistic view adopted by the learned Subordinate Judge. We do not think that the decision in — 'Seshavatarm v. Ramayya', 1943-1-Mad L. J. 34 on which the learned Subordinate Judge relies can be applied to the facts of the present case.

(11) Nothing could be urged before us to show that the conclusion arrived at by the District Munsif to the effect that the respondents had the benefit of the deposit only to the extent of Rs. 683-1-5 is incorrect. In these circumstances the plaintiff-appellant will be entitled to a decree for that amount only. The appeal is, therefore, allowed, the decree of the Subordinate Judge is set aside and that of the District Munsif restored with proportionate costs throughout.

B/D.H. Appeal allowed.

A. I. R. 1953 MADRAS 456 (Vol. 40, C. N. 173)

SUBBA RAO J.

Ravuru Punnamma, Appellant v. Lakkaraju Venkata Subba Rao, Respondent.

Second Appeal No. 1684 of 1948, D/- 6-3-1952.

(a) Easements Act (1882), S. 60 — Distinction between licence and lease — (T. P. Act (1882), S. 105).

A licence is not determined by forfeiture even if the licensor's title is denied by the licensee. Case law Ref. (Para 3)

The reason for this distinction between a lease and a license is apparent. In the case of a license except in the two cases mentioned in S. 60 (a) and (b) it is re-

vocable at the will of the owner. (Para 4)

Anno: Ease. Act, S. 60 N. 6; T. P. Act, S. 105 N. 13 Pt. 14.

(b) Evidence Act (1872), S. 116 — Licensee cannot deny licensor's title — S. 116 does not sanction forfeiture of licence — (Easements Act (1882), S. 60). (Para 4)

Anno: Ev. Act, S. 116 N. 15; Ease. Act, S. 60 N. 6.

(c) Specific Relief Act (1877), S. 55 —Refusal of injunction.

A person, having a right to object, if acquiesces in the construction of structures that encroach upon a partition wall, is not entitled to the discretionary remedy of a mandatory injunction. (Para 5)

Anno: Sp. R. Act, S. 55 N. 6.

Ch. Suryanarayana and Ch. Ramakrishna Rao, for Appellant; G. Chandrasekhara Sastri, for Respondent.

REFERENCES: Courtwise/Chronological/ Paras

('01) 1901 All WN 157 4
('17) 39 All 621: (AIR 1917 All 395) 4
('23) AIR 1923 All 403: (75 Ind Cas 596) 4
('25) AIR 1925 All 203: (78 Ind Cas 216) 4
('29) 113 Ind Cas 757 (All) 4

JUDGMENT: This second appeal arises out of O. S. No. 199 of 1946 on the file of the Court of the District Munsif, Tenali, for recovery of plaint schedule site and for removal of the wall standing thereon. The facts found and admitted may be briefly narrated. The plaintiff and defendant are the owners of adjacent houses in Tenali Municipality. In the year 1917 the defendant's father, Ramakrishniah entered into an agreement in respect of 15-5/9 square yards in D. No. 55 belonging to the plaintiff. Ramakrishniah intended to construct a building on his site and he found it necessary to have a boundary wall between his site and the plaintiff's site. They agreed that Ramakrishniah should be allowed to construct a masonry wall on the suit site to serve as a boundary and the plaintiff should continue to be the owner of the site. Another stipulation was that Ramakrishniah should not build any house or project his eaves over the wall at any time. He also agreed to keep the said wall in good repair at all times and in case it was damaged or got demolished, he was to get it repaired and restored. According to the agreement if he did not repair it or restore it within three months from the day the plaintiff asked him to do so, she could take back the site. If the wall was kept in good condition, it was agreed that the plaintiff should not ask for the demolition of the wall or for recovery of the site. Subsequently Ramakrishniah put up buildings on his site. In so building, the roof of his kitchen was made to extend over the boundary wall by 3' 5". The bath room also rested on the wall. The Commissioner pointed out that east of the kitchen, on the top of the boundary wall, a little southward from the middle, there were two pillars 3' 8" high and resting on them was a wooden beam 5½" thick and on this the northern wall of the defendant's bath room 6' 6" by 4' 4" was supported. So too the plaintiff in constructing her house allowed her cement beam of the terrace to rest on the wall.

It will, therefore, be seen that notwithstanding the agreement, Ex. A. 1, the plaintiff as well as the defendant made encroachments over the suit wall. Though the defendant's constructions were made twenty-five years ago or at any rate, prior to 1931, the plaintiff did not question the same. Nor did she take any steps to enforce her rights under Ex. A. 1 till she gave notice under Ex. B. 1 dated 22-2-1946. The present suit was filed by her for recovery of possession of the site mainly on the ground that as the defendant committed a breach of the terms of Ex. A. 1 she should be entitled to recover the site. She also alleged that the defendant denied her title and, therefore, forfeited his rights under the document. Both the Courts found that the breach of the stipulation under Ex. A. 1 namely, that the defendant should not build any house or project his eaves over the wall at any time, is only a breach of warranty and not of a condition and, therefore, she would not be entitled to evict the defendant but would be entitled to recover damages. They also agreed in holding that the denial by the licensee of the owner's title would not entail forfeiture. Both the Courts accepted the contention of the defendant that the plaintiff having acquiesced in the constructions put up by the defendant, she would not be entitled to an equitable relief of mandatory injunction. To avoid future troubles the appellate Court valued the site in a sum of Rs. 200 and directed the defendant to pay the sum to the plaintiff. The plaintiff preferred the above second appeal.

(2) The first question is whether under the terms of Ex. A. 1, in the circumstances that happened, the plaintiff will be entitled to evict the defendant. A perusal of Ex. A. 1 shows that the parties made a clear distinction between the stipulation prohibiting the defendant from building any house or projecting his eaves over the wall and the stipulation asking him to keep the wall in good repair or restoring the wall if demolished. Under the agreement the plaintiff was entitled to recover back the site only if the defendant broke the second condition. So long as he kept the wall in good repair, the plaintiff cannot recover back the site. Therefore both the Courts found that the first stipulation is only a warranty, the breach whereof enables the plaintiff to recover damages and in regard to the second condition that it goes to the root of the contract and its breach will enable the plaintiff to recover possession. I agree with the construction put upon the documents by the Courts below.

(3) It is then contended that the defendant denied the title of the plaintiff and, therefore, forfeited his rights under the document. The question is whether the denial of the owner's title by the licensee entails forfeiture. Unlike the case of lease, there is no statutory provision stating that the licence is determined by forfeiture if the owner's title is denied. Section 60, Easements Act, prescribes the conditions under which a licence may be revoked. It reads:

"A licence may be revoked by the grantor, unless

(a) it is coupled with a transfer of property and such transfer is in force;

(b) the licensee, acting upon the licence, has executed a work of a permanent character and incurred expenses in the execution."

In the present case the licensee acting upon the license has built up a wall which is admittedly of a permanent character and incurred expenses in constructing the same. The licence is, therefore, irrevocable.

(4) Learned counsel for the appellant relied upon S. 116, Evidence Act, in support of his contention that the law of forfeiture will apply equally to a lease as well as licence. Under S. 116, Evidence Act,

> No tenant of immovable property, or person claiming through such tenant, shall, during the continuance of tenancy, be permitted to deny that the landlord of such tenant had, at the beginning of the tenancy, a title to such immovable property; and no person who came upon any immovable property by the licence of the person in possession thereof shall be permitted to deny that such person had a title to such possession at the time when such licence was given."

This section embodies the rule that a lessee as well as a licensee are estopped to deny the title of the landlord or the licensor as the case may be. But this section does not expressly state or even indirectly give assistance in considering the question whether the law of forfeiture will apply to the case of a licensee denying a licensor's title. The forfeiture of a right is in the nature of a penalty. In the absence of an express condition or a statutory provision prescribing for forfeiture on the denial of the owner's title, it is not permissible to invoke the law of forfeiture applying the analogy of a lessor and lessee. The reason for this distinction between a lease and a license is also apparent. In the case of a license except in the two cases mentioned in S. 60 (a) and (b) it is revocable at the will of the owner. For that reason, unlike in the case of a lease, the legislature did not provide for forfeiture in the case of a licence. Nor was learned counsel for the appellant able to place before me any case which applied the rule of forfeiture to a licence. Indeed all the cases that were cited at the Bar took the view that a denial of title of the owner by the licensee will not entail forfeiture — see — 'Dharmkunwar v. Fakira', 1901 All WN 157; — 'Mt. Durga v. Baburam', AIR 1923 All 403; — 'Akbar Ali Khan v. Shah Muhammad', 39 All 621; — 'Amjad Khan v. Shaffiuddin Khan', AIR 1925 All 203 and — 'Tripathi Anand Nath Tewari v. Jokhu Kumari', 113 Ind Cas 757. As there is unanimity of opinion it is not necessary to consider the cases in detail. I respectfully agree with the views expressed in the said judgments. I, therefore, hold that the licence was not forfeited in this case.

(5) The next point is whether this is a fit case for issuing a mandatory injunction. Section 55, Specific Relief Act says:

> When, to prevent the breach of an obligation, it is necessary to compel the performance of certain acts which the Court is capable of enforcing, the Court may in its discretion grant an injunction to prevent the breach complained of, and also to compel performance of the requisite acts."

Courts invariably refuse to give this discretionary remedy if the plaintiff acquiesced in the act complained of. Pollock and Mulla in their commentary on the Indian Contract and Specific Relief Acts say at page 790:

> The result of authorities on the subject is that where a person had a legal right, it could be destroyed by his acquiescence, that is, if he stood by and allowed his neighbours to incur expenditure in doing what he knew would injure his property."

In this case it is abundantly clear on the facts found that both the plaintiff and the defendant's father, notwithstanding the terms of Ex. A. 1, put up structures encroaching upon the wall presumably with the knowledge of each other. As the defendant's father is dead, it is not possible to say whether the constructions were put up by some other subsequent agreement; but it is not likely that the constructions were put up on the sly. The nature of the constructions put up and the fact that both the parties encroached upon the wall indicate that they must have done it with the consent of each other and the plaintiff allowed the defendant to put up the structures encroaching upon the wall and did not question it for about a quarter of a century. On the facts I must hold that the plaintiff had acquiesced in the construction of the structures and is now not entitled to the discretionary remedy of a mandatory injunction. The two Courts below refused to exercise their discretion in her favour and I do not think I am justified in taking a different view on the facts found.

(6) The learned Subordinate Judge valued the site in the sum of Rs. 200 and directed that amount to be paid to the plaintiff and gave a declaration that the defendant will have full rights in the site. In my view the Court cannot compel the plaintiff to sell the site to the defendant. If she insists to have her title to the site, she is entitled to have it. But as the defendant broke one of the warranties in the agreement Ex. A. 1, he would be liable to pay nominal damages to the plaintiff in view of his subsequent conduct, which I fix at a sum of Rs. 20.

(7) With the aforesaid modification the second appeal is dismissed with costs. No leave.

B/V.S.B. Appeal dismissed.

A. I. R. 1953 MADRAS 458 (Vol. 40, C. N. 174)

FULL BENCH

RAJAMANNAR C. J., CHANDRA REDDI AND VENKATARAMA AIYAR JJ.

Garimella Suryanarayana, Appellant v. Gada Venkataramana Rao, Respondent.

Letters Patent Appeal No. 66 of 1949, D/- 14-11-1952.

(a) **Interpretation of Statutes — Principle in arriving at real meaning of statute stated in (1584) 76 ER 637, reiterated.** **(Para 4)**

†(b) **Debt Laws — Madras Agriculturists' Relief Act (4 of 1938), S. 8, Expl. I — Applicability to settlement of debt — (Contract Act (1872), S. 60).**

The object of Expl. I of S. 8 is to take away the right of the creditor to appropriate payments towards interest unilaterally, as he would be entitled to under S. 60, Contract Act and to nullify the effect of the decision in AIR 1948 Mad 434. **(Para 5)**

For the Explanation to apply, there must be on the one hand arrears of interest outstanding and payable and on the other payments, open and unappropriated and the Explanation provides how in that contingency the payments are to be appropriated. Where there has been in fact a settlement of accounts and a fresh document executed by the debtor, that must necessarily have the effect of discharging the interest on the one hand and of appropriating the payment on the other. Such a transaction is outside the Explanation. Hence, appropriations made by a

debtor as part of a settlement are not liable to be reopened under Expl. I to S. 8. O. S. A. No. 17 of 1948 (Mad); C. M. A. No. 180 of 1950 (Mad.) and S. A. No. 2115 of 1947 (Mad.), Approved; Case Law Ref. (Paras 6, 8)

C. Rama Rao, for Appellant; U. Sethumadhava Rao and N. Ramamohan Rao, for Respondent.

REFERENCES: Courtwise/Chronological/ Paras

('40) 1940-2 Mad LJ 758: (AIR 1940 Mad 940) 5
('41) ILR (1941) Mad 57: 1940-2 Mad LJ 648: (AIR 1941 Mad 107) 5
('41) 1941-1 Mad LJ 9: (AIR 1941 Mad 403) 5
('41) 1941-1 Mad LJ 316: (AIR 1941 Mad 479) 6, 7
('41) 1941-1 Mad LJ 295: (AIR 1941 Mad 571) 5
('42) 1942-2 Mad LJ 592: (AIR 1943 Mad 5) 6
('46) 1946-1 Mad LJ 272: (AIR 1946 Mad 380) 5
('47) S. A. No. 2115 of 1947 (Mad) 1, 8
('48) 1948-1 Mad LJ 441: (AIR 1948 Mad 434) 5, 8
('48) O. S. A. No. 17 of 1948 (Mad) 1, 8
('50) C M A 180 of 1950 (Mad) 1, 8
(1897) AC 286: (66 LJ P 86) 5
(1898) 2 Ch D 28: (67 LJ Ch 337) 4
(1584) 3 Co Rep 7a: 76 ER 637 4
(1905) 1 KB 715: (74 LJ KB 413) 5
(1816) 1 Mer 572: 35 ER 781 5

ORDER OF REFERENCE

RAJAMANNAR C. J.: The question raised in this appeal is of considerable importance and relates to the construction of Expl. I to S. 8 of Madras Act 4 of 1938 recently introduced by Act 23 of 1948. Our attention has been drawn to an unreported decision of a Division Bench in O. S. A. No. 17 of 1948, in which the learned Judges took the view that this explanation would not affect adjustments and settlements already made between creditor and debtor. This decision has since been followed by a learned Judge sitting single in S. A. No. 2115 of 1947 and by another Division Bench in C. M. A. No. 180 of 1950. We are inclined to think that the learned Judges who decided O. S. A. No. 17 of 1948 have not attached sufficient importance to the word "expressly" which occurs in the explanation in arriving at their conclusion. In the appeal now before us Panchapakesa Aiyar J. has taken a contrary view. We think it desirable that there should be an authoritative ruling as to the interpretation of this new provision. The appeal will be posted before a Full Bench of three Judges.

OPINION OF THE FULL BENCH.

VENKATARAMA AIYAR J.: This appeal has been referred for the decision of a Full Bench as it raises a question of considerable importance on the construction of Expl. (I) to S. 8, Madras Agriculturists' Relief Act, 4 of 1938, on which there is a conflict of judicial opinion. The facts are that on 12-11-1921 the respondent borrowed a sum of Rs. 2,000 from one Lakshminarayana Sastri and executed a promissory note therefor (Ex. D-1). Nine payments were made towards this promissory note and endorsed thereon. We are concerned in this appeal with five of them. The endorsements relating to them have been marked as Exs. D. 1(e) to D. 1(j) & they state that the payments were made "towards principal and interest". On 14-7-1929 there was a settlement of accounts & after giving credit for the payments made, the balance found due was Rs. 1658 and for this amount a fresh promissory note Ex. D. 2 was executed. The appellant is an endorsee of this promissory note. The respondent filed O. P. No. 23 of 1943 on the file of the Sub-Court, Rajahmundry, for declaring the amount payable under the promissory note after scaling the debt under the provisions of the Act. Several contentions were raised, but only one of them is now material & that is as to how the five payments under Exs. D. 1(e) to D. 1(j) should be dealt with. The respondent claimed that being open payments they were liable to be appropriated towards the principal, while the appellant contended that those payments had been appropriated towards interest at the settlement which resulted in the execution of the promissory note Ex. D. 2 and that that appropriation could not be reopened. The Courts below held that though the payments under Exs. D. 1(e) to D. 1(j) were open payments at the time when they were made, the debtor had appropriated them towards interest at the time of Ex. D. 2. and that such appropriation could not be reopened. Against that decision the respondent preferred C. M. S. A. No. 150 of 1947 on the file of this court & while that was pending Expl. (I) to S. 8 of the Act came to be enacted by the Madras Act 23 of 1948. That Explanation is as follows:

> "In determining the amount repayable by a debtor under this section every payment made by him shall be credited towards the principal, unless he has expressly stated in writing that such payment shall be in reduction of interest."

(3) Panchapakesa Aiyar J. who heard the appeal held that the payments in question should be appropriated towards the principal, as the settlement of accounts and the execution of the promissory note did not amount to an express statement by the debtor that they should be appropriated towards interest as required by the new explanation. Against this judgment, the creditor has preferred this appeal under the Letters Patent. The point for decision in this appeal is whether on a true construction of the Explanation, appropriations made by the debtor as part of a settlement could be reopened and the payments reappropriated towards the principal.

(4) In an old English case known as — 'Heydon's case' (1584) 3 Co. Rep. 7a: 76 E. R. 637, Lord Coke observed that to arrive at the real meaning of a Statute it was necessary to consider

> "(1) what was the law before the Act was passed; (2) what was the mischief or defect for which the law had not provided; (3) what remedy Parliament has appointed; and (4) the reason of the remedy."

In — 'Mayfair Property Co., In re, Bartlett v. Mayfair Property Co.', (1898) 2 Ch. D. 28, Lindley M. R. stated:

> "In order properly to interpret any statute it is as, necessary, now, as it was when Lord Coke reported 'Heydon's case,' to consider how the law stood when the statute to be construed was passed, what the mischief was for which the old law did not provide, and the remedy provided by the statute to cure that mischief."

Following these principles, it is necessary to consider what changes were effected in the general law relating to appropriation of payments by a debtor, by the Madras Agriculturists' Relief Act 4 of 1938; what led to the further amendment in 1948; and what its precise effect is.

(5) The principles governing appropriation of payments made by a debtor are under the general law well settled. When a debtor makes a payment, he has a right to have it appropriated in

such manner as he decides and if the creditor accepts the payment, he is bound to make the appropriation in accordance with the directions of the debtor. This is what is known in England as the rule in 'Clayton's case' (1816) 1 Mer. 572: 35 E. R. 781 and it is embodied in S. 59, Contract Act. But when the debtor has not himself made any appropriation, that right devolves on the creditor who can exercise it at any time. vide 'Cory Bros. & Co. v. Owners of the Turkish Steamship 'Mecca', (1897) A. C. 286; and even at the time of the trial: Vide — 'Seymore v. Pickett', (1905) 1 K. B. 715. That is S. 60, Contract Act. It is only when there is no appropriation either by the debtor or the creditor that the Court appropriates the payments as provided in S. 61, Contract Act. That was the law in force at the time when the Madras Agriculturists' Relief Act 4 of 1938 was enacted. That Act introduced a substantial change in the right of a creditor to make an appropriation under S. 60, Contract Act, if there had been no appropriation by the debtor. Section 8(1) of the Act provides that all interest outstanding on 1-10-1937 shall be deemed to have been discharged. On this, the question arose whether payments which had remained unappropriated either by the debtor under S. 59 or by the creditor under S. 60 prior to 1-10-1937 could thereafter be appropriated by the creditor towards interest. But for the Act, they could have been. But it was held that as on 1-10-1937 all arrears of interest stood discharged, it was not open to the creditor thereafter to exercise his right of appropriation and that all such payments should be appropriated only to the principal: Vide — 'Duraiswami Aiyanger v. Raghavachariar', ILR (1941) Mad 57: (1940) 2 Mad L. J. 648. It was further held that payments made generally towards the debt or "towards principal and interest" were open payments and were liable on the above principle to be appropriated towards the principal after 1-10-1937: Vide — 'Veerraju v. Rayanimi Dora Garu', (1940) 2 Mad L. J. 758 and — 'Venkateswarlu v. Narayanaraju', (1946) 1 Mad L. J. 272. These authorities were understood as settling the law on the subject and had been uniformly followed, until we come to the decision in — 'Duraiswami Mudaliar v. Md. Amiruddin', (1948) 1 Mad L. J. 441. There, a sum of Rs. 5400 was paid "in part payment of a decree debt in C. S. No. 500 of 1930" and it was held by Gentle C. J. and by Bell J. that the payment was liable to be appropriated first towards the interest due under the decree and then to the principal. The reason for the decision was thus stated by the Chief Justice:

> "The principle of law which always has been observed and recognised is that when a payment is made in respect of principal and interest, there is an inference that the payment is ordinarily first allocated towards interest and thereafter any balance in respect of principal. That was recognised in the decisions under the Madras Agriculturists' Relief Act, 1938 in — 'Ramaswami Aiyar v. Ramayya Sastrigal', (1941) 1 Mad L. J. 295 and in — 'Venkateswara Iyer v. Ramaswami Iyer', (1941) 1 Mad L. J. 9. In my view, the recognised and acknowledged principle regarding the utilisation of a payment which is made in respect of principal and interest has in no way been interfered with by any provision in the Madras Agriculturists' Relief Act, 1938."

In the two decisions referred to in the judgment, there had in fact been appropriation of the payments before the Act came into force. The larger principle laid down in this decision was that when there was no specific appropriation by either the debtor or the creditor, an inference of appropriation would arise in law and that therefore the payments could not be reappropriated towards principal under S. 8(1) of the Act. This of course was a reversal of the long course of authorities which had held that unless there was specific appropriation, the payments should be held to be open and that such payments should be appropriated towards principal as by the operation of S. 8 (1) there would be no interest outstanding. The Legislature then intervened and enacted Expl. I to S. 8 by the Amendment Act 23 of 1948. The substance of that Explanation is that payments made by a debtor could be appropriated towards interest only if he had stated expressly in writing that they should be so appropriated. The object of the amendment was to take away the right of the creditor to appropriate payments towards interest unilaterally as he would be entitled to under S. 60, Contract Act; to nullify the effect of the decision in — 'Doraiswami Mudaliar v. Md. Amiruddin', 1948-1 Mad LJ 441 and to give legislative recognition to a principle which prior thereto rested on a course of judicial decisions. Thus far, the scope of the explanation is clear and intelligible.

(6) The question now is, does it extend further and have the effect of annulling appropriations made, not by the creditor unilaterally, but by the debtor himself as part of a settlement. Before the amendment, it had been held in a series of cases that where accounts between the parties had been settled and a fresh document executed there was appropriation by the debtor and that such appropriation could not be reopened under the provisions of Act 4 of 1938. In — 'Venkayyamma v. Ramakotayya', 1941-1 Mad L. J. 316 the debtor executed a promissory note on 23-8-1931 for Rs. 259-9-6. Towards this note he paid Rs. 150 on 9-10-1932 without expressly appropriating it either towards principal or interest. On 17-8-1934 there was a settlement of accounts under which after giving credit for Rs. 150 with counter interest the balance was struck at Rs. 162-10-0, and for that a promissory note was executed on 17-8-1934. One of the questions raised was whether the payment of Rs. 150 on 9-10-1932 which was an open payment when made should under the Act be appropriated towards the principal. It was held by Wadsworth and Patanjali Sastri JJ. that there was an appropriation of the payment by the debtor on 17-8-1934 and that it could not be reopened. In — 'Rangareddi v. Venkatareddi', 1942-2 Mad L. J. 592 there was a mortgage in January 1922 towards which two payments had been made. On 29-1-1934 the accounts were settled and a fresh mortgage was executed. In holding that the payments made under the mortgage of 1922 could not be treated as open and unappropriated, the Court observed:

> "When these two payments were adjusted to the debt in order to calculate the amount for which the later document was executed, it could no longer be contended that they were unappropriated."

The point for decision is whether by the Explanation the Legislature intended to alter the law as laid down in these decisions. An examination of the scheme of S. 8 does not support the contention that such alteration was intended. Section 8(1) enacts that "all interest outstanding" on 1-10 1937 shall be deemed to be discharged. These words presuppose that interest as such remains outstanding and payable on that date and it is that outstanding interest that is discharged by the operation of the statute. If in fact there was no interest payable on that date S. 8(1) would

have no application. Likewise, when the explanation provides that the payments shall be credited towards principal, it presupposes that those payments are still open and unappropriated. In other words, for the Explanation to apply there must be on the one hand arrears of interest outstanding and payable and on the other payments, open and unappropriated and the Explanation provides how in that contingency the payments are to be appropriated. Where there has been in fact a settlement of accounts and a fresh document executed by the debtor, that must necessarily have the effect of discharging the interest on the one hand and of appropriating the payment on the other. Such a transaction would therefore seem to be outside the Explanation.

(7) It is argued for the respondent that Ex. D 2 does not satisfy the requirements of the Explanation inasmuch as it does not expressly appropriate the payments towards interest and that it should therefore be disregarded and that if Ex. D. 2 is disregarded, we are thrown back on the original payments which, being open payments, should be appropriated towards principal. Ex. D. 1 is for Rs. 2000 and after giving credit for the payments made towards it, the balance struck is Rs. 1658 and that is the principal under Ex. D. 2. As the amount under Ex. D. 2 is less than the principal of Ex. D. 1, the whole of it must represent the balance of principal due under Ex. D. 1 and that means that the payments had been appropriated in discharge of the entire interest due on Ex. D. 1 and also a part of the principal. Clearly, therefore, there is appropriation towards interest: Vide — 'Venkayamma v. Ramakotayya', 1941-1 Mad L. J. 316. The contention of the respondent is that the Explanation requires something more than a writing signed by the debtor from which an appropriation could be inferred, that the document should expressly state that the payments were to be appropriated towards interest and the appropriation involved in Ex. D. 2 is not saved by the explanation. But, as already mentioned, the explanation contemplates a stage when there are open payments, remaining to be appropriated and appropriations being made in the process of scaling the debt in accordance with the provisions of the Act. But where the payments did not exist as payments on 1-10-1937, but had become merged in a settlement entered into prior thereto, the Explanation would be inapplicable.

(8) This question has also been considered in a number of cases which have come up before this Court subsequent to the decision of Panchapakesa Aiyar J. now under appeal. In O. S. A. No. 17 of 1948 Horwill and Raghava Rao JJ. held that the true scope of Expl. I was only to nullify the decision in — 'Duraiswami Mudaliar v. Md. Anwaruddin', 1948-1 Mad L. J. 441 and that it had not the effect of overruling the line for authorities which had held that settlement made by parties involving appropriation of payments could not be reopened. This decision was followed by Govinda Menon & Ramaswami JJ. in C. M. A. No. 180 of 1950 and by Subba Rao J. in S. A. No. 2115 of 1947. We agree with the views expressed in these decisions and do not find sufficient reason for upsetting the construction which had been put upon the explanation in a long course of decisions. We are accordingly of opinion that appropriations made by a debtor as part of a settlement are not liable to be reopened under Expl. I to S. 8.

(9) In the result, this appeal is allowed and the decree of the Courts below are restored with costs throughout.

A/V.S.B.

Appeal allowed.

A. I. R. 1953 MADRAS 461 (Vol. 40, C. N. 175)

P. V. RAJAMANNAR C. J. AND VENKATARAMA AIYAR J.

K. Indira Bai, Appellant v. R. Venkata Sivaprasada Rao, Respondent.

O. S. Appeal No. 2 of 1949, D/- 10-8-1951.

(a) Succession Act (1925), S. 283(1)(b) — "Due execution" — Burden of proof — Suit for grant of letters of administration with will attached — Burden is on plaintiff to prove sound disposing state of testator's mind — Onus of establishing coercion and undue influence lies heavily on defendant — (Evidence Act (1872), Ss. 101 to 103). (Para 7)

Anno: Succession Act, S. 283 N. 8; Evidence Act, Ss. 101 to 103 N. 52.

(b) Succession Act (1925), S. 59 — Capacity to execute will — (Hindu Law — Will).

The rules of Hindu law only curtail the powers of an undivided coparcener to affect by will joint family property and do not take away his capacity to make a will which he has under S. 59. (Para 14)

Anno: Succession Act, S. 59 N. 3.

(c) Hindu Law — Will — Validity.

Where a testator dies a divided member, the will would be operative in respect of his undivided share and the fact that at the time of the execution of the will he was not separate would not be material. (Paras 14 and 15)

G. Chandrashekhara Sastry and R. Venkata Rao, for Appellant; P. Ramachandra Reddy, for Respondent.

REFERENCES: Courtwise/Chronological/ Paras

('27) 50 Mad 508: (AIR 1927 PC 139) 14
('07) 29 All 82: (3 All LJ 747) 14
('74-75) 8 Mad HCR 6 14
('85) 8 Mad 89 14
('15) 38 Mad 369: (AIR 1915 Mad 1077) 14
('38) ILR (1938) Mad 315: (AIR 1938 Mad 390) 16
('49) 1949-2 Mad LJ 268: (AIR 1951 Mad 561) 17

RAJAMANNAR C. J.: This is an appeal against the judgment of Yahya Ali. J. dismissing a suit brought by the appellant for grant of letters of administration with the will of the deceased K. V. Balakrishnamurthy annexed. She is the widow of the testator. The caveator, the defendant in the suit and the respondent herein is the uterine brother of the deceased. The appellant alleged that her husband Balakrishnamurthi duly executed on 4-8-1947 the will in respect of which letters of administration were sought. He died on 6-8-1947.

The defendant pleaded that when the will was executed by him Balakrishnamurthy was not in a sound and disposing state of mind and in any event the will was executed under coercion and undue influence exercised on the testator by his father-in-law, one Dr. G. Venkatarao. In addition to these pleas which are strictly germane to a testamentary suit, the defendant also pleaded that the deceased was an undivided member of a joint family along

with the defendant when he executed the Will and when he died and that therefore it was not valid and binding as the deceased had no power to dispose of joint family properties. The following issues were framed on the pleadings.

1 Was the Will dated 4-8-1947 executed by late Kathirisetti Venkata Balakrishnamurthi while in a sound disposing state of mind?
2. Was the Will, dated 4-8-1947, executed by late K. V. Balakrishnamurthi under coercion and undue influence exercised by his father-in-law?
3. Was the deceased not divided in status from the other members of his family at the time when he executed the will and when he died?

Though a determination of the third issue was not necessary for the grant of the relief prayed for by the plaintiff, yet both the parties went to trial on the issue and the learned Judge has given his finding on that issue as well.

(2) The learned Judge found in favour of the plaintiff on both issues 1 and 2. Ordinarily, on these findings, the suit should have been decreed. But the learned Judge found against the plaintiff on issue 3 on the ground that the deceased was not divided in status from the defendant at the time when he executed the will and therefore the will was not valid and binding on the defendant. In the result, he dismissed the suit, though the learned Judge felt constrained to observe that the result was by no means satisfactory. The plaintiff appeals against the dismissal of her suit.

(3) The learned counsel for the respondent challenged the findings of fact arrived at by the learned trial Judge and sought to support the dismissal of the suit on the grounds on which the trial Judge had held against him. The appellant's counsel besides supporting the findings of the learned Judge on the facts attacked the correctness of the learned Judge's finding on issue 3. It is convenient first to take up issues 1 and 2 together.

(4) The deceased Balakrishnamurthi was the son of one Venkatanarasayya by his second wife Kesavanarayanamma. By his first wife he had a son and a daughter. The daughter was married to one Dr. G. Venkatarao and the plaintiff is their daughter. She was married to Balakrishnamurthi on 22-11-1945. Venkatanarayya died in 1934 leaving behind him a will dated 5-1-1934. He bequeathed a third share in the family properties to his second wife, the mother of the deceased and the defendant.

(5) The deceased Balakrishnamurthi was a Bachelor of Engineering and was employed at the time of his death as Supervisor in the Sanitary Engineer's Office at Madras, after having served in various other places. He was transferred to Madras in July 1947 but was unable to secure a house and was therefore compelled to put up with a friend. His wife was staying with her father Venkatarao at Chicacole (Srikakulam). He appears to have been given a quinine injection, it is not clear for what disease, and he developed an abscess at the place where he was injected. Unfortunately tetanus also set in; symptoms became very acute on 1-8-1947 and he was therefore admitted as an inpatient into the General Hospital, Madras on that day. In spite of large doses of ante-tetanus serum administered to him, he did not improve. He had lockjaw and abdominal rigidity on 2nd August. He was given paraldehyde and chloral bromide by the rectum. In spite of the treatment and though he appears to have been in a better condition on the 5th, he never rallied and finally he expired at 11-30 a.m. on 6-8-1947.

(6) The Will in dispute was executed on 4-8-1947 at the General Hospital. It was a short Will and its operative portion runs as follows:

"I hereby declare my intention to get separated from brother Venkatasivaprasada Rao. I bequeath all my movable properties including cash and monies in banks, insurance policies, all immovable properties belonging to my share, out of love and affection to my wife Indira Bai absolutely.

I hereby authorise my wife to adopt any boy of her choice to perpetuate my line.

I reserve to myself the power to cancel this Will."

The Will is in the handwriting of an Advocate of this Court, Mr. M. S. Ramachandra Rao. It was attested by Major Reddi, Civil Assistant Surgeon, Government General Hospital on duty, K. Kesava Rao, Dy. Commercial Tax Officer, Madras, N. Prakasa Rao, House Surgeon, General Hospital, Madras and another advocate Mr. G. Balaparameshwari Rao. The will contains both the signature and the thumb impression of the testator. The signature and the thumb impression are not disputed and it was not alleged that there was no proper attestation. The defendant's case was that on account of the feeble physical state to which the testator was reduced at the material time, he was not in a sound disposing state of mind and it was also possible for his father-in-law G. Venkatarao to exercise coercion and undue influence on him to make him execute the Will.

(7) On behalf of the plaintiff the two advocates, namely, the writer and attestor, two of the other attestors Mr. K. Kesava Rao and Major Reddi and Dr. G. Venkata Rao, the father of the plaintiff, were examined, besides the plaintiff herself who gave evidence. On behalf of the defendant, one of the attestors Dr. Prakasa Rao and one Narasamma who is alleged to have been the testator the day next after the execution of the Will along with the testator's mother and Mr. Ramamurthi (handwriting expert) were examined in Court and the evidence of the mother of the deceased and one Mr. Prabhakara Rao Nayudu, then Collector and Magistrate of Guntur was taken on commission.

The learned counsel for the respondent did not impeach the veracity of the two Advocates nor of Major Reddi, though he pointed out discrepancies between their version as to what happened on the 4th and the version as deposed to by Kesava Rao and Venkata Rao. So far as the issue relating to sound disposing state of mind is concerned, the onus will be on the plaintiff, while it is equally clear that the onus of establishing coercion and undue influence would lie heavily on the defendant.

(8) We have no hesitation in concurring in the finding of the learned trial Judge that the will was executed by Balakrishnamurthi while in a sound disposing state of mind. We are equally in agreement with his finding on the plea of undue influence and coercion. The learned counsel did not keep the two questions as entirely separate in canvassing the evidence.

The learned Judge had the great advantage of watching the witnesses, such of those who were examined in court, while giving evidence and noting their demeanour and we see no reason not to accept the finding arrived at by him on a consideration of the entire evidence. (His Lordship upheld the findings of the lower Court on the first two issues after discussing the evidence and proceeded:)

(9-12) On the findings on the first two issues the plaintiff appellant would be entitled to the relief for which she prayed, namely, the grant of Letters of Administration with the will annexed. But the third issue was framed on the plea raised by the defendant and the parties went to trial on that. The suit itself has been dismissed, because the learned Judge found against the plaintiff on that issue. We have thought it therefore desirable to deal with it also. For the disposal of this issue, the following facts may be taken as undisputed.

(13) The testator and the defendant were members of an undivided family till 4-8-1947. Though an attempt was made at the trial to contend that according to the will of the testator's father made in 1934, there was a division in status between the testator and the defendant this contention was not pressed before us by the appellant's counsel. On the 4th sometime before the execution of the will, the testator signed a telegraph form Ex. P. 3. The telegram was addressed to his brother at Srikakulam and ran as follows:

"Hereby declaring my intention separating from you am executing will."

The genuineness of the signature on the form was disputed by the defendant before the trial Judge, but before us the learned counsel for the defendant accepted the finding of the learned Judge that the testator did sign the telegraph form. The form itself shows that it was handed in at the Mount Road telegraph office at 8-20 p.m. and that it was signalled from that office at 8-32 p.m. It was an express telegram. In the ordinary course, the telegram should have been delivered at the defendant's address on the 5th. The defendant was given notice to produce the telegram received by him, but he did not produce it. Nor did he go into the box and depose if and when he received it. The will was executed at about 7-30 p.m. The testator died on the 6th morning.

On these facts it was contended on behalf of the respondent that though telegraph form might have been signed by the testator before the execution of the will, it was not handed over at the telegraph office till after the execution. The testator had therefore no testamentary capacity at the time when he executed the will, because the intention to separate must be deemed to have been communicated to the defendant at the earliest only when the telegram was handed in at the telegraph office. Mr. Narasaraju for the respondent went further and argued that even the handing in of the telegram was not sufficient, it must be proved when the telegram actually reached the defendant, because it was only then that the intention could be said to have been really communicated.

The learned Judge did not accept the contention on behalf of the plaintiff that handing over the telegram to a messenger which was before the execution of the will amounted to communication and held that the testator must be deemed to have become divided from his brother only after the telegram had been handed in at the telegraph office. As this was after the execution of the will, the learned Judge held that the testator did not possess testamentary capacity at the time of the execution of the will. He therefore felt constrained to hold that the will was invalid and dismissed the suit.

(14) With due respect to the learned Judge we have no hesitation in holding that he was in error in his conclusion. The learned Judge was evidently misled by the use of the words "testamentary capacity". He apparently proceeded on the assumption that an undivided Hindu coparcener had no testamentary capacity. This of course is wrong. Section 59 of the Succession Act declares that every person of sound mind not being a minor may dispose of his property by will. An undivided coparcener who is not under any personal disability and who is in a sound disposing state of mind has the capacity to execute a will.

The rules of Hindu law only curtail the powers of the testator to affect by will joint family property and do not take away the capacity of the coparcener to make a will. Obviously an undivided coparcener can validly dispose of his separate property. His status as an undivided coparcener does not prevent him from doing so. Only a member of an undivided family cannot validly bequeath his undivided coparcenary interest in the family properties. It is not a lack of capacity; it is a lack of power to bequeath. In other words, the will cannot affect joint family property. The reason is succinctly stated in a very early Madras case, — 'Vitla Butten v. Yamenamma', 8 Mad H C R 6 thus,

> "At the moment of death the right by survivorship is at conflict with the right by devise. Then the title by survivorship, being the prior title, takes precedence to the exclusion of that by devise."

A Will speaks only from the date of the death of the testator. But on the death of an undivided member of a coparcenary his interest survives to the other member or members with the result that the will cannot operate on such interest. In this view the important question to be determined is not whether a testator was or was not an undivided coparcener at the time of the execution of the will but whether he died a divided or an undivided member of a joint family. If at the time of his death he was undivided member, the will will not have any effect on his undivided share of joint family property, but if he was divided then the will would be valid, and the disposition of his divided share would be valid.

The case in — 'Shib Sabitri Prasad v. Collector of Meerut', 29 All 82 is directly in point. In that case one Nanakchand executed a will on 20-1-1885. He died on 16-10-1899. It was admitted that Nanakchand died separate from the rest of his family. It was contended that the will was invalid because he was not divided at the time of the execution of the will. The learned Judges did not accept the contention. Assuming that he was joint at the time of the will, as it was admitted that he was separate when he died, they held that the will must be construed as

> "Speaking and taking effect with reference to the state of things in existence immediately

before the testator's death, when admittedly he had separated from the members of his family."

In — 'Bodi v. Venkataswami Naidu', 38 Mad 369, a Hindu, who had no male issue or an undivided coparcener along with him, executed a will which devised ancestral properties to which he was at that time absolutely entitled as the sole surviving coparcener. But subsequent to the execution of the will, the testator had a son born to him. But the son died shortly after his birth, so that the testator had no son alive at the time of his death. The question was whether the will had been revoked by reason of the death of a son after the execution of a will. It was held that it was not. In discussing the law on the point the learned Judges start with the basic principle that a will is to be understood as speaking at the death of a testator and its validity is to be determined accordingly. They also take it as well settled that even property which a person does not possess at the time of the will may be validly bequeathed. They then say:

"Survivorship has the effect of rendering a will invalid with respect to property which the testator could not dispose of at the time of his death. All other dispositions made by him are valid."

This principle is also illustrated by cases in which it has been held that where a sole surviving coparcener makes a will of ancestral property and subsequently makes an adoption, the will becomes inoperative and by cases in which he has been held that where subsequent to the will a son is born who survives the testator or when a posthumous son is born, the will becomes inoperative so far as joint family property is concerned. See — 'Krishnamurthi v. Krishnamurthi', 50 Mad 508 (PC) and — 'Minakshi v. Virappa', 8 Mad 89.

(15) It is therefore clear that if the testator in this case can be said to have died a divided member, then the will would certainly be operative in respect of the divided share of the testator. The fact that at the time of the execution of the will he was not separate would not be material. The learned Judge erred in thinking that the testator should have been a divided member even at the time of the execution of the will.

(16) The learned Judge held that the testator must be deemed to have become divided in status from 8-30 p. m. on the 4th August that is to say, before his death. Mr. Narasaraju for the respondent contended that it is only when the telegram actually reached the defendant that the severance can be held to have taken place and as there was no proof when it reached him, it has not been established that the testator died separate from the defendant. Mr. Narasaraju was unable to cite any authority in support of his contention. On the other hand, the ruling in — 'Narayana Rao v. Purushotham Rao', ILR (1938) Mad 315 is directly against him.

In that case S and his son were members of a joint Hindu family. On 3-8-1926 S sent to his son a registered notice of his intention to become divided from him. On 4-8-1926 he executed a Will disposing of his share in the joint family property in favour of a stranger and died on 5-8-1926. The notice was in fact received by the son on 9-8-1926. i.e., after the death of S. It was contended that the division in status arose only on the 9th when the son received the notice and as S had died on the 5th, the estate had passed by survivorship to his son and the will was therefore not valid. It was held by Varadachariar and King JJ. that the issue of the notice was sufficient to prevent the operation of the principle of survivorship and the will was valid. Varadachariar J. who delivered the judgment of the Bench observed at page 318:

"It is true that the authorities lay down generally that the communication of the intention to become divided to other coparceners is necessary, but none of them lays down that the severance in status does not take place till after such communication has been received by the other coparceners."

In that case the testator was certainly justified in expecting that in the ordinary course his notice would have been delivered to his son on the 4th or at least on the 5th and the testator died on the 5th. In these circumstances it was held that the issue of the notice was sufficient to bring about a separation in status. In the case before us the telegram was despatched on the 4th evening and in the ordinary course it must have been delivered on the 5th and the testator died only on the 6th morning.

(17) In this view, it is unnecessary to call in aid the dictum of Viswanatha Sastri J. in — 'Katheesumma v. Beechu', 1949-2 Mad L J 268 that once there is a clear unequivocal and unambiguous declaration of an intention to become divided on the part of a member of a joint Hindu family, there would be forthwith a severance in status and the despatch to or the receipt by the other member of the family of a communication or notice showing the intention to divide on his part is not essential nor its absence fatal to a severance in status. The testator in this case must be held to have died divided from his brother (the defendant) and therefore the will was valid and operative in respect of his share of the joint family property.

(18) In the result the appeal is allowed and the suit decreed with costs of the trial and the appeal. Advocate's fee in the trial Court Rs. 1000, here in appeal Rs. 750.

A/V.R.B. Appeal allowed.

A. I. R. 1953 MADRAS 464 (Vol. 40, C. N. 176)

GOVINDA MENON J.

Nalabala Chalamiah, Petitioner v. Nalabala Rubiah and another, Respondents.

Civil Revn. Petn. No. 1482 of 1951, D/- 16-10-1952.

Civil P. C. (1908), O. 9, R. 13 — "Upon such terms as to costs".

Order 9, R. 13 gives ample discretion to the Court in setting aside an 'ex parte' decree to impose such reasonable terms as it deems fit. The direction to deposit the costs of the suit is not unreasonable or punitive, even though the party had sufficient grounds for not appearing on the date on which the suit was disposed of. **(Para 1)**

Anno: C.P.C., O. 9 R. 13 N. 22.

T. S. Narasinga Rao and M. Balachandrudu, for Petitioner; O. Chinnappa Reddi, P. Ramakrishna and B. Prasada Rao, for Respondents.

JUDGMENT: This is an application by a defendant in whose favour an 'ex parte' decree has been set aside on condition that the costs of the suit are deposited before 1-10-1951. Mr. T. S. Narasinga Rao argues that condition imposed is too onerous especially in view of the finding of the learned Judge that the defendant had sufficient grounds for not appearing on the date on which the suit was disposed of. Even so O. 9, R. 13 gives ample discretion to the Court in setting aside an 'ex parte' decree to impose such reasonable terms as the Court deems fit. I cannot say that the direction to deposit the costs of the suit is unreasonable or punitive. The civil revision petition is therefore dismissed with costs.

(2) As a matter of grace the time granted to the petitioner to deposit the costs is extended till 15-11-1952. If that is done the 'ex parte' decree will be set aside and the suit tried on the merits. In default the 'ex parte' decree will stand confirmed.

B/G.M.J. Revision petition dismissed.

A.I.R. 1953 MADRAS 465 (Vol. 40, C. N. 177)

RAMASWAMI J.

L. Venkataswamy Chetty, Petitioner v. V. A. Ganapathia Pillai and others, Respondents.

Civil Revn. Petn. No. 1715 of 1949, D/- 11-2-1952.

(a) Provincial Insolvency Act (1920), S. 75(4) — Period of 30 days — Starting point — (Words and Phrases — Date of order).

A person can become aggrieved only when the act by reason of which the grievance arises comes to his knowledge. Hence in the case of parties to the proceeding the 30 days would be from the date of the order of adjudication because they would have known of its pronouncement but in the case of third parties the starting point would be the date of Gazette notification which would fix him with knowledge of the order passed by the Court. AIR 1930 Mad 490, Rel. on. (Para 11)

Anno: Pro. Insolvency Act, S. 75 N. 12.

(b) Limitation Act (1908), S. 5 — Provincial Insolvency Act (1920), Ss. 75 and 78.

Where a third person is aggrieved by an order of adjudication the appellate Court should consider whether a case had been made out for the application of S. 5 of the Limitation Act. Case law Rel. on. (Para 13)

Anno: Lim. Act, S. 5 N. 3; Pro. Insolvency Act, S. 75 N. 12.

(c) Limitation Act (1908), S. 12 — Appeal under S. 75 of Provincial Insolvency Act — Provincial Insolvency Act (1920), Ss. 75 and 78.

Section 12 of the Limitation Act has been clearly made applicable to an appeal under S. 75 of the Provincial Insolvency Act by the provisions of S. 78 and the time taken for getting copies can be excluded. (Para 12)

Anno: Lim. Act, S. 12 N. 2; Pro. Insolvency Act, S. 75 N. 12.

P. V. Viswanatha Iyer, for Petitioner; S. Ramachandra Iyer and K. R. Rama Iyer, for Respondents.

REFERENCES: Courtwise/Chronological/ Paras

('43) 1943-2 Mad LJ 160: (AIR 1943 PC 130) 13
('30) 53 Mad 491: (AIR 1930 Mad 490) 11
(1879) 10 Ch D 3: (48 LJ BK 17) 13
(1879) 12 Ch D 308: (48 LJ BK 118) 13
(1882) 22 Ch D 436: (48 LT 405) 13

ORDER: This is a civil revision petition filed against the order made by the learned District Judge, Tirunelveli, in C.M.A. No. 11 of 1949.

(2) The facts are: The petitioner before us L. Venkataswami Chetty had dealings with Ganapathi Pillai who has been adjudicated an insolvent and on the foot of the transactions between them he filed a suit in the Court of the District Munsif of Coimbatore. He obtained an order for attachment before judgment and consequently a major portion of the articles mentioned in the inventory filed by Arunagiri Nadar (to whom reference will be made later) on 7-10-1948 had been attached and removed and came to be in the possession of this Venkataswami Chetty.

(3) In these circumstances Arunagiri Nadar filed a creditor petition against this Ganapati Pillai alleging that the latter had borrowed on five promissory notes and by means of a cheque a sum of Rs. 17,000/-, that the amount due to the said Arunagiri Nadar as on 30-6-1948 was Rs. 14625-7-3, that there was a demand in August 1948 and this Ganapathi Pillai stated that he could not pay his creditors, that this Ganapathi Pillai when the creditors sought him made himself unavailable & could not be got at though searched for several times in his house and shop and that in the meanwhile the petitioner herein Venkatasami Chetti had filed a suit against Ganapathi Pillai in the Coimbatore District Munsif's Court and attached before judgment the clothes in Ganapathi Pillai's shop.

(4) Ganapathi Pillai promptly filed a statement that it was true that this Venkataswami Chetti had obtained an order for attachment before judgment and had removed the clothes from his shop and that therefore he proposed to submit to an adjudication in order to safeguard the interests of all his creditors and that he was prepared to put all his assets and accounts in the hands of the Official Receiver except these attached & removed as aforesaid & that therefore he may be adjudged an insolvent as prayed for by Arunagiri Nadar and that all his assets be made to vest forthwith in the Official Receiver.

(5) The psychological moment at which this creditor-petition is filed and the prompt submission to adjudication with the request that the assets in the hands of Venkatasami Chetti should be vested in the Official Receiver bore all the impress of a collusive creditor-petition.

(6) On account of only one other person by name B. T. Subbiah Mudaliar being added as second respondent creditor as per order dated 19-11-1948 (the creditor petition itself was dated 24-9-1948) and that creditor though represented by a vakil not putting forward any contention as can be seen from the order of the learned Subordinate Judge who makes no reference to this creditor in his order at all, Arunagiri Nadar had a walk over and this Ganapathi Pillai was adjudicated an insolvent on 13-12-1948 and his assets were made to vest in the Official Receiver of Tinnevelly.

(7) On receiving notice from the Official Receiver to make available the assets in his hand this Venkatasami Chetti of Sukravarpet in Coimbatore ran to the District Judge of Tirunelveli and filed C. M. A. No. 11 of 1949 to set aside the order of adjudication on various grounds which do not concern us for the present here.

(8) The learned District Judge dismissed the appeal on the short ground that the order of adjudication was made on 13-12-1948 and that this Venkatasami Chetti had applied for a copy of the order on 24-1-1949 and received the copy on 18-2-1949 and filed the appeal on 21-3-1949 and that Venkatasami Chetty had not come to Court within 30 days from the date of the order of the adjudication and also the date of publication in the Gazette on 28-12-1948. Hence this civil revision petition.

(9) Section 75(4) of the Provincial Insolvency Act states that any person aggrieved by an order made by a subordinate Court may appeal to the District Court and the period of limitation for such appeal to the District Court shall be 30 days. Section 78(2) of the said Act states that the provisions of Ss. 5 and 12 of the Limitation Act shall apply to appeals and applications under this Act. Combining these two what will be the effect in regard to limitation in this case?

(10) In this case we have to consider three points, namely, what was the starting point of limitation for the 30 days, secondly, whether the time taken for getting copies can be excluded, and thirdly, whether S. 5 of the Limitation Act is applicable.

(11) Point 1: The starting point of limitation in this case can only be the Gazette notification of the adjudication which was on 28-12-1948 and cannot be the date of adjudication, viz., 13-12-1948. Section 75(4) itself is silent in regard to the starting point of limitation. But when we consider that a person can become aggrieved only when the act by reason of which the grievance arises comes to his knowledge, the better and more commonsensical view seems to be that in the case of parties to the proceeding the 30 days would be from the date of the order because they would have known of its pronouncement and in the case of third parties the starting point would be the date of Gazette notification which would fix him with knowledge of the order passed by the Court. The object of the Gazette notification is to notify the entire world of the adjudication of an insolvent which is a judgment 'in rem' so that all persons interested and aggrieved may come forward and take steps for establishing their rights or ventilating their grievances. There are observations supporting this view in — 'Swaminathan v. Lakshmanan', reported in 53 Mad 491. Otherwise parties affected by it will have no means of observing the order or acting in conformity with it or of appealing against it or otherwise setting it aside. Therefore the starting point of limitation in this case is the date of Gazette notification, viz., 28-12-1948.

(12) Point 2: Section 12 of the Limitation Act has been clearly made applicable to an appeal under S. 75 of the Provincial Insolvency Act by the provisions of S. 78 and in fact the lower Court itself has remarked that the appeal had been presented beyond the period of 30 days even excluding the period allowable for obtaining copy of the order. In this case the application for copy was made on 24-1-1949 and excluding the time taken for obtaining copies, the appeal filed on 21-2-1949 was certainly within 30 days of the date of the Gazette notification dated 28-12-1948.

(13) Point 3: But even assuming that the appeal had been filed beyond 30 days the learned District Judge was not justified in summarily dismissing the appeal but should have considered whether a case had been made out for the application of S. 5 of the Limitation Act. The point is concluded by authority. In — 'Mahomed Siddique Yousuf v. Official Assignee of Calcutta', (1943) 2 Mad LJ 160 (PC) their Lordships of the Privy Council have held, approving 'ex parte' Learoyd (1879) 10 Ch D 3 that in the case of such third parties

> "this appeal being the sole remedy is one which justice demands that the Courts should carefully protect; and, if an extension of time for appealing is reasonably required such extension should be granted 'ex debito justitiae' to use the words of James L. J. in 'ex parte' Tucker: 'In re Tucker', (1879) 12 Ch D 308.

Their Lordships further pointed out that though the time for appealing from an adjudication order under the Limitation Act is limited thereunder, a general power of extension of time is given by S. 5 of the Act and that such applications should not be rejected as belated but should be granted. The facts of this case are even stronger than the facts covered by the Privy Council decision and the decision in 'ex parte' Tucker: in re Tucker, (1879) 12 Ch D 308 is in point. There it was held that

> "a third person who is aggrieved by an adjudication of bankruptcy, by reason of the date of an act of bankruptcy on which the adjudication purports to be founded is after the expiration of the time limited for appealing, entitled, 'ex debito justitiae', to an extension of the time for appealing, if he applies promptly after he becomes aware of the date of the act of bankruptcy which affects his rights."

See also 'ex parte' Geisal: — 'In Re Stranger v. Stranger', reported in (1882) 22 Ch D 436.

(14) The order of the lower Court cannot be sustained as this was a case where first of all applying S. 12 of the Limitation Act and taking the starting of limitation as the date of Gazette notification, there is no default on the part of the appellant and his appeal is in time. Assuming that the date of starting point of limitation is the date of the order, applying S. 12 of the Limitation Act the lower Court should have 'ex debito justitiae' applied S. 5 of the Limitation Act.

(15) In this connection it is strongly pressed by the learned advocate for the respondent that an application should have been directed to be filed under S. 5 of the Limitation Act so that he might have been able to show that no case has been made out for excusing the delay and that the petitioner from the very beginning knew of the adjudication and that no case has been made out for extending 'ex debito justitiae' the appealing time. This is not a contention without substance. We have no materials before us to decide one way or the other.

(16) The proper course therefore is to set aside the order of the learned District Judge and direct the petitioner to file an application under S. 5 of the Limitation Act to come up

along with the appeal in regard to which the order of the lower Court is set aside and to direct the learned District Judge to hear both the matters together and dispose of them according to law. Ordered accordingly. The costs of this civil revision petition will abide by and be provided for in the revised order of the lower Court and the separate claims of these persons will be considered.

B/D.H. Order accordingly.

A.I.R. 1953 MADRAS 467 (Vol. 40, C. N. 178)

RAJAMANNAR C. J. AND VENKATARAMA AIYAR J.

A. Ananthalakshmi Ammal and another, Appellants v. The Indian Trades and Investments Ltd. and another, Respondents.

Original Side Appeals Nos. 120 of 1951 and 15 of 1952, D/- 4-4-1952, from judgment and order of Krishnaswami Nayudu J., in Appln. No. 2813 of 1950, D/- 14-11-1951.

(a) Companies Act (1913), S. 83B — Power to co-opt directors.

The power to co-opt directors does not come to an end only because an annual meeting is convened. The order of the Court directing that the annual meeting be convened for filling up vacancies has not the effect of extinguishing that power. (Para 7)

Anno: Companies Act, S. 83B N. 1.

(b) Companies Act (1913), S. 86I — Retirement of directors.

The directors who were due to retire at the annual meeting next to that held on previous occasion should be held to have vacated their office on the last date on which the annual meeting should have been held and in consequence they ceased to be directors after such last date. Case law rel. on. (Para 9)

(c) Companies Act (1913), S. 83B — Power to co-opt directors.

The power to co-opt a director might be exercised notwithstanding that the strength of the directorate has fallen below the minimum required and below the quorum prescribed by the Articles of Association. Case law Rel. on. (Paras 12, 13)

Anno: Companies Act, S. 83B N. 1.

(d) Companies Act (1913), S. 83B — Mala fide co-option.

If the co-option of a director is not made in the interests of the share-holders but for other purposes it cannot stand. (1867) 2 Ch 77 and (1873) 8 Ch 149, Rel. on. (Para 14)

Anno: Companies Act, S. 83B N. 1.

(e) Companies Act (1913), S. 76(3) — Powers of Court.

The decision on the validity of the co-option of a director is incidental to the exercise of the powers under S. 76(3). (Para 20)

Anno: Companies Act, S. 76 N. 1.

G. Vasantha Pai, for Appellants; V. Radhakrishnayya and V. Sambandamurthy, for Respondents.

REFERENCES: Courtwise/Chronological/ Paras

('31) 61 Mad LJ 724: (AIR 1932 Mad 100) 10
(1946) AC 459: (1946-1 All ER 586) 10
(1867) 2 Ch 77: (15 WR 27) 14
(1873) 8 Ch 149: (42 LJ Ch 83) 14
(1883) 23 Ch D 413: (49 LT 348) 12, 13
(1900) 2 Ch 272 12
(1901) 1 Ch 115: (70 LJ Ch 82) 12
(1911) 2 Ch 430: (81 LJ Ch 55) 13
(1914) 1 Ch 883: (83 LJ Ch 760) 9, 10
(1914) 2 Ch 506: (84 LJ Ch 28) 13
(1944) Ch 346: (113 LJ Ch 264) 10
(1889) 59 LT 291 13

VENKATARAMA AIYAR J.: The question raised in these appeals is whether the co-option of K. N. Narayana Iyer and K. C. Chandy as directors in a company called the Amalgamated Coffee Estates Ltd., is valid. This company was formed with the object of carrying on business in coffee, tea, cardamom and other commodities and was incorporated under the Indian Companies Act in 1944. The last annual meeting of the company was held on 31-1-1949. Art. 55 of the Articles of the company provides that a general meeting shall be held within 18 months from the date of its incorporation and thereafter once at least in every calendar year at such time (not being more than 15 months after the holding of the last preceding general meeting) and place as the directors may decide. In accordance with this provision the last day for holding the annual meeting would be 30-4-1950, but no meeting was held either on or before that date. Notices were issued by the management on 21-7-1950 for an annual meeting to be held on 6-8-1950. But this meeting, however, was cancelled on the ground that objections were taken to its legality. On 14-8-1950 one of the shareholders, Mrs. A. Ananthalakshmi Ammal filed an application under S. 76(3) of the Indian Companies Act, Appln. No. 2813 of 1950 for an order that the Court should call for a general meeting, and in the affidavit filed in support of that application it was alleged that no general body meeting had been called after 31-1-1949 that the directorate consisted of only three members, V. R. Veeramani, A. S. Padmanabhan and B. V. Raman while Art. 75 provided for a minimum of four directors; that the affairs of the company were being grossly mismanaged and that accordingly the Court should direct that a general body meeting should be convened for scrutinising the balance sheets, appointing auditors and electing "new directors in the vacancies caused".

There was also a prayer that a Commissioner should be appointed to convene the meeting and act as Chairman therefor. A similar application was filed by one of the debenture holders, Appln. No. 2813 of 1950 and therein Appln. No. 2826 of 1950 was made for an injunction restraining the management from co-opting any person as director. On 18-8-1950 an interim injunction was issued. On 21-8-1950 the management applied in Appln. No. 2954 of 1950 for cancelling interim injunction and all the four applications were heard together by Krishnaswami Nayudu J. who passed an order on 26-9-1950 that the annual meeting be called on 29-10-1950 for discussing the balance-sheet and profit and loss account, for "election of directors in the places vacant" and to consider the auditor's report, and that notices of the said meeting be issued in the names of the two directors, V. R. Veeramani and B. V. Raman. He also appointed an advocate, Mr. Sanjeevi Naidu as Commissioner to preside over the meeting. The injunction petition was dismissed on the ground that in view of the orders passed in Appln. Nos. 2813 of 1950 and 2814 of 1950 no orders were necessary. On 7-10-1950 notices were issued. for an annual meeting on 29-10-1950 in terms of the

order dated 26-9-1950. The notices also stated that

"two directors, A. S. Padhmanabhan and B. V. Raman retire. The vacancies created by their retirements have to be filled. Of the retiring directors Mr. B. V. Raman offers himself for re-election."

(2) On 9-10-1950 two of the directors, Veeramani and B. V. Raman passed a resolution co-opting K. N. Narayana Iyer as a director in the place of one Dakshinamurthi who had resigned on 18-6-1950. On 11-10-1950 V. R. Veeramani resigned his office as an elected director and was nominated by the managing agents as a director under Art. 82-A; and in the vacancy thus created K. C. Chandy was co-opted as a director. Both the co-options took place after the Court had passed an order on 26-9-1950 for holding the annual meeting on 29-10-1950 and after notices thereof had actually been issued. Thus on 29-10-1950 the position was that V. R. Veeramani had become a nominated director: two directors had to be elected in the place of Padmanabhan and B. V. Raman whose terms of office had expired; and K. N. Narayana Iyer and K. C. Chandy had been co-opted as directors.

(3) At the annual meeting held on 29-10-1950 when the subject of "election of directors in the places vacant was taken up disputes arose as to the number of vacancies which were available to be filled. On behalf of Mrs. Ananthalakshmi Ammal it was contended that the expression "places vacant" would include the maximum number of directors that could be elected under Art. 75 and that should be determined by the general body and that further the co-options of K. N. Narayana Iyer and K. C. Chandy were invalid. The management contended that the election should be limited to the two vacancies mentioned in the notice & that the co-options of Narayana Iyer and K. C. Chandy were valid. In this conflict of opinion it was decided to adjourn the meeting and obtain from the Court a clarification of the order dated 26-9-1950. Appln. No. 4025 of 1950 was then filed by Mrs. Ananthalakshmi Ammal for that purpose and on that Krishnaswami Nayudu J. passed an order on 3-11-1950 that apart from the two vacancies mentioned in the notice there was also a vacancy caused by the resignation of Dakshinamurthi on 18-6-1950 and that an election should be held to fill up that vacancy as well. On the question of the validity of the co-options he observed that it was unnecessary to go into the question in these proceedings.

(4) Against this order the management filed O. S. A. No. 103 of 1950, their contention being that as there was valid co-option in the place of Dakshinamurthi there were only two vacancies. Mrs. Ananthalakshmi Ammal filed O. S. A. No. 110 of 1950 claiming that V. R. Veeramani was the only director validly in office, that all the other places were vacant & that the shareholders had the right to fill the vacancies up to the maximum as provided under Art. 75. Both these appeals were disposed of by the judgment of this Court dated 9-2-1951. Therein it was held that for the purpose of election of directors "in the places vacant" as provided in the order dated 26-9-1950, it was necessary to determine the number of vacancies and that to decide that, it was necessary to decide whether the co-options were valid or not. The matter was accordingly remanded for decision on the validity of the co-options of K. N. Narayana Iyer and K. C. Chandy. There was also a direction that the Court might order, at its discretion, addition of parties for the purpose of a satisfactory disposal of the points in dispute.

(5) In pursuance of this order of remand, Appln. No. 2813 of 1950 and 2814 of 1950 came up for rehearing before Krishnaswami Nayudu J. The two directors, the validity of whose co-option was at issue, Narayana Iyer and K. C. Chandy, were also impleaded as parties. The whole case was reheard and on 14-11-1951 Krishnaswami Nayudu J. pronounced judgment upholding the co-option of K. N. Narayana Aiyar and rejecting that of K. C. Chandy. It is against this judgment that the present appeals have been brought. In O. S. A. No. 120 of 1951 Mrs. Ananthalakshmi Ammal contends that the co-option of K. N. Narayana Iyer on 9-10-1950 is invalid. In O. S. A. No. 15 of 1952 Mr. K. C. Chandy contends that this co-option on 11-10-1950 is valid. These are the questions that fall to be determined in these appeals.

(6) In O. S. A. No. 120 of 1951 Mr. Vasanta Pai, the learned advocate for the appellant contends that co-option of Narayana Iyer on 9-10-1950 was invalid because there was only one director who was entitled to act on that date and that the power to co-opt could not be exercised when there is no Board of directors competent to act under Art. 75; that in any event such a power could not be exercised after an annual meeting had been called; that at any rate on the facts of the present case such a power could not be exercised as the Court had ordered on 26-9-1950 that the shareholders should elect the directors in the vacancies at an annual meeting to be held on 29-10-1950 & that the resolution dated 9-10-1950 did not comply with the requirements of Art. 99 of the Articles of the company. It was further argued that even if the power to co-opt could be validly exercised on 9-10-1950 it was not in fact so exercised as the co-option was made not in the interests of the shareholders but of the management. The management controverts the soundness of these contentions.

(7) The position that the power to co-opt directors comes to an end when once an annual meeting is convened, is not sought to be supported by anything in the Companies Act or in the Articles of the company. Nor is any authority cited in support of it. We have no hesitation in rejecting it. Nor is there any substance in the argument that the order of the Court dated 26-9-1950 directing that the annual meeting be convened for filling up vacancies has the effect of extinguishing that power. Though interim injunction was issued against co-option in Appln. No. 2826 of 1950 on 18-8-1950 that became dissolved on the dismissal of that application on 26-9-1950. It is true that the order of dismissal was made not on the merits but in view of the orders passed in Appln. Nos. 2813 of 1950 and 2814 of 1950 and it must have been assumed that all the places would be filled by election at the annual meeting on 29-10-1950. This circumstance, though material on the question whether the exercise of power on 9-10-1951 and 11-10-1951 was bona fide or not, does not operate to deprive the management of its powers under Art. 81. The objection based on Art. 99 that the resolution dated 9-10-1950 was not signed by all the directors but only by two of them must also be rejected inasmuch as no contention is raised by the management that the co-option of K. N. Narayana Iyer, if not valid under Art. 81 could still be upheld as one passed in circulation under Art. 99.

(8) The two substantial contentions urged on behalf of the appellant are (1) that on 9-10-1950 there was only one director competent to act and according to the Articles of the company he would have no power to co-opt a director and (2) that in any event the exercise of the power was not for the benefit of the shareholders and therefore void. With reference to the first contention it is necessary to

set out the relevant articles of the company on which it is based. Under Art. 75 "Until otherwise determined by a general meeting the number of the directors shall not be less than four or more than nine". Art. 83 provides that

> "at the first ordinary meeting of the company the whole of the directors excepting the ex-officio directors, shall retire from office and at the ordinary meeting in every subsequent year, one-third of the directors (other than the ex-officio directors) for the time being or if their number is not three or a multiple of three, then the number nearest to one-third shall retire from office".

Section 83-A (1) of the Indian Companies Act enacts that "every company shall have at least three directors". Turning to the facts it should be remembered that the last annual meeting was held on 31-1-1949. Even at that time there were only three directors in office, A. S. Padhmanabhan, M. S. Periaswami Nadar and V. R. Veeramani. Of these Padhmanabhan was due to retire under Art. 83 at the next annual meeting. Periaswami Nadar resigned in August 1949 and in his place Dakshinamurthi was co-opted on 25-9-1949. On 22-3-1950 one B. V. Raman was co-opted as the fourth director but he was also due to retire at the next annual meeting. The meeting should have been held under Art. 55 on 30-4-1950 at the latest. On 18-6-1950 Dakshinamurthi resigned and it was in his place that K. N. Narayana Iyer was co-opted by a resolution of the directors, Veeramani and B. V. Raman.

(9) On these facts it was argued by the learned advocate for the appellants that two of the directors, Padhmanabhan and B. V. Raman who were due to retire at the annual meeting next to that held on 31-1-1949, should be held to have vacated their office on the last date on which the annual meeting should have been held and that in consequence they ceased to be directors after 30-4-1950. This contention is amply supported by the authorities. In 're Consolidated Nickel Mines Ltd.' (1914) 1 Ch. 883, the question arose whether two directors, Steel and Phillips were entitled to remuneration as directors. Art. 101 of the Company provided that at the ordinary meeting all the directors should retire from office. Section 49 of the Companies Act provided that the directors were bound to summon a general meeting of the company once in every calendar year. After 1905 no meeting was called but the two directors continued to act. It was held that they vacated the office on the last day on which the annual meeting should have been held, that is on 31-12-1906 and that therefore they were not entitled to remuneration thereafter.

(10) In — 'Srinivasan v. Subramania Aiyar', 61 Mad L. J. 724 Cornish J. followed the decision in 'Re Consolidated Nickel Mines Ltd.,' (1914) 1 Ch. 883. In — 'Kansseen v. Rialto (West End) Ltd.', (1944) Ch. 346, the point for decision was whether the allotment of shares made at a directors' meeting held on 30-3-1942 was valid. Two persons Cromie and Strelitz purported to act as directors and made the allotment. Strelitz claimed to have been appointed as director at a meeting held on 1-2-1940. It was found that there was no meeting or appointment. Cromie was one of the original directors but under R. 73 of Table A of the Companies Act, 1929, which in substance corresponds to Art. 83 in the present case the directors would have to retire at the annual meeting and the last day on which such a meeting should have been held was 31-12-1941. On these provisions Lord Green M. R. who delivered the leading judgment of the Court of appeal observed as follows:

> "Neither Mr. Cromie nor Mr. Strelitz was then (on 30-3-1942) a director of the company. Mr. Cromie had been a director but he had vacated the office on 31-12-1941, by reason of Art. 73 of the Companies Articles of Association. See in 'Re Consolidated Nickel Mines Ltd.' (1914) 1 Ch. 883."

This decision was affirmed by the House of Lords in — 'Morries v. Kansen', (1946) A. C. 459. On the point now under consideration the decision is thus stated in the headnote:

> "No general meeting was held in 1941 and accordingly by the effect of Art. 73 of Table A as varied by Art. 22 of the Company's articles of association, there were thereafter no de jure directors."

Vide the observations in the speech of Lord Simonds at pp. 467-468 & 471. In Buckley on Companies Acts the learned author commenting on R. 89 in schedule 1 of the Companies Act, 1948, which in terms corresponds to the present Art. 83 states the law as follows:

> "If in any calendar year an annual meeting is not held under an article in this form, those directors who would have retired at the meeting had the same been held will vacate office on the last date of the year." (12th Edn. page 882)

On these authorities it must be held that both Padhmanabhan and B. V. Raman ceased to be directors after 30-4-1950 & that at the time of the co-option of K. N. Narayana Iyer on 9-10-1950 there was only one director, Veeramani, who was lawfully in office.

(11) What follows on this conclusion? The appellant contends that if on 9-10-1950 there was only one director, then there was no board of directors as required by Art. 75 and that therefore there could be no valid co-option as the power to co-opt could only be exercised by the board. The respondent relies on Art. 81 which is in these terms:

> "The continuing directors may act notwithstanding any vacancy in their body; but so that if the number falls below the minimum above fixed the directors shall not, except in emergencies or for the purpose of filling up vacancies, act so long as the number is below the minimum."

The argument is that this is a special provision made for meeting contingencies like the present and that the co-option made thereunder is valid. The contention of the appellant is that even for invoking the power under Art. 81 there must be a board with the minimum strength as required by Art. 75 but this is opposed to the plain language of the Article which expressly confers power on the continuing directors to fill vacancies when the number falls below the minimum and the minimum that is referred to in this Article is the minimum prescribed under Art. 75.

(12) There is also considerable body of authority in England on the construction of clauses similar to Art. 81. In 'Re Scottish Petroleum Co.' (1883) 23 Ch. D. 413, the Article fixed a minimum strength of the board of directors at four and the quorum for the board's meeting at two as do Arts. 75 and 93 in the present case. The strength of the board came down to two; when they co-opted another director and allotted shares to him. Art. 83 of the company provided that the continuing directors may act notwithstanding any vacancy in the board. On these provisions it was held that the power to co-opt a director could be exercised even though the strength of the board had fallen below the minimum. The

following observations occurring in the judgment of Baggallay L. J. may be usefully quoted:

"It is also contended that though by the articles two directors form a quorum when the board is duly constituted, there could not be a quorum capable of transacting business when the board of directors was not filled up to the minimum number. I assume that the retiring directors had ceased to be directors, and if that be so, the board was not made up to the minimum number. Still I think that having regard to Art. 83, the objection cannot be maintained. It is urged that this article can only apply when the number of directors is more than four, I see no reason for adopting that view."

In 'Re Bank of Syria', Owen and Ashworth's claim, Whiteworth's claim, (1900) 2 Ch. 272 Art. 38 of the company provided that the members of the council shall be not less than three and not more than nine. At the time of the transaction there were only two directors and the question arose whether they had the power to act. Art. 42 provided that "the continuing council may act notwithstanding any vacancy." It was held by Wright J. that under this clause the directors were entitled to act. He observed

"I am asked to say that inasmuch as there were only two directors acting at that time, they had no power to bind the company. But it seems to me that I ought to hold having regard to the authorities, that Art. 42 which provides that a continuing council may act notwithstanding any vacancy, gets over the difficulty. X X X X It seems to me having in view Art. 42, that the principle in 'Re Scottish Petroleum Co., Ltd.' (1883) 23 Ch. D. 413 applies to the present case."

There was an appeal against this decision. Vide in 're Bank of Syria' Owen and Ashworth's claim, Whiteworth's claim,' (1901) 1 Ch. 115. Lord Alverstone C. J. in agreeing with the decision of Wright J. on this point observed that even if the number of directors fell below the quorum fixed for a directors' meeting the principle laid down in 'Scottish Petroleum Co.', (1883) 23 Ch D. 413, would apply and that the continuing directors would be entitled to act under Art. 42. That is to say, the power to co-opt might be exercised notwithstanding that the strength of the directorate has fallen below the minimum required and below the quorum prescribed, by the articles.

(13) 'In Re Sly Spink and Co', (1911) 2 Ch. 430, the articles required that the number of directors should not be less than four, that the quorum for a board's meeting should be three and Art. 88 gave authority to the continuing directors to fill in vacancies. From the very start the company had never a board of four directors. Only three directors were appointed and they allotted shares. The company having gone into liquidation the question arose whether the allotment of shares was valid. It was contended that the three directors had authority to act under Art. 88 and that the allotment was consequently valid. Neville J. held that Art. 88 would apply only if there had been a properly constituted Board of directors in the first instance but that where there never was a board with the minimum strength, Art. 88 would not apply. The following observations may be quoted:

"It is said that they were continuing directors because they had not ceased to be directors. I do not think that is a reasonable interpretation to put upon the words contained in the articles. The expression is familiar one and it applied to cases where the number of original board has been reduced by death or otherwise, and in such cases those who are left, subject to the provisions of Art. 88, would be entitled to conduct the business of the company. With regard to that, I think the two cases which were cited — 'in re Scottish Petroleum Co', (1883) 23 Ch. D 413 & —'in re British Empire Match Co', (1889) 59 LT 291, show very clearly the distinction between the case where the directors too few in number can and cannot act as continuing directors. In one case you have a board insufficient in number from the first and notwithstanding the continuing clause it was held that the board could not transact business. In the other case you have a board which was originally competent to transact business but was diminished by retirement to a number less than that provided for by articles. The continuing clause was held to apply and those directors were held to be competent to transact the business of the company."

The company in the present case started with four directors, being the minimum strength under Art. 75. Vide the allegations in Para 5 in the affidavit of Davar in Appln. No. 2954 of 1950; and therefore the continuing directors would under the decision —'in re Sly Spink and Co', (1911) 2 Ch. 430, have power to act under Art. 81. In —'Channel Collieries Trust Ltd. v. Dover St. Margaret's and Martin Mill Light Rly.', (1914) 2 Ch. 506 the articles of the company provided that the minimum number of directors should be three; that the quorum for the board's meeting should be two and article 89 gave power to the "remaining directors" to fill vacancies. The company began with three directors, then two of them resigned leaving only one director in office and he co-opted a director under Art. 89. It was contended that this co-option was invalid because the Board had neither the minimum strength nor even the quorum provided by the articles. Rejecting this contention Lord Cozens Hardy M. R. observed as follows:

"Sir John Jackson thus became sole director. What was his power? Under the Companies Clauses Act, 1845, as continuing director, he had power to fill up the vacancies on the board. The fact that a person exercising that power does not constitute a quorum is not really a relevant matter. The generality of the language used in S. 99 is so clear that it is impossible for us to overlook it. Any other view on that point would paralyse many a company."

The following observations occurring in the judgment of Swinfen Eady L. J. might also be usefully quoted:

"I think that the context requires that the words 'remaining directors' should include the case of a remaining director. It is obvious that the number of the board may, by death or resignation or otherwise, be so reduced that it may be below the quorum, as well as that there may be vacancies occurring in the board whilst still leaving a quorum, but in either case it is necessary or proper that the vacancy should be filled up. In my opinion the necessity of the case requires that 'the remaining directors' should be read as including the case of a remaining director, so that if and so long as there is any remaining director he may proceed to fill up the board by appointing persons when casual vacancies occur. For these reasons I am of opinion that it was open to Sir John Jackson as the sole remaining director, under S. 89 to appoint duly qualified persons to be directors in the place of the two who had ceased to be members of the board."

Applying these principles it must be held that the power under Art. 81 could be exercised even though the strength of the board had fallen below

the minimum prescribed by Art. 75 and below the quorum mentioned in Art. 92 and even when there is only one director capable of acting. The co-option of Narayana Iyer on 9-10-1950 must, therefore, be held to be within the scope of the authority conferred on the continuing directors under Art. 81.

(14) The only question that remains to be decided is whether on the facts and circumstances of this case the co-option of Narayana Iyer is open to attack as improper and mala fide. The learned advocate for the appellant argued that the directors stand in a fiduciary relationship to the shareholders that any power conferred on them must be exercised for the benefit of the shareholders, that the co-option of directors should also be made only in the interests of the shareholders and that Narayana Iyer was co-opted only for the purpose of strengthening the hands of the management in their fight with their shareholders and it is, therefore, invalid. That the directors are in a fiduciary position in relation to the shareholders cannot seriously be questioned. In —'Ferguson v. Wilson', (1867) 2 Ch. 77, at p. 90, Lord Cairns while holding that the directors of the company were in the position of agents of the company in its dealings with the outside world, they were in the position of the trustees in relation to the shareholders. Similar observations are to be found in the judgment of Lord Selborne in —'G. E. Rly. v. Turner, (1873) 8 Ch 149 at p. 152. The position is thus summed up in Palmer's Company Precedents:

> "Where the directors of a company are invested by the regulations with certain powers, the authority thus conferred is to be read subject to the general rules applicable to the exercise by directors of the powers vested in them, and in particular to the rule that the directors are to exercise the powers for the benefit of the company and in the true interests of the company and according to the best of their judgment, for they stand in a fiduciary position, and must act accordingly."

(Vide Vol. 1 page 434 para 21; 16th edition)

We, therefore, agree with the appellant that if the co-option of a director under Art. 81 is not made in the interests of the shareholders but for other purposes it cannot stand.

(15) What then are the facts? It is common ground that the affairs of the company were during this period in a very unsatisfactory condition. For want of funds the coffee and tea estates were in a state of neglect. More than Rs. 95,000 had to be paid for income-tax and the Government were taking coercive steps to recover the same. Interests due to the debenture holders had not been paid; nor dividends which had been declared on the shares. The creditors had obtained decrees against the company and execution proceedings were in progress. These facts are stated in the affidavits filed on behalf of the appellants in these proceedings. But it also appears from these affidavits that the coffee and tea plantations owned by the company were extensive and valuable and if finance was forthcoming they could be properly worked and made to yield profits. It is clear from the records that the managing agents were making strenuous attempts to get at a financier who would be willing to advance the necessary funds for the working of the estate and at last they found him in Narayana Iyer. This Narayana Iyer was the managing director of a company called Messrs. Parkins (India) Ltd, which has under its management several plantation companies owning tea, coffee and rubber estates. He has had experience in this line of business for about twenty years and is a man of considerable worth. It cannot be doubted that it would be to the advantage of the company if he could be persuaded to join it. It appears from para 3 of his affidavit that early in August 1950 the shareholders themselves approached him with a request to join the company and advance the necessary funds. This is borne out by a letter dated 7-9-1950 written by a director of Messrs. Parkins (India) Ltd. to the advocate for the appellant. This letter gives particulars about the status of Messrs. Parkins (India) Ltd, and of its managing director, Narayana Iyer and proceeds to state,

> "Messrs. Parkins (India) Ltd. are willing and they are in a position to provide working finance and other finance required immediately to pay the pressing creditors of the Amalgamated Coffee Estates Ltd."

A reading of this letter leaves no doubt that the shareholders considered that the accession of Narayana Iyer would add to the strength of the company and enable it to tide over its difficulties. It is admitted in the affidavit filed in Appln. No. 2828 of 1950 that as early as August the management itself had been negotiating with Narayana Iyer with the object of bringing him in. He insisted naturally that if he should advance the necessary funds he should have a voice in the control and management of the company. The management agreed to this and co-opted him as a director on 9-10-1950. It appears from the affidavit of Narayana Iyer that after his co-option he advanced monies to the extent of a lakh of rupees for the working of the estate and harvesting coffee. The facts clearly show that the company was in need of finance, that Narayana Iyer was co-opted for the purpose of finding the necessary funds and that both from the point of view of his experience and financial status he would be a source of strength to the company.

(16) But it is argued on behalf of the appellant that notwithstanding the above circumstances, the co-option of Narayana Iyer must be rejected as improper and mala fide because the vacancy in which he was filled arose on 18-6-1950 when Dakshinamurthi resigned, that the management did not choose to fill that vacancy then; that on the other hand, they stated in their counter-affidavits in Appln. Nos. 2813 of 1950 and 2814 of 1950 that they thought it fair not to co-opt a director in view of the general body meeting that was proposed to be convened; that an injunction was actually issued on 18-8-1950 restraining the managing agents from making any co-option and though it became dissolved on 26-9-1950 it was understood by all persons that the vacancy would be filled by the shareholders at the annual meeting and that, therefore, the co-option on 9-10-1950 must be held to have been made with the object of depriving the shareholders of their right to elect a director.

(17) But it must be remembered that during this period the management was on the look out for a suitable financier and that it was commandable on their part to have left the place vacated by Dakshinamurthi vacant until a suitable person could be found and to have left it to the shareholders to fill the place if their endeavours to get at a financier did not succeed. Nor can any sinister purpose be spelt out of the fact that the co-option was made after a general meeting had been called. It is admitted that the coffee crops were ready for harvesting and if early steps were not taken to gather them considerable damage would result. In para 13 of the counter-affidavit

filed by Davar in Appln. No. 2954 of 1950 it is alleged that

"the coffee plantations in Palghat and the cardamoms are deteriorating; crops were being spoilt and what little can be gathered from the crops would be lost to the shareholders and the debenture holders on account of the neglect and irresponsible attitude of the managing agents."

This was in August 1950. It is obvious that the urgency must have been greater in October and the managing agents acted in the best interests of the shareholders in concluding a bargain with Narayana Iyer on 9-10-1950.

(18) On a review of all the circumstances we agree with Mr. Krishnaswami Nayudu J. that the co-option of Narayana Iyer was a proper exercise of the power under Art. 81. O. S. A. No. 120 of 1951 must accordingly be dismissed with costs.

(19) In O. S. A. No. 15 of 1952 the point for determination is whether the co-option of K. C. Chandy on 11-10-1950 was a valid exercise of the power under Art. 81. The facts relating to this co-option present a picture totally different from what has been seen in the case of Narayana Iyer. No particular reason has been shown why this co-option should have been made on 11-10-1950 when the annual meeting had been called for on 29-10-1950. It is not stated that this co-option was made under any arrangement to advance funds for the company. That arrangement had already been concluded with Narayana Iyer. Nor does K. C. Chandy possess anything like the experience which Narayana Iyer undoubtedly does possess. He is an Advocate practising at Kottayam. The circumstances under which the co-option was made clearly stamp it as mala fide. V. R. Viramani who was the one director who has been in active management resigned his place as an elected director on 11-11-1950 and as part of the same proceedings he became a nominated director. It is clear that this manoeuvre was adopted for co-opting a director of the choice of the managing agents and it is open to the objection that it was made with a view to strengthen the hands of the managing agents and not in the interests of the shareholders. We agree with Krishnaswami Nayudu J. that this co-option cannot be upheld.

(20) It was argued by Mr. V. Radhakrishnaiya the learned advocate for the appellant that the validity of this co-option cannot be gone into in these proceedings but the matter is concluded by the judgment of this Court dated 9-2-1951 and even otherwise the decision on the validity of the co-option is incidental to the exercise of the powers under S. 76(3) of the Companies Act. In the result the appeal fails and is dismissed with costs.

(The above appeals having been set down this day for being mentioned, the Court delivered the following (Judgment): O. S. A. No. 120 of 1951:)

(21) The adjourned meeting will be held at 3 p. m. on 3-5-1952 at 310-311 Linghi Chetti Street, George Town. The Commissioner will issue the necessary notices.

A/D.H. Appeal dismissed.

A.I.R. 1953 MADRAS 472 (Vol. 40, C. N. 179)

SUBBA RAO J.

R. V. K. M. Surya Rao Bahadur Varu, Rajah of Pithapuram, Petitioner v. The Board of Revenue (Settlement of Estates) Madras, Respondent.

Writ Petn. No. 796 of 1951, D/- 5-2-1952.

(a) Constitution of India, Art. 226 — Petitioner submitting to jurisdiction of Revenue Board — Petitioner is precluded from questioning jurisdiction in writ of 'Certiorari' — (Tenancy Laws — Madras Estates (Abolition and Conversion into Ryotwari) Act (26 of 1948), S. 18). (Para 3)

Anno. C. P. C. Appendix III, Constitution of India, Art. 226 N. 13.

(b) Tenancy Laws — Madras Estates (Abolition and Conversion into Ryotwari) Act (26 of 1948), S. 18 (5) — Building.

If any portion of a building was used immediately before the notified date for a purpose other than office purpose, it would not vest in the Government. (Para 5)

(c) Tenancy Laws — Madras Estates (Abolition and Conversion into Ryotwari) Act (26 of 1948), S. 18 (5) — Building.

A building may be called an out-house, but may be used as a separate building. (Para 6)

Ch. Ramakrishna Rao, for Petitioner; Govt. Pleader, for Respondent.

CASES CITED:

(A) (1857) 26 LJ Ch 731: 5 WR 812
(B) (1860) 29 L. J. Ch. 462: 54 E. R. 305

ORDER: This is an application for issuing a writ of 'certiorari' and for quashing the order of the Board of Revenue dated 6-8-1951.

(2) The building described in the schedule annexed to the affidavit filed in support of the petition is situated in Polavaram B Estate, East Godavari district. In March 1950 the manager of the Pitapur and other allied estates filed a petition before the Estates Abolition Tribunal for having the value of the said building assessed. That application was referred to the District Collector, Eluru, for enquiry, who forwarded the same to the Board of Revenue. The Board of Revenue held that the said building constituted two separate buildings, one of them being used as an office before Act 26 of 1948 came into force, and the other, a small one, being used by visiting officers and by other guests. The Board directed the value of the main building to be deducted from the compensation payable to the Zamindar, and excluded the smaller building from the operation of the provisions of S. 18 of the Act. The present application is filed to quash that order.

(3) Learned counsel for the petitioner raised before me three points:

(i) The Government has no jurisdiction to delegate its power under S. 18 of the Act to the Revenue Board.

(ii) The building in question is not part of Polavaram B Estate;

and (iii) the main building along with the out-house form component parts of the same building, and the house not being used solely for office purposes the entire building will not fall within the scope of S. 18.

The first two points were not raised before the Revenue Board, and they raise a question of jurisdiction. The petitioner who has submitted to the jurisdiction of the Revenue Board is precluded from questioning the jurisdiction in a writ of 'certiorari'.

(4) To appreciate the third point raised, the relevant provision of the Madras Estates (Abo-

lition and Conversion into Ryotwari) Act, 26 of 1948 :

S. 18 : "Every building situate within the limits of an estate, which immediately before the notified date, belonged to any landholder thereof and was then being used by him as an office in connexion with its administration and for no other purpose, shall vest in the Government, free from all encumbrances, with effect on and from the notified date."

(5) In this section 'building' includes the site on which it stands and any adjacent premises occupied as an appurtenance thereto."

For the purpose of ascertaining the meaning of the word "building", learned counsel for the petitioner relied upon the decisions in — 'Grosvenor v. The Hampstead Junction Ry. Co.', (1857) 26 LJ Ch 731 (A) and — 'King v. The Wycombe Ry. Co.', (1860) 29 LJ Ch 462 (B). In the former case, the question was whether a railway company could acquire a land appurtenant to a building. It turned upon the meaning of the word "building" in S. 92, Lands Clauses Consolidation Act (8 and 9 Vict. Ch. 18). If it was a part of the building, the entire building had to be taken. Turner L. J. laid down the following test to find out the meaning of that word at p. 737 :

"The question, therefore, in my view, is what would pass under the conveyance of these houses? That, as I think, must be judged by the particular position and circumstances of the property at the time ..... It is obvious that the intention was that the intervening land should constitute a garden to the houses, and was to be fenced off, according to the plan by an iron fence, separating it from the road."

The learned Judge therefore held that the land formed part of the building. In the other case, a railway company under the compulsory powers of the Lands Clauses Consolidation Act attempted to take a portion of a garden and an orchard essential to the enjoyment of a mansion and premises. The mansion and the premises were surrounded by a brick wall, and the railway company took a portion of the garden and orchard, divided one part of the premises from another and destroyed all internal communications. It was held that the company was bound to take the whole estate. The Master of the Rolls observed at p. 405 :

"The Act must be construed liberally, and not to the detriment of existing rights ..... The Courts therefore have held, that the word 'house' was intended to comprise such adjuncts as were within its circuit and necessary to its use and enjoyment."

Later on, he proceeded to say :

"Land held with a house does not necessarily pass under the word 'house' even although it was intended to pass; but if it is part of the curtilage and within the circuit of the house, if it is necessary to the enjoyment of the house, if it forms part of that which is necessarily held and occupied with the house, and without which it cannot be enjoyed, then it does pass under the word 'house'."

(5) These decisions only lay down the principle accepted and embodied in S. 18(5) of the Act. The provisions of S. 18 of the Act make it clear that building includes the site as well as the premises occupied as an appurtenance thereto, and that the entire building so defined must have been used as an office. If any portion of that building was used immediately before the notified date for a purpose other than an office purpose, it would not vest in the Government.

(6) The question therefore is whether the out-house was occupied as an appurtenance to the main building. The Revenue Board found on the evidence that the out-house was a separate building with a compound of its own and used for a different purpose. It therefore held that the main building and the out-house could not be treated as a single unit. Indeed, the attempt made before the Revenue Board was to exclude the out-house from the main building on the basis that it was a separate building. If the petitioner conceded before the Revenue Board that the out-house was a part of the main building, they might have held that the out-house was also used for office purposes providing lodging to the visiting officers. The petitioner cannot, therefore, in view of his earlier attitude and the finding of the Revenue Board take a contrary position and contend that the out-house is a part of the building. The finding of the Revenue Board was based on the evidence, and is not vitiated by any error on the face of the record. A building may be called an out-house, but may be used, as in the present case, as a separate building.

(7) The petition therefore fails and is dismissed with costs, advocate's fee, Rs. 100.

A/V.R.B. Petition dismissed.

A.I.R. 1953 MADRAS 473 (Vol. 40, C. N. 180)

RAJAMANNAR C. J. AND VENKATARAMA AIYAR J.

D. V. Sanjeevi Naidu, Appellant v. M. N. Chittibabu Mudaliar, Respondent.

O. S. Appeals Nos. 70 and 133 of 1950, D/- 3-10-1952.

Houses and Rents — Madras Buildings (Lease and Rent Control) Act (15 of 1946), Ss. 2(4) and 7 — 'Tenant' — Tenant holding over — Liability to eviction under decree for possession — Liability for mesne profits — (T. P. Act, S. 116) — (Civil P. C., O. 20 R. 12).

Tenancy determined by lessor giving notice of his intention to determine tenancy on tenant setting up title in himself. If tenant holds over terms of tenancy under which he came into occupation including that relating to rent, would govern case — Such person, being a tenant holding over and a person by whom rent is payable is a "tenant" within S. 2(4), and cannot be evicted in execution of a decree for possession. Tenant would be entitled to benefit of S. 7(2) even though his denial of title was found against by Civil Court. He would also be not liable for mesne profits and no decree for mesne profits would be passed against him.

(Paras 5, 6, 7, 8)

Anno: T. P. Act, S. 116 N. 11; Civil P. C. O. 20 R. 12 N. 5

C. Srinivasachari and Raghavan, for Appellant; in Appeal No. 70 and for Respondent in no. 133; C. Musalappa Reddi for Appellant in No. 133 and for Respondent in No. 70.

RAJAMANNAR C. J.: These two appeals arise out of further proceedings in C. S. No. 115

of 1947 the main appeal (O. S. A. No. 102 of 1949) from which we have just disposed of. As already mentioned, in this suit Sanjeevi claimed not only possession but also mesne profits, and Rajagopalan J. directed that mesne profits should be ascertained by the Official Referee in proceedings subsequent to the decree. The Official Referee accordingly ascertained the mesne profits and his report came up for consideration before Rajagopalan J. who accepted the figures arrived at by the Official Referee and granted a decree to Sanjeevi for mesne profits on that basis by his order dated 2-11-1950. O. S. A. No. 133 of 1950 is by Chittibabu against the order. The main ground of appeal is that he is not liable in mesne profits as he must be deemed to be a tenant.

(2) Sanjeevi filed an execution petition, E. P. No. 34 of 1950 for delivery of possession. Chittibabu raised the objection that notwithstanding the decree he was not liable to be evicted because of the provisions of S. 7(1), Madras Buildings (Lease and Rent Control) Act of 1949. The Master before whom the execution petition came on for hearing first, upheld Chittibabu's contention and dismissed the execution petition. On appeal to the Judge in Chambers, Krishnaswami Nayudu J. confirmed the order of the Master and held that execution could not issue as Chittibabu must be deemed to be a tenant entitled to the protection of the Act. O. S. A. No. 70 of 1950 is by Sanjeevi against this order.

(3) It will be seen that the question which has to be decided before these two appeals can be disposed of is whether the provisions of the Madras Buildings (Lease and Rent Control) Act of 1949 apply to this case. In that Act "tenant" is defined as any person by whom or on whose account rent is payable for a building and includes a person continuing in possession after the termination of the tenancy in his favour. We are not concerned with the rest of the definition. Section 7(1) runs as follows:

"A tenant in possession of a building shall not be evicted therefrom, whether in execution of a decree or otherwise and whether before or after the termination of the tenancy, except in accordance with the provisions of this section:

Provided that nothing contained in this section shall apply to a tenant whose landlord is the Provincial Government:

Provided further that where the tenant denies the title of the landlord or claims right of permanent tenancy, the Controller shall decide whether the denial or claim is bona fide and if he records a finding to that effect the landlord shall be entitled to sue for eviction of the tenant in a civil Court and the Court may pass a decree for eviction on any of the grounds mentioned in this section, notwithstanding that the Court finds that such denial does not involve forfeiture of the lease or that the claim is unfounded."

(4) The contention on behalf of Chittibabu is that he came into possession of the building as a tenant under the lease executed by Mohanasundara in his favour on 15th April 1944 and that though that lease expired in 1947 he must be deemed to be holding over as a tenant, since his claim under the agreement to sell in his favour had been negatived by Court. On the other hand, Mr. Srinivasachari for Sanjeevi contended that though he might have come into possession as a tenant he subsequently set up title in himself as owner and denied his title to the property. On account of this disclaimer of his status as a tenant he could not after his failure in the suit be permitted to fall back upon his original position. According to learned counsel a person who has denied that he was a tenant could not, after such denial, be treated as a tenant within the meaning of the Act.

(5) Undoubtedly Chittibabu denied the title of Sanjeevi who must be deemed to have succeeded to all the rights of Mohanasundara as landlord. The effect of a denial of title under the general law is set out in S. 111, T. P. Act:

"A lease of immoveable property determines

(g) by forfeiture, that is to say,.....

(2) in case of the lessee renounces his character as such by setting up a title in a third person or by claiming title in himself, ...and.....the lessor or his transferee gives notice in writing to the lessee of his intention to determine the lease."

On behalf of Sanjeevi his advocate did give such notice to Chittibabu through his advocate (Ex. P. 16). It was definitely stated in this notice that as Chittibabu had set up title in himself and had renounced his character as tenant Sanjeevi was giving notice of his intention to determine the lease under the provisions of S. 111(g), T. P. Act. So it may be taken as established that under the general law the tenancy in favour of Chittibabu had been duly terminated. But the definition of "tenant" in the Rent Control Act expressly includes a person continuing in possession after the termination of the tenancy in his favour. Chittibabu would certainly be such a person. In accordance with the finding of the trial Court which has since been affirmed by us, Chittibabu did not have title to the property at any time. He must, therefore, be deemed to have continued all along in possession as a tenant. He would be a tenant holding over. Under the general law a tenant holding over is deemed to be governed by the same terms as the terms of the tenancy under which he came into occupation. One of such terms would be the payment of monthly rent of Rs. 25. We, therefore, hold that Chittibabu was a tenant within the meaning of S. 2(4), Rent Control Act, as a person by whom rent was payable and as a person continuing in possession after the termination of the tenancy in his favour.

(6) Section 7(1) expressly provides that a tenant in possession of a building shall not be evicted therefrom, whether before or after the termination of the tenancy, whether in execution of a decree or otherwise, except in accordance with the provisions of that section. This provision is a complete answer to the execution petition filed by Sanjeevi for eviction. In this view it is not necessary to consider the effect of the proviso because the procedure indicated in the proviso has not been followed in this case. That proviso contemplates first a petition before the Rent Controller himself for eviction and a denial of title in such proceeding. If the Controller decides that the denial of title is bona fide and records a finding to that effect, then the landlord will be entitled to sue for eviction of the tenant in a civil Court. But even here the decree for eviction can only be passed on any of the grounds mentioned in S. 7. Though the proviso in terms will not have any application to the facts of this case, the principle of the proviso supports

the view which we have already taken as regards the status of Chittibabu as a tenant under the Act. The effect of the proviso is that even if a civil Court finds that the claim of the tenant is not well founded the tenant can be evicted only on any of the grounds mentioned in S. 7. In other words, even when the tenant has denied the title of the landlord and his denial has been found to be without foundation, he will be entitled to the benefits of S. 7(2).

(7) We, therefore, hold that Chittibabu cannot be evicted in execution of the decree for possession obtained by Sanjeevi. We also hold that as Chittibabu must be deemed to have continued to be in possession as a tenant he would be liable only for the rent fixed under the lease in his favour and would not be liable for mesne profits. Of course, this would not prevent the landlord or the tenant from approaching the Rent Controller with an application to fix the fair rent.

(8) Mr. Srinivasachari for Sanjeevi raised a technical objection that the plea under the Rent Control Act should have been raised in the suit. It was in a manner raised in the written statement, but was not dealt with by the learned trial Judge. But as the entire case was at large before us in appeal we see no point in this objection. It is open now to us to deal with this plea in appeal.

(9) Another contention was raised on behalf of Sanjeevi Naidu which has no substance whatever, namely, that though Chittibabu might be a tenant within the definition in the Rent Control Act, still there is nothing to preclude the Court from decreeing mesne profits. We are unable to follow this contention. We have held Chittibabu to be a tenant because in our opinion he is liable to pay the rent as fixed under the lease deed in his favour. If that be so, how could he at the same time be made liable for a higher or different amount? The entire scheme of the Rent Control Act proceeds on the liability of the tenant to pay a definite rent. Mesne profits, on the other hand, should be ascertained from time to time and may vary.

(10) In the result O. S. A. No. 70 of 1950 must be dismissed. O. S. A. No. 133 of 1950 must be allowed and the decree, instead of directing Chittibabu to pay mesne profits, should direct him to pay rent at the rate of Rs. 25 per month till the date of this judgment. There will be no order as to costs in O. S. A. No. 70 of 1950. In O. S. A. No. 133 of 1950 the appellant will get his costs from the respondent.

B/M.K.S. Order accordingly.

A.I.R. 1953 MADRAS 475 (Vol. 40, C. N. 181)

RAJAMANNAR C. J. AND SATYANARAYANA RAO J.

Rajahmundry Electric Supply Corporation Ltd., by its Vice Chairman, Appanna Ranga Rao, Petitioner v. The State of Madras represented by the Secretary to the Government, Public Works Department, Government of Madras, Respondent.

Misc. Petns. Nos. 7163 and 7164 of 1951, D/- 20-7-1951.

(a) Civil P. C. (1908), O. 45, R. 13 (2) (d) — Powers of High Court pending appeal to Supreme Court.

Order 45, R. 13 (2) (d) only enables the High Court to place the party seeking the assistance of the Court under any conditions which the Court may think fit to impose. It also enables that Court to give such other direction, that is to say, direction other than a direction placing under any condition respecting the subject-matter of the appeal, such as for instance, by an order directing the appointment of a Receiver. But it does not enable the Court to give any direction to the successful party by way of restricting or preventing him from exercising the rights to which he has become entitled under its final order. (Para 2)

Anno: Civil P. C., O. 45, R. 13 N. 12.

(b) Civil P. C. (1908), O. 45, R. 13 — Stay of execution pending appeal — Order passed by Government under S. 4 (1), Madras Electricity Supply Undertakings (Acquisition) Act (43 of 1949), directing electric company to vest company in Government — Dismissal of application for writ of Certiorari — Leave to appeal granted — Government seeking to acquire company in enforcement of its own order cannot be restrained by an injunction under this rule as it does not seek to execute any order of the Court. (Para 2)

Anno: Civil P. C., O. 45 R. 13 N. 12.

D. Narasaraju, for Petitioner; Advocate-General instructed by State Counsel, for Respondent.

CASES CITED:

(A) ('51) AIR 1951 Mad 979: (C M P No 4697 of 1951)

(B) ('39) AIR 1939 Mad 50; ILR (1939) Mad 135

RAJAMANNAR C. J.: C.M.P. 7163 of 1951: The applicant is entitled to leave to appeal to the Supreme Court from our final order in — 'Narasaraopeta Electric Corporation Ltd. v. State of Madras', AIR 1951 Mad 979 (A) under Art. 133(1)(b) of the Constitution, because our order involves directly a claim respecting property of over Rs. 20,000. This is not disputed by the learned Advocate-General. The applicant will further be entitled to leave under Art. 132(1) also as the case involved a substantial question of law as to the interpretation of the Constitution, in particular, Art. 19(1)(b) and Art. 31(2). A certificate will issue accordingly.

(2) C.M.P. No. 7164 of 1951. This is an application by the applicant in C.M.P. No. 7163 of 1951 at whose instance we have given leave to appeal to the Supreme Court against our order passed in C.M.P. No. 4697 of 1951 paying that this Court may grant stay of the operation of the G. O. dated 2-9-1950 directing the vesting of the petitioner-Corporation pending disposal of the appeal to the Supreme Court. The learned counsel for the petitioner has sought the assistance of O. 45, R. 13(2), Civil P.C., in support of his application. We are of opinion that this provision does not enable us to grant him the relief which he seeks in this application. Obviously he is not seeking stay of execution of the order passed by us. He is really in effect asking for an injunction restraining the State from taking action in pursuance of an order passed by it directing a vesting of the Corporation in the State. This relief cannot fall within the scope of Cl. (d) of R. 13(2). That provision only

enabled this Court to place the party seeking the assistance of the Court under any conditions which this Court may think fit to impose. And it enables this Court to give such other direction, that is to say, direction other than a direction placing the party under any condition respecting the subject-matter of the appeal, such as for instance, by an order directing the appointment of a Receiver. The provision does not enable this Court to give any direction to the successful party by way of restricting or preventing him from exercising the rights to which he has become entitled under the final order of this Court. The decision of a Division Bench in — 'Ramanathan v. Viswanathan', ILR (1939) Mad 135 (B) was relied upon by the learned counsel for the petitioner. No doubt cl. (d) of R. 13(2) was invoked to enable the Court to grant stay of execution of the final mortgage decree pending an appeal to the Privy Council against the preliminary decree. The decision may be supported on the ground that in effect the Court was staying the execution of the decree appealed from, because an appeal against a preliminary decree is in a sense an appeal against the final decree in so far as the final decree is dependent on the preliminary decree. Moreover, the learned Judges in that case do not appear to have considered the scope of cl. (d), namely, whether it enables the Court to place the party other than the party seeking the assistance of the Court under any conditions or to give any directions to such a party preventing him from enjoying the fruits of the order against which the appeal is pending. We are of opinion that the ruling in the case above referred to would not apply to this case in which the relief asked for has nothing whatever to do with the execution of the final order of this Court and which seeks to prevent the successful respondent from exercising its rights in accordance with the final order of this Court.

(3) This application must therefore be dismissed.

B/M.K.S. Application dismissed.

A.I.R. 1953 MADRAS 476 (Vol. 40, C. N. 182)

SUBBA RAO, J.

P. Narasimha Reddy, Petitioner; v. District Magistrate, Cuddapah, Respondent.

Civil Misc. Petns. Nos. 7676 and 7677 of 1951, D/-29-7-1952.

(a) Arms Act (1878), S. 17 — Power to issue license for arms carries with it power to refuse to issue license — R. 43 under Act is not ultra vires. (Para 4)

Anno: Arms Act S. 17 N. 1.

(b) Constitution of India, Art 19 (1) (f) — "Property" includes "gun" — What constitutes "property" explained. (Para 5)

(c) Constitution of India, Art. 19(5) — Restrictions created by Rule 43, Arms Act Rules, on fundamental right to hold a gun are reasonable restrictions and in interest of public — Refusal to grant license should not be arbitrary — Discretion should be judicial — Order refusing license held arbitrary — (Arms Act (1878), S. 17 — Rules under, R. 43) (Paras 6, 7.)

Anno: Arms Act S. 17 N. 1

K. V. Venkatasubramania Iyer, for Rao and Reddy, for Petitioner; V. P. Sarathy, for the Government Pleader, for Respondent.

CASES CITED:—

(A) 149 ALR 1416
(B) ('52) AIR 1952 SC 192; 1952-1 Mad LJ 806
(C) ('53) AIR 1953 Mad 279: (W P No 333 of 1951)
(D) ('51) AIR 1951 SC 118: 1950 SCJ 571
(E) ('51) W P No 441 of 1951 (Mad)

ORDER: C. M. P. No 7676 of 1951 is an application under Art. 226 of the Constitution of India to issue a Writ of Mandamus directing the District Magistrate, Cuddapah, to issue a licence applied for by the petitioner for the possession of a single-barrel cartridge gun No. 12 bore (S. B. B. L.). C. M. P. No. 7677 of 1951 is an application by the same party for issue of a Writ of 'Certiorari' to call for the records of the District Magistrate, Cuddapah, and to quash his order dated 9-3-1951.

The petitioner is a citizen of the Indian Union residing in the village of Anantharjupet, Kodur firka, Cuddapah district. It is stated in the affidavit that both on the eastern and southern side of the village, where his lands are situated, there are reserve forests & also unreserved forests and that these forests are infested by wild animals of various types like deer, stag, sambur, wild pigs, cheetahs, bears and tigers. As those animals cause considerable destruction of food crops and of cattle, the petitioner applied on 2-1-1951 to the respondent for a licence for a single-barrel cartridge gun No. 12 Bore (S. B. B. L.) for the purpose of hunting and the protection of crops from wild animals. On 19-3-1951, the petitioner received an order of the respondent refusing the grant of a licence, without any reasons being assigned therefor. It is alleged that in his own village licences were given for other persons on similar grounds.

The respondent in his counter states that he was satisfied that the petitioner was not a suitable person to be entrusted with a firearm and that in 'bona fide' exercise of his discretion he refused the licence to the petitioner.

(2) Learned counsel for the petitioner raised before me the following points:

1. The Magistrate has no power to refuse a licence.
2. The refusal of the licence to acquire and hold a gun is a violation of his fundamental right under Art. 19 (1) (f) of the Constitution of India.

Mr. Vepa Sarathy for the Government contended that a right to acquire and hold a gun is not a right to hold property within the meaning of the said Article but is a right created by the Arms Act, and the petitioner cannot, therefore, ask for a licence as of right. Assuming that Art. 19(1) (f) applies, he argued that the provisions of the Arms Act and the Rules made thereunder impose only reasonable restrictions within the meaning of Art. 19 (5). The relevant provision of the Arms Act and the Rules framed thereunder read as follows:

S. 5: No person shall manufacture, convert or sell, or keep, offer or expose for sale, any arms, ammunition or military stores except under a licence and in the manner and to the extent permitted thereby....

S. 17: Power to make rules as to licences. The Central Government may, from time to time by notification in the official Gazette, make rules to determine the officers by whom, the form in which, and the terms and conditions, on and subject to which, any licence shall be granted; and may.....

S. 19 : For breach of Ss. 5, 6, 10, 13 to 17. Whoever commits any of the following offences (namely) :

(a) manufactures, converts or sells, or keeps, offers or exposes for sale, any arms, ammunition or military stores in contravention of the provisions of S. 5; .... shall be punished with imprisonment for a term which may extend to three years, or with fine, or with both.

Rule 43 : Discretion and control of authorities empowered to grant licences — (1) Every authority empowered to grant or renew a licence or to give his previous sanction to such grant or renewal may, in his discretion,

(a) refuse to grant or renew such licence or to give such sanction, or

(b) where the authority is subordinate to a provincial Government, refer the application for orders to such provincial Government;

Provided that in any case in which such authority refuses to grant or renew a licence, the applicant for such grant or renewal may appeal to the immediate official superior of the authority so refusing.

In the Province of Madras the Board of Revenue shall be considered to be the immediate official superior of the District Magistrates for the purpose of such appeals.

(2) Every such authority shall exercise all powers and perform all duties conferred or imposed by these rules, subject to the control of the executive authorities to whom he is subordinate".

(3) The schedule to the rules gives the forms of the application and that of the licence issued under the Act.

(4) The first contention of the learned counsel turns upon the provisions of S. 17 of the Act and R. 43 of the Rules. It is said that the rule-making power of the Government is limited only to the laying down of the conditions for the issue of a licence, not for the refusal of the same, and, therefore, the rule empowering the District Magistrate to refuse a licence is invalid, being inconsistent with the provisions of the Act. Emphasis is laid on the following words in S. 17 of the Act:

"rules to determine the officers by whom the form in which, and the terms and conditions, on and subject to which, any licence shall be granted....."

To accept this contention is to take a very narrow view of the provisions of S. 17. Under S. 5, no person shall keep any arms except under a licence. The Government is authorised to make rules for issuing of such licences. A power to issue a licence necessarily carried with it the power to refuse the issue of a licence. When under S. 17, the Government authorises a particular officer to issue a licence if he is satisfied that certain conditions are complied with, it follows that if he is not satisfied he cannot issue a licence. I therefore hold that the provisions of Rule 43 are not illegal and that under that rule the District Magistrate can either issue or refuse to issue a licence in his discretion.

(5) The next question is whether the impugned order violates the fundamental right under Art. 19 (1) (f) of the Constitution and, if so, whether it is saved by Art. 19 (5) of the Constitution of India. Learned counsel for the Government contended that to hold a gun is not to hold a property within the meaning of the article. The word "property" has not been defined in the Constitution. The expression "property" includes

"Every interest one may have in any and everything that is subject of ownership by man, together with the right to freely possess, enjoy and dispose of the same".

See — 'Metropolitan Trust Co. v. Jones', 149 A. L. R. 1416(A). Cooly in his Constitutional Law at page 392 defines property as follows:

"Whatever a man produces by the labour of his hand or his brain, whatever he obtains in exchange for something of his own, and whatever is given to him, the law will protect him in the use or enjoyment and disposition of it".

There is no reason to assume that the makers of the Constitution did not use this word in its usual sense to take in everything that is subject of ownership by man. Whatever difficulty there may have been in other cases, I find it difficult to hold that a gun, which is a material object that can be acquired and owned, is not property. But the learned counsel relied upon the judgment of the Supreme Court in — 'Veerappa Pillai v. Raman and Raman Ltd.', AIR 1952 S. C. 192 (B) in support of his contention that a right to acquire and hold a gun is a right created by the Arms Act and, therefore, no one is entitled to a permit as of right even if he satisfied all the prescribed conditions. The learned Judges in the aforesaid case were dealing with a person's right to get a permit as of right to ply a motor bus under the Motor Vehicles Act. After pointing out that the Act established a regular heirarchy of administrative bodies to deal with the regulation of transport by means of motor vehicles, the learned Judges stated at p. 196.

"Thus we have before us a complete and precise scheme for regulating the issue of permits, providing what matters are to be taken into consideration as relevant, and prescribing appeals and revision from subordinate bodies to higher authorities. The remedies for the redress of grievances or the correction of errors are found in the statute itself and it is to these remedies that resort must generally be had. As observed already, the issue or refusal of permits is solely within the discretion of the transport authorities and it is not a matter of right".

But these observations were considered by a Bench of this court consisting of Rajamannar C. J. and Venkatarama Aiyar J. in — 'C. S. S. Motor Service Tenkasi v. State of Madras', AIR 1953 Mad. 279 (C) wherein the learned Judges pointed out that the observations of the Supreme Court should be confined to an order prior to the making of the Constitution of India, and that whenever a question of fundamental right arises, the validity of the impugned order should be tested with reference to the provisions of the Constitution of India. I cannot therefore accept this contention.

(6) It was then contended that the order is saved by the provisions of Art. 19 (5) of the Constitution. Under Art. 19 (5) nothing in sub-cl. (f) shall affect the operation of an existing law in so far as it imposes, or prevent the State from making any law imposing, reasonable restrictions on the exercise of any of the rights conferred by the said sub-clause either in the interests of the general public or for the protection of the interests of any scheduled tribe. The fundamental right, therefore, recognised under Art. 19 (1) (f) to acquire, hold and dispose of property can be restricted within the limits of the provisions of Art. 19 (5). The restrictions that can be imposed on the said right are conditioned by the provisions of that clause :

1. They should be reasonable, and
2. They should be in the interests of the general public, not a denominational part of it.

The Supreme Court of India has defined the phrase "reasonabe restriction" in — 'Chintaman-

rao v. State of Madhya Pradesh', AIR 1951 S. C. 118 at p. 119 as follows:

"The phrase reasonable restriction connotes that the limitation imposed on a person in enjoyment of the right should not be arbitrary or of an excessive nature beyond what is required in the interests of the public. The word 'reasonable' implies intelligent care and deliberation, that is the choice of a course which the reason dictates. Legislation which arbitrarily or excessively invades the right cannot be said to contain the quality of reasonableness and unless it strikes a proper balance between the freedom guaranteed in Art. 19 (1) (G) and the social control permitted by clause (b) of Art. 19, it must be held to be wanting in that quality".

There cannot be a hard and fast rule on the question of what restrictions are reasonable. The reasonableness of a restriction depends upon the nature of the right claimed, the object to be achieved, the means employed and the limitations imposed. They should be fair and commensurate with the purposes aimed at. Their validity should also be tested by another yardstick, namely, whether they were conceived and enacted in the interests of the general public. They could be made from purposes such as public security, public order, public health and public morality.

Judged by the aforesaid conditions, can it be said that the restrictions imposed under the Arms Act and the rules framed thereunder are unreasonable restrictions not aimed in the interests of the general public? The restrictions on the free acquisition and user of firearms is certainly necessary in the interests of the general public. Many situations can be visualised when the uncontrolled user of firearms may be detrimental to the interests of the general public, violent revolutions may be encouraged, wild game may be exterminated, murder and arson might be resorted to, and peaceful structure of society may be destroyed. At the same time possession of firearms in the hands of desirable persons may be a protection & safeguard against unruly elements & wild animals. They may also be required by peaceful citizens for entertainment and recreation such as shooting exercises, mild games etc. The State therefore may well have to intervene and put restrictions on the user to protect the general public, without at the same time destroying the fundamental right. The machinery evolved to achieve the purpose is the licensing system. The application form gives all the particulars necessary for the officer to decide on the desirability of issuing or refusing to issue a licence. The officer empowered to issue the licence is a responsible officer of the Government, the District Magistrate. In his discretion he may give or refuse the licence. The discretion is obviously a judicial one as his order is subject to an appeal to the Revenue Board. When his order is subject to an appeal, it is his duty to give reasons for his refusal, for the appellate tribunal must be in a position to evaluate the correctness or reasonableness of his rejection. Having regard to the right claimed and its dangerous potentialities, I cannot say that the restrictions imposed are not reasonable. But the necessary condition of the reasonableness is that the Magistrate should exercise judicial discretion disclosing his mind for the scrutiny of appellate tribunal, excluding the possibility of arbitrary action.

Learned counsel for the petitioner relied upon a judgment of a Bench of this Court in W. P. No. 441 of 1951 (E). There the learned Judges, Rajamannar C. J. and Venkatarama Aiyar J. were dealing with the sections of the Essential Supplies (Temporary Powers) Act, 1946. Under cl. 11 of the Act the Development Officer shall have discretion to grant or refuse a licence to any applicant. It shall not be necessary for the Development officer to assign any reason for any decision taken by him under that clause. The learned Judges held that the arbitrary power envisaged in the said clause offends the fundamental rights of a citizen. But under R. 43 of the rules framed, under the Arms Act, as interpreted by me, the District Magistrate cannot arbitrarily refuse to give the permit, but he must exercise a judicial discretion supported by reasons, subject to the scrutiny of an appellate tribunal. The scope of the two Acts and the mischief intended to be averted are not the same. Clause 11 of the Essential Supplies (Temporary Powers) Act, 1946, embodies an arbitrary discretion; R. 43 (1) confers a judicial discretion. I cannot therefore apply that decision to the facts of this case.

(7) The impugned order is a laconic one. It reads: "The gun licence applied for will not be granted". No reasons were given for the refusal The order is of an arbitrary character, though under R. 43 it should be made in exercise of a judicial discretion. The necessary safeguard against an arbitrary refusal, i.e., giving reasons for refusal, is ignored. As I hold that the licensing machinery established a reasonable restriction on the fundamental right only if the District Magistrate gave reasons for his order for the scrutiny of the appellate Tribunal, I must hold that the order without giving such reasons offends the fundamental right of the petitioner to acquire and hold property. The order of the District Magistrate, therefore, is set aside and he is directed to dispose of the application of the petitioner in accordance with law. The petitioner will have his costs.

A/R.G.D. Petition allowed.

A.I.R. 1953 MADRAS 478 (Vol. 40, C. N. 183)

SUBBA RAO AND RAMASWAMI JJ.

Arankandath Sankaran Nair and another. Appellants v. A. Doraiswamy Chettiar and others, Respondents.

A. A. O. No. 121 of 1948, D/- 7-10-1952.

Civil P. C. (1908), S. 60 — Central Excise Rules (1944), Rr. 60 and 174.

The owner has a saleable interest in splints & veneers which are liable to attachment under S. 60, Civil P. C. 32 Bom 157. Foll; AIR 1940 All 24; AIR 1931 Pat 97 and AIR 1931 Pat 364. Disting. (Para 6)

Anno: C. P. C., S. 60 N. 5.

D. A. Krishna Variar for Appellants; T. R. Srinivasan for Respondents.

CASES CITED:

(A) ('40) AIR 1940 All 24: ILR (1939) All 901
(B) ('31) AIR 1931 Pat 97: 131 Ind Cas 533
(C) ('31) AIR 1931 Pat 364: 10 Pat 582
(D) ('08) 32 Bom 157: 10 Bom LR 13

SUBBA RAO J.: The only question in this appeal is whether the splints and veneers can be attached under O. 38, R. 5, Civil P. C. The facts are simple and may be briefly narrated. The respondent instituted O. S. No. 3 of 1945 on the file of the Court of the Subordinate Judge of Ottapalam for possession of match factory and for mesne profits. After obtaining a decree therein, he took possession of the

factory and applied for ascertainment of mesne profits. He also applied for attachment before judgment of splints and veneers owned by defendant 1. It was contended, 'inter alia' that the said articles were not liable to attachment on the ground that defendant 1 had no disposing power over the said articles. The learned Subordinate Judge rejected the contention and directed the attachment of the said articles. The defendants have preferred the above appeal.

(2) Mr. Variar the learned counsel for the appellants raised before us the point which his clients had unsuccessfully raised in the Court below. It is contended that the licence, custody and sale of the articles are regulated by the rules framed under the Central Excise and Salt Act and that under the said rules they cannot be sold except with the previous consent of the Excise Officer. So it is argued that defendant 1 has no disposing power over the articles and therefore the articles are not liable to be attached.

(3) The relevant provisions of the Civil Procedure Code and the rules made under the Central Excise and Salt Act may now be read. Section 60(1), Civil P. C. runs thus:

"The following property is liable to attachment and sale in execution of a decree, namely,..... goods, ...all other saleable property, moveable or immoveable, belonging to the judgment-debtor, or over which, or the profits of which, he has a disposing power which he may exercise for his own benefit, whether the same be held in the name of the judgment-debtor or by another person in trust for him or on his behalf."

Under R. 174 of the Central Excise Rules

"every manufacturer, trader, dealer, or person hereinafter mentioned, shall be required to take out a licence.....and shall not conduct his business in regard to such goods otherwise than by the authority, and subject to the terms and conditions of a licence granted by a duly authorised officer in the proper form....."

Rule 60 runs thus:

"Where the splints and veneers are obtained from a licenced manufacturer or importer of such goods, an indent shall be prepared in duplicate and counter-signed by the officer at the factory. The supplier shall return one copy to the officer with an endorsement stating the quantity actually supplied. Each consignment shall be produced before the officer at the factory and if the quantity received differs from the quantity stated in the supplier's endorsement, the supplier shall be required to explain the discrepancy."

It will be seen from the aforesaid provisions that the licensee is the owner of the articles. In the interests of public, their custody, sale and purchase are regulated under the rules framed by the Government under the Central Excise and Salt Act. We have searched in vain to find any provision either in the Act or the rules framed thereunder prohibiting the sale of the said articles. The rules only regulate the mode of sale. If so, it follows that the licensee has a disposing power within the meaning of S. 60, Civil P. C.

(4) But the learned counsel for the appellants relied upon certain decisions in support of his contention. 'Radhakrishna Beni Prasad v. Kishore Chand Shiva Charanlal', AIR 1940 All 24 (A) is a case arising under the Electricity Act. Under that Act, in case a licence had been revoked certain provisions laid down by S. 5 of the Act had an imperative effect, and under those provisions the licensee had the power of disposing of all lands, buildings, works, materials and plant belonging to the undertaking in any manner which he might think fit only if cl. (f) of the section applied to the case. On a construction of the provisions of the Act, the learned Judges held that the defendant in that case had a disposing power only under the provisions of cl. (f) of S. 5 and as the contingency contemplated by that clause had not arisen, he had no disposing power and therefore the undertaking was not liable to be attached. As the defendant had no disposing power, the learned Judges rightly held that the undertaking was not liable to be attached. In — 'Ramdass v. Bhagwat Narain Singh', AIR 1931 Pat 97 (B), Rowland J. has held that S. 12A, Encumbered Estates Act read with S. 60, Civil P. C. prevents a property released under S. 12 from being sold in execution of a money decree obtained against the holder of such property without the sanction of the Commissioner. On a construction of the relevant provisions the learned Judge pointed out that under the Act a proprietor had no right to sell the property extending beyond his lifetime, except with the consent of the Commissioner. Having regard to the object and express provisions of the Act, the learned Judge held that the proprietor had no disposing power. A Bench of the same Court consisting of Macpherson and Dhavle JJ. accepted the correctness of the aforesaid judgment in — 'Khitnarain v. Sarjuseth', AIR 1931 Pat 364 (C) and also observed:

"The object of the Act of 1876 is to provide for the relief of 'holders' of land in Chota Nagpur who may be in debt and whose immoveable property may be subject to mortgages, charges and liens, and the method adopted is to vest the management of the property of a holder in an officer appointed by the Commissioner and termed the manager whose function is to clear off the encumbrances after which the property is released to the holder. For reasons of public policy the property is to be saved to the holder."

In view of the object underlying the Act and the provisions thereof, the learned Judges found that the holder had no disposing power over the property and therefore it was not liable to be attached. They have succinctly stated the proposition thus:

"The measure of liability to involuntary alienation is the power of voluntary transfer."

The aforesaid judgments only recognised and applied the incontestable proposition that a property of a judgment-debtor is not liable to be attached if he has no disposing power over the same. Whether a judgment-debtor has a disposing power in respect of a particular property is a question to be decided in each case.

(5) A judgment of the Bombay High Court in — 'Purshottam v. Balvant', 10 Bom L R 13 (D) is apposite and may be usefully referred to. The judgment-creditor in that case attached three casks of country liquor which were in the judgment-debtor's shop. The Collector intervened and objected to the attachment on the ground that the liquor could not be removed without a transport or permit and could not be sold without a permit under the Abkari Act & therefore not liable to be attached. Heaton:

J. in dealing with the aforesaid argument made the following pertinent remarks:

"Nothing has been pointed out to us in the law from which we can infer that country liquor is exempt from attachment and sale in execution. The liquor had admittedly been purchased and paid for by the judgment-debtor; it was his property. There was no doubt it could be sold by him though he had to deal with it in accordance with the terms of his licence and the provisions of the Abkari Act. It is, therefore, clear that it is saleable property, and is covered by the provisions of the first part of S. 266, Civil P. C."

We respectfully agree with the aforesaid observations.

(6) In the present case the splints and veneers are the property of defendant 1. Though under the Central Excise Rules he could only deal with them in the manner prescribed, the rules prescribed do not affect his saleable interest in the property. There is no clause just like in the Electricity Act or Chota Nagpur Encumbered Estates Act laying down a condition precedent for the exercise of his right to sell. As defendant 1 has a saleable interest in the property, it is clearly liable to be attached.

(7) Mr. Variar then contended that on the date when the property was attached the term of defendant 1's licence had expired and therefore on the date of the attachment he had no saleable interest in the property. This argument was not raised in the Court below. Indeed the judgment discloses that both parties proceeded on the basis that the licence was subsisting on the date when the property was attached. In the circumstances, we do not think we are justified in allowing the appellants to raise this question of fact for the first time before us.

(8) For the aforesaid reasons, we agree with the conclusion of the Court below and dismiss this appeal with costs.

B/V.S.B. Appeal dismissed.

A.I.R. 1953 MADRAS 480 (Vol. 40, C. N. 184)

SUBBA RAO J.

Avaran Kutti (minor) by next friend, Kalathingal Ithalukki, Appellant v. Cheriyakkan and others, Respondents.

Second Appeals Nos. 503, 504 and 505 of 1949, D/- 11-12-1952.

Limitation Act (1908), Arts. 36 and 116 — Independent of contract.

Though there is a contract between parties, the alleged breach of duty arising independently of the personal obligation undertaken by the contract is a tort: 1936-1 K. B. 399, Applied. (Para 3)

Contractual obligation of mortgagees to take proper care of trees on the land does not cover their duty not to cut and carry away trees which arises independently of the contract — Suit for damages for trees cut and carried away is governed by Art. 36 and not Art. 116. (Para 3)

Anno: Lim. Act, Art. 36 N 2; Art 116 N 6, 22.

N. R. Sesha Iyer for Appellant; N. Sundara Iyar for Respondents.

CASE CITED

(A) (1936) 1 KB 399: 105 LJKB 309

JUDGMENT: These appeals raise a question of limitation. One Avarankutti by next friend Ithalukki filed three suits, O. S. Nos. 638, 639 and 640 of 1945 on the file of the Court of the District Munsif of Parappanangudi against the defendant-mortgagees for recovery of amounts towards damages for having cut the trees in the mortgage property in their possession and for removing the same. The suits were filed more than two years after the alleged cutting of the trees. The learned District Munsif and on appeal, the learned District Judge held that the suits were barred by limitation under Art. 36, Limitation Act. The plaintiff preferred the aforesaid three appeals.

(2) Learned counsel for the appellant contended that the learned Judge was wrong in holding that the suits are governed by Art. 36, Limitation Act. He would say that the appropriate article is Art. 116 of the Act. Before proceeding to consider the facts of the instant case it may be convenient at this stage to consider the scope of Arts. 36 and 116, Limitation Act. (His Lordship quoted the articles and stated.)

Article 36 applies to actions 'ex delicto' whereas Art. 116 applies to actions 'ex contractu'. If an action is founded on tort of one or other of the three kinds mentioned in Art. 36, the suit for damages in respect thereof should be filed within two years when the wrong was committed. The words "malfeasance, misfeasance or non-feasance" are well known species of torts. In Rustomji's Law of Limitation at page 657 they are described as follows:

"These torts are often considered as of three kinds, viz., non-feasance, or the omission of some act which a man is by law bound to do, misfeasance being the improper performance of some lawful act, or malfeasance, being the commission of some act which is in itself unlawful."

These three tortious acts to come within the provisions of Art. 36 should be independent of a contract. The question therefore is, what is the meaning of the words "independent of contract" in Art. 36. The meaning of the words has been felicitously brought out by Greer L. J. in — 'Jarvis v. Moy, Davies, Smith, Vandervell and Co.', (1936) 1-K.B. 399 (A). There the plaintiff sued the defendants, a firm of stock brokers, claiming damages for breach of his instructions as to the purchase of certain shares whereby he sustained a loss. For the purpose of ascertaining the scale of fees it was necessary to decide whether the action was founded on contract or on tort. The Court of Appeal held that the action was founded on contract. At page 405 Greer L. J. said:

"The distinction in the modern view, for this purpose, between contract and tort may be put thus. Where the breach of duty alleged arises out of a liability independently of the personal obligation undertaken by contract it is tort and it may be tort even though there may happen to be a contract between the parties, if the duty in fact arises independently of that contract. Breach of contract occurs where that which is complained of is a breach of duty arising out of the obligations undertaken by the contract."

The question, therefore, is whether the present suits are based on breach of duty arising independent of the contract, or whether they are suits for recovery of damages for breach of a

term of the contract. In the former case Art. 36 would apply; in the latter case Art. 116 would govern the case.

(3) The three plaints practically contain similar allegations. The allegations in the plaint in O. S. No. 640 of 1945 may be taken as a sample. In paragraph 4 it is stated:

"Without the knowledge and consent of the plaintiff and also contrary to the terms of the kaichit, defendants 1 and 2 have cut and removed one mango tree of the value of about Rs. 10, 28 cashewnut trees of the value of Rs. 3 each, 19 puduvanni trees of the value of Rs. 2 each and some other kuzhikkoors from and out of the kuzhikoors standing on the schedule paramba under the kaichit described in para. 3(2) above and belonging to the plaintiff....."

Paragraph 6 reads:

"As it has been expressly stipulated in the kaichit and also under the assignment deed set out in para. 3 above, that if the kuzhikkoors belonging to the jenmi are damaged, the tenant is liable for such amount of damages, defendants 1 and 2 are bound to pay the amount of damages in respect of the kuzhikkoors, and the plaintiff is entitled to get the same and he should also get the same. Hence this suit."

Paragraph 8 says:

"The cutting of the kuzhikkoors set out above by defendants 1 and 2 without the knowledge and consent of the plaintiffs is an offence under the criminal law and is also punishable. This suit is not therefore maintainable in the Court of Small Causes and it is filed in this court."

The Kaichit in the above suit, Ex. D. 6 contains similar allegations as the kaichits in the other suits. The material portion of Ex. D. 6 reads:

"In the event of the kuzhikkoors belonging to the kammal are destroyed or caused to be ruined on account of 'want of proper care on our part'. the losses incurred in connection therewith, and the arrears of pattam and interest thereon, etc are always liable to our mortgage right herein."

Under the aforesaid condition in the kaichit the defendants are under an obligation to take proper care of the trees. It was obviously not intended to cover a case of vandalism on the part of the mortgagees. The duty not to cut away the trees arises independently of the contract. It is not an obligation undertaken under the contract. Therefore, Art. 36 directly applies to the present suits filed by the appellant for the recovery of damages from the defendants on the ground that they had cut and removed the trees put in their possession. The Courts below are therefore right in holding that the action is not 'ex contractu' but 'ex delicto' and, therefore, having been filed more than two years after the cause of action accrued, would be barred by limitation. The appeals fail and are dismissed with costs in S. A. No. 503 of 1949. No leave.

B/M.K.S. Appeals dismissed.

A. I. R. 1953 MADRAS 481 (Vol. 40, C. N. 185)

RAMASWAMI, J.

Public Prosecutor, Appellant v. P. V. Audinarayana Chetty Respondent.

Criminal Appeal No. 102 of 1951, D/- 27-2-1952.

(a) Evidence Act (1872), S. 57 — Propaganda by State Govt. calling upon people to help it in finding out corruption and promising them protection against prosecution for being accomplices — Courts can take judicial notice of this propaganda. (Para 8)

Anno: Evid. Act S. 57 N. 9

(b) Evidence Act (1872), S. 1 — Appreciation of evidence — Immaterial discrepancies do not affect conclusions. (Para 28)

Anno: Evid. Act S. 1 N. 12

(c) Interpretation of statutes — Penal Laws — Over-subtlising of law for protection of corrupt officials and not in furtherance of justice deprecated: Observations of V. Bhashyam Aiyangar J. in 14 M.L.J. 226, Ref (Para 28)

Anno: C. P. C. Preamble N. 7.

(d) Criminal P. C. (1898), S. 417 — Appeal under — Review of evidence at large.

In an appeal preferred by the State under S. 417 Criminal P. C. unlike a criminal revision petition preferred by a private party against an acquittal, it is open to the High Court to review at large the evidence upon which an order of acquittal is founded and the Code makes no distinction between an appeal from an acquittal and an appeal from a conviction. In an appeal from an acquittal if the court thinks the lower court has taken an erroneous view of the evidence it has no jurisdiction to refuse to convict.

In reviewing at large, the evidence upon an order of acquittal, the High Court has to consider such matters as (i) the views of the trial judge as to the credibility of the witnesses (ii) the presumption of innocence in favour of the accused (iii) the right of the accused to the benefit of any doubt (iv) the slowness of an appellate court in disturbing a finding of fact arrived at by a judge who had the advantage of seeing the witnesses; AIR 1924 Bom 335; AIR 1934 PC 227(2) Relied on. (Para 16)

Anno: Cr. P. C. S. 417 N. 1 S. 423 N. 14, 15

(e) Criminal P. C. (1898) S. 417 — Accused charged under S. 161 I. P. C. and also under Prevention of Corruption Act (2 of 1947) — Conviction under former and acquittal under latter charge — In appeal Sessions Judge acquitting accused of the charge under S. 161, Penal Code — Appeal against acquittal by Government — Evidence in regard to both charges standing apart — In appeal, the whole evidence can be looked into for the purpose of finding out whether charge under S. 161, Penal Code has been made out or not for the limited purpose permissible under Ss. 5 to 9, 11, 14 and 15 of the Evidence Act — (Cr. P. C. (1898) S. 423) AIR 1945 Mad 240 Relied (Para 17)

Anno: Cr. P. C. S. 423, N. 14, 15

Public Prosecutor for Appellant; V. Rajagopalachari and S. Ramachandra Aiyar for Respondent.

CASES CITED:—

(A) ('24) AIR 1924 Bom 335: 26 Bom LR 113: 25 Cri LJ 786
(B) ('34) AIR 1934 PC 227(2): 1934 Mad WN 1017: 36 Cri LJ 786 (PC)
(C) ('45) AIR 1945 Mad 240: 1945-1 Mad LJ 183: 46 Cri LJ 744
(D) ('23) AIR 1923 Oudh 217: 24 Cri LJ 770
(E) ('28) AIR 1928 Pat 100: 29 Cri LJ 239

(F) ('31) AIR 1931 Lah 38: 32 Cri LJ 522
(G) ('44) AIR 1944 FC 66: 23 Pat 517: 45 Cri LJ 755
(H) ('04) 27 Mad 271: 14 Mad LJ 226

JUDGMENT: This is an appeal preferred against the acquittal by the learned Sessions Judge of Chittoor division, Mr. M. A. Azeem reversing the conviction under S. 161, Penal Code (i.e. receiving illegal gratification by a Supervisor of Highways) and sentence of one year's rigorous imprisonment awarded by the learned Assistant Sessions Judge of Chittoor division, Sri D. R. Venkatesa Aiyar, M. L., in S. C. No. 17 of 1950.

(2) The facts leading to the institution of this appeal are: The accused Sri P. V. Audinarayana Chetty was a Supervisor employed in the Highways Department, Madras State. His office was at Puttur and his actual place of residence was Tirupati. This accused who was the Supervisor of the Puttur section of the Highways Department of the Chittoor district is stated to have been regularly receiving bribes from contractors who did road maintenance work in that section. His 'modus operandi' was as follows: He used to insist upon contractors agreeing to pay 5 per cent. of the bills, and which he later on raised to 10 per cent. and which sudden departure from the 'mamool' created an active resentment and protest. Then he would check-measure the works and prepare bills for payment and either before or after the cheques were cashed by the contractor, the 'mamool' had to be paid. This 'modus operandi' and payments to him are spoken to, by P. Ws. 7, 11, 12 and 1, who are all contractors working on this Puttur section. I shall now briefly summarise the evidence of these four contractors.

(3-6) (His Lordship reviewed their evidence and continued:)

(7) This is the evidence of the prosecution regarding the 'modus operandi' of the accused, the systematic toll levied by him and spoken to by the four contractors, P. W. 7 Muniswami Reddi P.W. 11 K. Sesha Pillai, P.W. 12 Purushotham Naicker and P. W. 1 Rangiah Naidu.

(8) I have just now mentioned that Rangiah Naidu was being demanded in regard to 1949-50 works 10 per cent. whereas the 'mamool' which was being paid was 5 per cent. This Rangiah Naidu P. W. 1 pleaded with the accused that the percentage should not be raised. On that, the accused told him that he was justified in raising his 'mamool' as the contractors had secured higher rates for these two works. Thereupon Rangiah Naidu pleaded that he had suffered losses and that he would pay the usual 5 per cent. Thereupon the accused pressed for immediate cash payment. Rangiah Naidu promised payment after cashing the cheque, with the mental reservation of naturally booking this accused because by that time the Madras State through the press and platform had been widely broadcasting — a notorious fact of which judicial notice can be taken — that in Republican India such 'mamools' should not be paid and citizens should come forward and help the authorities, that prompt investigations will be made and that those who rendered assistance to book these public leeches would be protected from being proceeded against as accomplices.

Thereupon Rangiah Naidu arranged with the clerk in the P. W. D. office to give him a cheque on the Chittoor Imperial Bank for this contract standing in the name of Venkataraju after misleading the accused that he would take a cheque on the Chandragiri treasury. This bill for Rs. 5700 had already been sent to the Divisional Engineer at Chittoor. P. W. 1 cashed the cheque on 7-7-1949 and took his share as sub-contractor, of Rs. 1904. Then both this P. W. 1 and Venkataraju went to the Collector of Chittoor and gave a complaint Ex. P. 1 in which it has been narrated how this accused has been pressing for payment of high bribes of 10 per cent on the bill amounts and that he prepared bills only after a promise of payment of 5 per cent. and that it would be easy to catch him red-handed. Having apprised the authorities and setting in motion the forces of law and order to trap the accused this Rangiah Naidu P. W. 1 evaded meeting the accused who was naturally on his toes for getting his cut in the bill. This accused sent his peon Subbaraju once and maistry Isack (P. W. 5) at another time to fetch this P. W. 1. But Rangiah Naidu after cashing the cheque on 12-7-1949 for Rs. 5700 had gone home and made himself scarce to the supervisor. But on reaching home, maistry Doraiswami was in his house sent by the accused with a message to come and cough up the per centum, and P. W. 1 sent a soothing message that he (accused) need not worry himself and that he (P. W. 1) would stick by his undertaking and come and pay up. This increased pressure by the accused on this P. W. 1 Rangiah Naidu made him all the more energetic to book this supervisor. So he went to Chittoor but could not find the Divisional Engineer. Therefore, he went to Madras to complain to the Minister in charge of P. W. D. and finding that the Minister was on tour he went to the office of the Criminal Investigation Department. There he gave the complaint, Ex. P. 3 on the evening of 15-7-1949 at Madras to P. W. 15 Sri Y. Satyanarayana Choudhury, Deputy Superintendent of Police, C. I. D. This Ex. P. 3 mentions all the details of payment in 1948-49 and the worry given by this Supervisor to the contractor for higher per centage and how this accused was waiting for payment in respect of the bill which had just been cashed. Thereupon P. W. 15, an officer of great experience and integrity in the service of the Madras State, set a trap for this accused.

(9) P. W. 15 took three currency notes of Rs. 100 denomination from P. W. 1 who had them with him and then both of them left by car to Puttur. On learning at Puttur that the accused had gone to Tirupathi with the object of returning on the next day P. W. 15 and Rangiah Naidu went to Tirupathi from Puttur and stayed in the Travellers' bungalow at Tirupati on the night of 15-7-1949. The Deputy Superintendent of Police P. W. 15 instructed Rangiah Naidu to contact the accused at about 2 p.m. and gave the three marked currency notes to the accused when the latter was expected to go to the bus stand and then come round to the Deputy Superintendent of Police who had moved to the Devasthanam choultry and inform him of what had happened so that P. W. 15 and the panchayatdars could catch the Supervisor with the goods on him.

(10) P. W. 1 Rangiah Naidu thereupon waited for the accused near the Koneru opposite to the bus stand at Tirupati, because as I have just now stated inside information had made this Rangiah Naidu know that the accused would be coming to the bus stand, and I have mentioned also that the accused lives in Tirupati

though his office is in Puttur. On seeing this accused coming as expected P. W. 1 contacted him and the accused who did not apparently suspect this trap remarked to P. W. 1 that he had been avoiding seeing him though he had sent word several times. I suppose the accused meant by this to mildly rebuke this P. W. 1 to see the errors of his ways and how he should keep up his word with the supervisor. Then Rangiah Naidu handed over the three currency notes to him and accused thereupon demanded the balance of Rs. 200. This P. W. 1 has evasively stated that Venkataraju would pay him the balance the next day. The accused after expressing his dissatisfaction with the contractor's altered behaviour after the completion of the work and the passing of the bill put the three currency notes in a purse and tucked it inside the pocket of his coat. The accused went to the bus stand and sat in the bus preparatory to its starting. I may point out what is stated by the Public Prosecutor and which is not denied by the other side, that on account of the congestion of bus traffic in Tirupati and elsewhere passengers do try to get into the buses sometime before the scheduled time of departure to get a good place and the bus people leave the stand after the bus gets completely filled up. Therefore while the accused was sitting inside the bus apparently feeling complacent that he was the richer by a sum of Rs. 300, this P. W. 1 slipped away and contacted within five minutes P. W. 15 who was waiting for him in the Devastanam choultry and told him how he had handed over the three currency notes to the accused and that the accused was sitting inside the bus with currency notes inside his pocket in a purse.

(11) Then P. W. 15, the Deputy Superintendent of Police, with two panchayatdars Raghava Reddi and another Ponneri Raju came towards the bus stand from the choultry, stopped the bus which had just started and asked the accused whom P. W. 1 had pointed out to get down. The accused got down and on P. W. 15's demand produced two purses, M. Os. 2 and 3 from his inside coat pocket. M. O. 2 which is a smaller purse contained three currency notes M. Os. 4, 4(a) and 4(b). Ex. P. 5 was also recovered from this accused from the bigger purse M. O. 3. On the request of the Deputy Superintendent of Police, P. W. 4 Raghava Reddy verified the numbers on the three notes with the numbers given in a slip of paper Ex. P. 4 and Raghava Reddi said that the numbers tallied alright. This recovery was also witnessed by P. W. 2 Dr. H. N. Simham a pilgrim to Tirupati and who happened to be at the bus stand and who was impressed as a panchayatdar. P. W. 2 testifies that the notes which were found in the money purse of the accused bore the same numbers that were given in the list Ex. P. 4 which was with the Deputy Superintendent of Police, P. W. 15. P. W. 4 is a resident of Tirupati and a forest contractor of property and a respectable man and Dr. Simham was an entire stranger to the locality who had come as a casual pilgrim. The accused was then arrested and taken into custody. Then after completing the investigation and obtaining the sanction of the Chief Engineer, Highways, Madras, under Ex. P. 9, which is proved by P. W. 6, the accused was charge-sheeted for offences under Ss. 5(1) (a) and (d) and 5(2) of the Prevention of Corruption Act, 2 of 1947 and also for an offence under S. 161, Penal Code.

(12) The Stationary Sub-Magistrate, Tirupati, who held a preliminary enquiry committed the accused for trial at the sessions for offences under Ss. 5(1) (a) and (d) of the Prevention of Corruption Act, 2 of 1947. This Sessions case was tried by the learned Assistant Sessions Judge, Sri D. R. Venkatesa Aiyar on two charges, namely, criminal misconduct in the discharge of official duties under Ss. 5(1) (a) and (2) of the Prevention of Corruption Act and under S. 161, I. P. C. of receiving illegal gratification of Rs. 300 on 16-7-1949.

(13) In regard to the first charge, the case for the prosecution was as set out in the earlier paragraphs above and based on the evidence of the four contractors, P. Ws. 7, 11, 12 and 1, and the corroborative witnesses of P. W. 7, viz., P. Ws. 8, 9 and 10 and the account books of P. W. 11, viz., Exs. P. 14 and P. 15. The charge under S. 161, Penal Code, was based on the evidence of the prosecution set out in later paragraphs above and spoken to mainly by P. Ws. 1 to 5 and 15.

(14) The learned Assistant Sessions Judge has after thoroughly analysing the evidence with great care in an elaborate judgment came to the conclusion that the offence regarding the first charge, viz., habitual taking of bribes was not made out because of two reasons namely, that in regard to these payments these contractors stood in the position of accomplices of willing payers of the bribes and that therefore their evidence required independent corroboration in regard to each of them and that in this case, though he accepted the testimony of the four contractors themselves there was such independent corroboration only as regards the testimony of P. W. 7 in regard to the transaction covered by Ex. P. 5 and that therefore the charge under the Prevention of Corruption Act 2 of 1947 failed as this solitarily corroborated instance would be inadequate to support the finding of habitual bribe taking which is contemplated under Ss. 5(1)(a) and (2) of Act II of 1947. In regard to the offence under S. 161, Penal Code, the learned Assistant Sessions Judge agreeing with the unanimous opinion of the four assessors in the case came to the conclusion that the charge had been brought home by reliable and corroborative evidence against this accused and convicted him thereunder and sentenced him to one year's rigorous imprisonment.

(15) In appeal, the learned Sessions Judge of Chittoor, Mr. M. A. Azeem came to the conclusion that the charge under S. 161, Penal Code, had not been brought home to the accused and acquitted him. The State of Madras has thereupon preferred this appeal.

(16) Before discussing the evidence in this case, I must briefly point out that this being an appeal preferred by the State under S. 417, Criminal P. C. unlike a criminal revision petition preferred by a private party against an acquittal, it is open to the High Court to review at large the evidence upon which an order of acquittal is founded and the Code makes no distinction between an appeal from an acquittal and an appeal from a conviction. In an appeal from an acquittal, if the court thinks the lower court has taken an erroneous view of the evidence it has no jurisdiction to refuse to convict: see — 'Emperor v. Moti Khoda', AIR 1924 Bom 335 (A). This court has laid down that in reviewing at large the evidence upon an order

of acquittal, the High Court has to consider such matters as (i) the views of the trial Judge as to the credibility of the witnesses (ii) the presumption of innocence in favour of the accused (iii) the right of the accused to the benefit of any doubt (iv) the slowness of an appellate court in disturbing a finding of fact arrived at by a Judge who had the advantage of seeing the witnesses: — 'Sheo Swarup v. Emperor', AIR 1934 P C 227 (2) (B). But in this case we have the opposite view, the lower appellate court without considering these matters has reversed the conviction and sentence of the learned Assistant Sessions trial Judge. And yet, bearing in mind these considerations laid down by this court I shall review the evidence and arrive at my conclusion.

(17) The other point to be borne in mind is that in regard to two charges based upon several acts of bribe-taking including the receiving of illegal gratification of Rs. 300 the subject-matter of the trap, the trial court itself on the ground that adequate corroboration was not forthcoming, acquitted the accused in respect of offences under Act II of 1947 and convicted him under S. 161, Penal Code. This appeal to the High Court has been preferred only against the acquittal under S. 161, Penal Code, and in such a case can the whole evidence be looked into for the purpose of finding out whether the charge under S. 161, Penal Code, has been made out or not? This has been answered in the affirmative in a decision of this court in — 'In re Rangarao', AIR 1945 Mad 240 (C). In that case an accused was charged for the offence of cheating effectuated by means of forgery that is to say for offence under Ss. 420 and 467, I. P. C. The accused was acquitted in regard to cheating and convicted for forgery. On appeal a reference was made to the High Court by the Sessions Judge and the High Court answered the reference as follows:

> "The whole evidence is before the court. He is entitled if he thinks fit, to express his disagreement with the findings of fact in the acquittal although there being no appeal the acquittal still stands. He is not in the least bound by any finding of facts in the acquittal. The fact that the trial Judge was able to acquit of cheating and convict of forgery makes evident that this is not a case when on precisely the same facts a man is tried for two offences.....The reference will be returned to the learned Sessions Judge with these observations. He can come to his conclusion with regard to the appeal against the conviction under S. 467 quite untrammelled by the fact that the acquittal under S. 420, I. P. C. stands. It may act as a plea in bar to further trial of cheating but does not in the least act as a plea in bar with regard to the facts in so far as they are relevant in considering the charge of forgery."

But unfortunately in this case the evidence for the offence under S. 161, I. P. C., stands apart from and was not the subject-matter of adjudication in respect of the offences under Act 2 of 1947. This was so because the habitual bribe taking constituted the preliminary part & the offence under S. 161, I. P. C., constituted the sequel as a result of the trap to catch this habitual bribe-taker. Therefore, it is not necessary in this case to consider or make use of the evidence on which the acquittal of the trial court was based though I need not point out it can be made use of wherever relevant and proved in the adjudication of this offence under S. 161, I. P. C., for the limited purpose permissible under Ss. 5 to 9, 11, 14, and 15 of the Indian Evidence Act.

(18) There is no dispute regarding the recovery of the three one hundred rupee currency notes from the person of the accused at the bus stand by P. W. 15, and the only point of dispute is according to the prosecution these notes had been given by P. W. 1 as an illegal gratification in the circumstances set out by them and in order to catch the accused red handed and according to the accused P. W. 1 Rangiah Naidu gave him the three currency notes at the Koneri near the bus stand in the following circumstances: The explanation of the accused is that when he met Rangiah Naidu the latter expressed inability to leave Tirupathi to Puttur on account of a case in court and that Rangiah Naidu's son-in-law would be waiting at the Puttur bus stand expecting Rangiah Naidu with money and that Rangiah Naidu requested him to take the three currency notes to be handed over to his son-in-law and that the accused undertook the errand with a view to help the coolies so that the work would not suffer and that at that time one T. Ramakrishnaiya (D. W. 1) was in his company.

(19) On a review of the entire circumstances of the case I have come to the conclusion that the prosecution had brought home beyond reasonable doubt that the three currency notes recovered from the accused had been received by him as an illegal gratification as alleged by the prosecution witnesses and in the circumstances set out by them and incidentally that the explanation which the accused has put forward to give an innocent origin for his possession is thoroughly false. I shall now set out my reasons.

(20-28) (His Lordship considered the explanation of the accused and the evidence offered by him and also the reasoning of the Sessions Judge and proceeded:) I am unable to follow this reasoning of the learned Sessions Judge, who seems to think that he would have arranged the trap more cleverly than the C. I. D. Officer, and in any event I am unable to see its relevance or logic. Sixthly, the learned Sessions Judge makes much of the immaterial discrepancy, viz., that when the Deputy Superintendent of Police asked the accused to hand up the money taken as bribe one witness said that the accused got a fright and after five minutes unbuttoned his coat and another witness said that he stood motionless without talking for a while and a third said that he did not tremble. But it is curious that the learned Sessions Judge does not say that on account of those discrepancies he disbelieves these witnesses but merely contents himself with the remark "There are discrepancies" without finding whether they are more apparent than real or cut at the root of the prosecution story. It has been laid down by several High Courts that immaterial discrepancies of this nature do not affect the conclusion one way or the other. See — 'King Emperor v. Narotam', AIR 1923 Oudh 217 (D) — 'Ghanshyam Singh v. Emperor', AIR 1928 Pat 100 (E) and — 'Mahla Singh v. Emperor', AIR 1931 Lah 38 (F). It is not surprising that this inconsequential discussion of the evidence of the learned Sessions Judge has been wound up with an observation from the decision in —

'Huntley H. T. v. Emperor', AIR 1944 F C 66 (G), wholly overlooking that the learned Assistant Sessions Judge himself, an officer of great experience and considerable ability, has scrupulously weighed the evidence and come to his conclusion in the light of the principles laid down in this very decision. On the other hand, it is the treatment accorded to the evidence by the learned Sessions Judge which recalls the dissatisfaction expressed by one of the eminent Judges of this Court the late Mr. Justice Sir V. Bhashyam Aiyangar in — 'Ramasami Gounden v. Emperor', 14 Mad L J 226 (H) about oversubtlising of the law of the country for the protection of corrupt officials and not for the furtherance of justice.

(29) I have therefore not the slighest hesitation in setting aside the acquittal by the learned Sessions Judge of Chittoor, and I find the accused guilty of the offence under the second charge viz., S. 161, I. P. C. and convict him thereunder and sentence him to one year's rigorous imprisonment.

B/R.G.D. Appeal allowed.

***A. I. R. 1953 MADRAS 485 (Vol. 40, C. N. 186)**

RAJAMANNAR C. J. AND VENKATARAMA AIYAR J.

Sm. K. Ponnalagu Ammal, Petitioner v. The State of Madras, represented by the Secretary to the Revenue Department, Madras and others, Respondents.

Letters Patent Appeal No. 134 of 1952 and W. P. No. 317 of 1952, D/- 7-11-1952, against order of Subba Rao J. in C. M. P. No. 13519 of 1950, D/- 15-4-1952.

†*Letters Patent (Madras), Cl. 15 — Appeal by person not party to suit — (Civil P. C. (1908), Ss. 96 and 104).

Under the practice consistently followed by the English Courts which is a just and equitable practice and is in no way inconsistent with the doctrine that a right of appeal can only be created by statute, a person who is not a party to the suit may prefer an appeal if he is affected by the judgment, decree or order of the trial Court, provided he obtains leave from the Court of appeal. AIR 1949 Bom 141, Foll. AIR 1934 Mad 360, Not foll; AIR 1925 PC 155 and case law referred. (Para 18)

It would be improper to grant leave to appeal to every person who may in some remote or indirect way be prejudicially affected by a decree or judgment. Ordinarily leave to appeal should be granted to persons who, though not parties to the proceeding, would be bound by the decree or judgment in that proceeding and who would be precluded from attacking its correctness in other proceedings. AIR 1924 Mad 689 and 62 Cal 701, Ref. (Para 19)

Anno: C.P.C., S. 96 N. 6 Pt. 2a.

K. V. Venkatasubramania Iyer, K. S. Desikan and N. C. Srikumar, for Petitioner; R. Kesava Iyengar, K. S. Ramamurthi, K. Parasoram and Government Pleader, for Respondents.

CASES CITED:

(A) ('25) AIR 1925 PC 155: 87 Ind Cas 313 (PC)
(B) ('12) 35 Mad 1: 8 Ind Cas 340 (FB)
(C) ('39) AIR 1939 FC 43: 1939 FCR 159 (FC)
(D) ('41) AIR 1941 FC 16: 1940-3 FLJ (FC) 97
(E) ('49) AIR 1949 FC 1: 1947 FCR 180: 49 Cri LJ 625 (FC)
(F) (1864) 10 HLC 704: 11 ER 1200
(G) (1913) 2 KB 614
(H) ('38) AIR 1938 FC 1: 1939-2 FLJ 1
(I) ('39) AIR 1939 FC 42: 1939 FCR 121
(J) ('24) AIR 1924 Mad 689: 47 Mad 633
(K) ('35) 62 Cal 701: 61 Cal LJ 853
(L) ('34) AIR 1934 Mad 360: 57 Mad 670
(LA) ('41) AIR 1941 Mad 577: 1941-1 Mad LJ 531
(M) ('40) AIR 1940 FC 4: 1940-3 FLJ 12
(N) ('30) AIR 1930 Mad 75: 52 Mad 952
(O) ('49) AIR 1949 Bom 141: ILR (1949) Bom 591
(P) (1894) 2 Ch D 410: 63 LJ Ch 777
(Q) (1881) 16 Ch D 1: 29 WR 228
(R) (1882) 20 Ch D 137: 51 LJ Ch 344
(S) (1885) 16 QBD 408: 55 LJ QB 257
(T) (1921) 1 Ch D 107: 90 LJ Ch 1
(U) (1909) 2 Ch D 620: 79 LJ Ch 19

JUDGMENT: L. P. A. No. 134 of 1952:— This is an appeal under the Letters Patent against the judgment of Subba Rao J. in C.M.P. No. 13519 of 1950. That petition was filed in the following circumstances. Krishna Vijaya Poochaya Naicker, Zamindar of Marungapuri, an impartible estate situated in Tiruchirapalli district, died on 17-9-1926 leaving behind him three widows, Lakshmi Ammani, Ponnalagu Ammani and Muthulagu Ammani. As one of the incidents of impartible estates in Southern India is that the estate is descendible to a single heir, the seniormost of the three widows would be first entitled to succeed. The Government, on the assumption that Lakshmi Ammani was the seniormost of the widows, proceeded to exercise powers conferred on them by the Madras Court of Wards Act. On 11-7-1927 the following notification was published in the Fort St. George Gazette and in the Tiruchirapalli district Gazette:

"Under S. 15, Madras Court of Wards Act, 1902, His Excellency the Governor in Council declares Lakshmi Ammani Ammal, the proprietrix of the Marungapuri estate in the Kulitalai taluk of the Tiruchirapalli District to be incapable of managing her property and directs the Court of Wards to assume the superintendence of that property.

2. The Collector of Tiruchirapalli will discharge in respect of the property the duties imposed on a Collector by the said Act."

It is common ground that in pursuance of this notification the Court of Wards assumed the superintendence not only of the impartible estate of Marungapuri but also other partible properties left by the deceased zamindar.

(2) The late Zamindar left behind him a will dated 30-7-1915 and a codicil dated 10-8-1926. Ponnalagu Ammani alleged that she took the son of her daughter in adoption to her husband on 1-12-1949 under the authority given to her by her husband in the will and the codicil. She appears to have sent a petition to the Government on 6-1-1950 on behalf of the minor adopted son. Lakshmi Ammani filed another petition on 1-5-1950 evidently attacking the validity of the alleged adoption. The Government passed an order, G. O. No. 2709 on 9-10-1950 dealing with both the petitions and communicated portions

of their order to the two widows respectively. The following is the portion of the order communicated to Ponnalagu Ammani:

"(5) With reference to her petition dated 6-1-1950, read above, Sm. Ponnalagu Ammani is informed that the Government have directed the Court of Wards to release from its superintendence the properties pertaining to Marungapauri estate which are now under its superintendence. As however there is dispute as to title to the properties between the senior Zamindarini and the adopted boy the Government have decided to retain custody to enable either of the claimants to obtain suitable orders from the civil Court in regard to the custody of the properties."

To Lakshmiammani the Government communicated para. 4 of their order, which runs as follows:

"(4). With reference to her petition dated 1-5-1950 read above Sm. Lakshmiammani is informed that the Government have been advised that the adoption made by Sm. Ponnalagu Ammani is valid in law and that she (Sm. Lakshmi Ammani) has no longer any subsisting legal right or title to the impartible and partible properties of the late Zamindar which are in the custody of the Court of Wards and that it is therefore not possible to hand over possession of such properties without an order of a civil Court. The Government have directed the Court of Wards to release the properties from its superintendence. She is informed that in case she does not obtain suitable orders from a civil Court, within a period of three months from the date of receipt of this order regarding the custody of the properties, the Government will, on the expiry of that period, take such steps in regard to them as they may consider suitable and necessary in the light of the legal advice they have received."

On 17-10-1950, the following notification was published in the Fort St. George Gazette:

"In exercise of the powers conferred by S. 15, Madras Court of Wards Act, 1902 (Madras Act I of 1902) and of all other powers enabling them in this behalf, His Excellency the Governor of Madras hereby rescinds Revenue Department Notification No. 210 dated 11-7-1927, published at page 1079 of Part 1 of the Fort St. George Gazette dated 19-7-1927, declaring Sm. Lakshmi Ammani Ammal, the then proprietrix of the Marungapuri estate, in the Kulitalai taluk of the Tiruchirapalli district, to be incapable of managing her property and directing the Court of Wards to assume the superintendence of that property."

The Government followed it up by another notification a few days later which was published in the Fort St. George Gazette dated 21-11-1950. It was in the following terms:

"It is hereby notified under S. 62, Madras Court of Wards Act, 1 of 1902 that, under orders of Government, the Court of Wards has released from its superintendence the Marungapuri estate in the Kulitalai taluk on the Tiruchirapalli district including the separate and partible properties left by the late Zamindar."

(3) Immediately after this notification Lakshmi Ammani filed in this Court an application under Art. 226 of the Constitution for the issue of a Writ of Mandamus or any appropriate writ or order directing the State of Madras and the Court of Wards to deliver possession of the Marungapuri Zamin properties which were in the superintendence of the Court of Wards to her with accounts, records, documents, etc. She also prayed for an 'ad interim' injunction restraining the respondents from parting with the custody of the properties in favour of any person other than her pending disposal of the main application. In the affidavit filed by her karyasthar, after setting out the facts above narrated, he alleged that the Court of Wards was bound to hand over possession of all the properties including the accumulated income only to her and stated that the Court of Wards having assumed management on her behalf & in her right, it would be unjust and incompetent for them to set up the rights of anyone else in derogation of and inconsistent with her rights without surrendering and restoring possession of the properties to her.

(4) The Collector of Tiruchirapalli filed a counter affidavit on behalf of the respondents. He stated inter alia that the Government were advised that the adoption was validly made and had the effect of divesting Lakshmi Ammani of the estate and the adopted son became entitled not only to the impartible zamindari but also to the separate and partible properties left by the late Zamindar. The attitude taken up by the Government and the Court of Wards is summed up in para. 5 of the counter affidavit in which the objection was taken that the question as to who is the proprietor of the estate could not be decided in proceedings by way of a writ and the matter could only be decided properly in a civil Court at the instance of either of the two claimants.

(5) Lakshmi Ammani's karyasthar filed a reply affidavit alleging that it was not competent to the respondents to raise any objection to the re-delivery of the zamin to her as it was from her they took the zamindari and it was on her behalf that they had been in management of the estate. A legal plea was put forward in the following terms:

"The respondents having accepted the position of guardianship and taken the zamin in that capacity it is not competent for them to assert any hostile title or set up 'jus tertii' until they had surrendered possession and discharged themselves from the guardianship with which the statute had clothed them."

(6) Lakshmi Ammani's karyasthar subsequently filed a further affidavit evidently because of the notification of the Marunapuri estate under Madras Act 26 of 1948. He alleged that even if that Act was valid the notification under it would not vest in the Government the properties other than the zamindari like the separate properties, jewels, etc., left by the late zamindar, and these had in any event to be re-delivered to her. A schedule was attached to the affidavit setting out in detail the items of properties which would not vest in the Government under Madras Act 26 of 1948.

(7) The petition was disposed of by Subba Rao J. He held after a consideration of the facts and the relevant provisions of the Court of Wards Act that the Court of Wards had no power to refuse to give possession to the person who was their ward and who had subsequently ceased to be such. If a third party had paramount rights it was for that party to institute a suit in a civil Court to establish his or her rights. The learned Judge recognised the effect of Madras Act 26 of 1948, namely, that even on his finding Lakshmi Ammani could only claim

to recover possession of properties that did not vest in the Government under the provisions of that Act. He therefore directed the respondents to hand over to her the properties belonging to Lakshmi Ammani in their possession excluding the properties that vested in the Government under Madras Act 26 of 1948. This order was passed on 15-4-1952.

(8) Neither the State of Madras nor the Court of Wards filed any appeal. But on 22-4-1952 Ponnalagu Ammani filed an application before us asking for leave to prefer a Letters Patent appeal against the order on the ground that neither she nor the adopted son had been impleaded in Lakshmi Ammani's petition, that she was a person whose rights were affected by the said decision and as an aggrieved person she should be granted leave to file an appeal though she was not a party to the petition. In the affidavit filed in support of the application she submitted that even if the adoption were to be disregarded she would be entitled to an equal share in the partible properties left by the late zamindar, and if the adoption were to be upheld neither she nor Lakshmi Ammani would be entitled to any share. We granted leave to appeal as we thought that Ponnalagu Ammani was vitally interested in the subject matter and felt aggrieved by the order passed by Subba Rao J. and we admitted the Letters Patent Appeal. The order granting leave was, however, passed 'ex parte'.

(9) A preliminary objection was taken by Mr. Kesava Aiyangar on behalf of Lakshmi Ammani that the appeal was incompetent because Ponnalagu Ammani who was not a party to the petition disposed of by Subba Rao J. could not file an appeal against the order in that petition and there was no provision of law under which this Court had the power or jurisdiction to grant leave to a person not party to a proceeding to prefer an appeal against an order in that proceeding. His contention briefly was that the right of appeal is the creation of a statute and a Court could not enlarge its appellate jurisdiction by its own rules of practice. His contention was obviously based on the assumption that there was something in the Letters Patent which impliedly restricted the right of appeal against judgment or order in any proceeding to the parties to the proceeding.

(10) The material provision of the Letters Patent is Cl. 15. It runs thus:

> "Appeal from the Courts of Original jurisdiction to the High Court in its appellate jurisdiction:— And we do further ordain that an appeal shall lie to the said High Court of Judicature at Madras from the judgment (not being a judgment passed in the exercise of appellate jurisdiction in respect of a decree or order made in the exercise of appellate jurisdiction by a Court subject to the superintendence of the said High Court, and not being an order made in the exercise of revisional jurisdiction, and not being a sentence or order passed or made in the exercise of the power of superintendence under the provisions of S. 107, Government of India Act, or in the exercise of criminal jurisdiction) of one Judge of the said High Court or one Judge of any division Court, pursuant to S. 108, Government of India Act, and that notwithstanding anything hereinbefore provided an appeal shall lie to the said High Court from a judgment of one Judge of the said High Court or one Judge of any division Court, pursuant to S. 108, Government of India Act made (on or after the 1st day of February 1929) in the exercise of appellate jurisdiction in respect of a decree or order made in the exercise of appellate jurisdiction by a Court subject to the superintendence of the said High Court, where the Judge who passed the judgment declares that the case is a fit one for appeal; but that the right of appeal from other judgments of Judges of the said High Court or of such division Court shall be to Us, Our Heirs or Successors in Our or Their Privy Council, as hereinafter provided."

The argument was that the word "judgment" in this clause had the same meaning as the word "decree" in the Civil Procedure Code and S. 96 of the Code which provides for an appeal from "every decree passed by any Court exercising original jurisdiction to the Court authorised to hear appeals from the decisions of such Court" has been construed as conferring that right of appeal only on the parties to the suit who might be aggrieved by the decree.

(11) Mr. Kesava Aiyangar relied on the following observation which occurs in the opinion of Sir John Edge in—'S. J. Bhogilal v. Dakore Temple Committee', AIR 1925 PC 155 (A).

> "The term 'judgment' in the Letters Patent of the High Court means in civil cases a decree and not a judgment in the ordinary sense."

In the Code of Civil Procedure we find three expressions used relating to the decisions of Courts, namely, decree, order and judgment. Decree is defined as follows:

> " 'Decree' means the formal expression of an adjudication which, so far as regards the Court expressing it, conclusively determines the rights of the parties with regard to all or any of the matters in controversy in the suit and may be either preliminary or final. It shall be deemed to include the rejection of a plaint and the determination of any question within S. 47 or S. 144, but shall not include (a) any adjudication from which an appeal lies as an appeal from an order, or (b) any order of dismissal for default."

"Order" means

> "the formal expression of any decision of a civil Court which is not a decree."

"Judgment" is defined as

> "the statement given by the Judge of the grounds of a decree or order."

Their Lordships of the Judicial Committee evidently had in mind this definition of judgment when they refer to "a judgment in the ordinary sense". The scheme of appeals under the Civil Procedure Code is this. Under S. 96,

> "Save where otherwise expressly provided in the body of this Code or by any other law for the time being in force, an appeal shall lie from every decree passed by any Court exercising original jurisdiction to the Court authorised to hear appeals from the decisions of such Court."

Under S. 104 an appeal lies from certain orders mentioned in that section and in O. 43. But no appeal ordinarily lies from any other order. In certain cases a second appeal is provided from appellate decrees (S. 100). No appeal lies against a judgment as such, as distinct from a decree or order. Under Cl. 15, Letters Patent an appeal lies from "the judgment" of one Judge of the High Court. This difference in language has led to the view taken by this Court in the

leading case — 'Tuljaram Row v. Alagappa Chettiar', 35 Mad 1 (FB) (B) and subsequent decisions following it that certain decisions of Judge on the Original Side of the High Court are subject to appeal under Cl. 15, Letters Patent though similar decisions would not be appealable under the Civil Procedure Code. We are not now concerned with the correctness of this view. Sulaiman J. in — 'Horriram Singh v. Emperor', AIR 1939 F C 43 (C) was inclined to hold that in view of the observation made by the Privy Council in — 'AIR 1925 P C 155' (A) the word "judgment" cannot now be taken in its widest possible sense so as to include every order which terminates a proceeding pending in the High Court so far as that Court is concerned. It was not disputed before us that an appeal would lie from the judgment of a Judge of this Court disposing of an application for a writ under Art. 226 of the Constitution to a Division Bench though it may not be strictly a decree within the meaning of the Civil Procedure Code. Mr. Kesava Aiyangar's anxiety to equate judgment in Cl. 15, Letters Patent with "decree" in the Civil Procedure Code was to have the benefit of rulings in which it was held that only parties to a suit could appeal against the decree in the suit. Support for this view is apparently sought from the definition of "decree" as "the formal expression of an adjudication which conclusively determines the rights of the parties to the suit." Varadachariar J. in — 'United Provinces v. Mt. Atiqa Begum', AIR 1941 F C 16 (D), observes at p. 42.

> "S. 96, Civil P. C. does not in terms say who is entitled to prefer an appeal, but according to the Code it is the decree that has to be appealed against. The decisions have therefore laid it down as a matter of inference that a party adversely affected by the decree is the only person entitled to appeal."

Observations in decisions of the Federal Court in appeals sought to be preferred in criminal cases which were relied on by Mr. Kesava Aiyangar appear to us to be entirely irrelevant. Their Lordships in those cases were concerned with the question whether an interlocutory order made in a criminal proceeding could be carried in appeal to the Federal Court, and it was held that it could not be. See — 'Kuppuswami Rao v. The King', AIR 1949 FC 1 (E).

(12) It is equally not necessary to deal with the rulings of English and Indian Courts to which Mr. Kesava Aiyangar referred us for the proposition that there is no inherent right of appeal and the creation of a right of appeal is an act which requires legislative authority and that neither the inferior Court nor the superior Court nor both combined can create such a right — 'Attorney General v. Sillem', (1864) 10 H L C 704 (F), — 'National Telephone Co., Ltd. v. Postmaster General', (1913) 2 K B 614 at p. 621 (G);—'Pashupati Bharti v. Secretary of State', AIR 1938 F C 1 (H) and — 'Lakhpatram v. Beharilal', AIR 1939 FC 42 (I). In the case before us there is not controversy about the right of appeal as such. The only controversy is as to who is entitled to appeal. On that question the cases referred to above have no bearing whatever.

(13) Mr. Kesava Aiyangar concedes that every party to a suit is not entitled as of right to file an appeal against the decree in the suit. The party must be aggrieved. While it has been held that a party who is not aggrieved is not entitled to appeal, it has also been held that even a successful party in a suit can file an appeal against a finding of the Court on one of the issues which is adverse to him, though the final decision is in his favour: 'Vide — 'Venkateswaralu v. B. Lingayya', AIR 1924 Mad 689 (J) and — 'Hara Chandra Das v. Bhola Nath Das', 62 Cal 701 (K). It was laid down in these cases that the test to be applied in each case is whether the finding sought to be appealed against is one to which the rule of res judicata may be held to be applicable so as to disentitle the aggrieved party to agitate the question covered by the finding in any other proceeding. This rule is certainly an extension of the principle that it is only a party adversely affected by the decree that is entitled to appeal (Vide Varadachariar J. at page 42 in — 'AIR 1941 F C 16 (D)'.) This extension is evidently based on grounds of justice. Guha J. in — '62 Cal 701' (K) says:

> ".....The Code of Civil Procedure, by the provisions relating to the right of appeal, as they now stand, does not provide for an appeal against a finding contained in a judgment; the appellants in this Court have, therefore, no right of appeal, under the law. On grounds of justice and recognising that, on that ground, the implication of suitable exception or qualification may be justifiable and even necessary, we are prepared to follow the rule engrafted on the statute by a current of decisions by High Courts in this country, that an aggrieved party may have a right of appeal, and that the test to be applied in such a case is whether the finding sought to be appealed against is one to which the rule of 'res judicata' may be held to be applicable, so as to disentitle the aggrieved party to agitate the question covered by the finding in any other proceeding."

(14) On the immediate question, namely, whether a person who is not a party to a suit or other proceeding is under no circumstance entitled to prefer an appeal against the decision in that suit or proceeding, there is very little authority in India. In — 'Indian Bank Ltd. Madras v. Bansiram Jashamal', AIR 1934 Mad 360 (L), Madhavan Nair and Jackson JJ. held that neither under the general principles of law nor under the Civil Procedure Code can a person who was not a party to a suit prefer an appeal against the decree therein. In that case the Official Receiver representing the general body of creditors was a defendant in a suit brought by two plaintiffs to declare their title to two items of property. The suit went against the Official Receiver. But he did not file an appeal. One of the creditors thereupon filed an appeal against the decree in the suit and along with it filed an application praying that in the circumstances this Court may be pleased to permit the applicant to appeal against the decree. The learned Judges held that under the Civil Procedure Code no person who is not a party to the suit can prefer an appeal under S. 96 because

> "the right of appeal is a special creature of statute and it can be exercised only by those in whom the power is vested expressly or implied by the statute."

Two decisions of the Chancery Court in England were relied on by the appellant in which leave to a person interested in, but not a party to an action, was given to appeal from an order by which the person was aggrieved.

But the learned Judges did not act on those decisions as in their opinion they related to powers of the appellate Court to grant leave to appeal and such power was vested on the practice prevailing in the English Courts. No provision of law or rule of practice, they said, has been shown to them entitling the appellant to claim such leave. But they added that even if such permission could be asked they were not satisfied that it was a proper case in which the permission should be given. This ruling was followed by a single Judge (Abdur Rahman J.) in — 'Kasi Chettiar v. Secretary of State', AIR 1941 Mad 577 (LA).

(15) Mr. Kesava Aiyangar further contended that an appellate Court cannot give leave to appeal unless under a statutory power. In support of this contention he relied on the decisions in — 'AIR 1938 FC 1 (H)'; — 'AIR 1939 FC 42 (I)'; — Kishorilal v. Governor in Council, Punjab', AIR 1940 F C 4 (M) and—'Ramanayya v. Kotayya', AIR 1930 Mad 75 (N). These decisions are only authority for the position that when under a statute a right of appeal is conferred on an aggrieved party only with the leave of or on a certificate from the Court from which the appeal is sought to be preferred and if such leave or certificate be refused by that Court, an appellate Court will not have the power to grant the leave or certificate. In the decisions of the Federal Court their Lordships had to consider the effect of S. 205, Government of India Act, 1935, under which an appeal to the Federal Court was available only with a certificate from the High Court. In the earliest of these cases, their Lordships say:

> "In the first place though every Court of superior jurisdiction no doubt possesses inherent powers for certain purposes (of which it is unnecessary and perhaps would be unwise to attempt an exhaustive definition) we know of no authority for the proposition that a Court by the exercise of any inherent powers can extend its appellate jurisdiction or increase its revisional authority over other Courts."

In the later case in — 'AIR 1940 FC 4' (M), their Lordships point out that a certificate under S. 205 is a necessary condition precedent to all appeals to the Federal Court, and if the High Court refuses to grant a certificate it is not for them to enquire into the reasons for the refusal against which no appeal lay to that Court. We have nothing like that here. There is no provision making such a leave a condition precedent to an appeal like the one under consideration.

(16) Mr. Venkatasubramania Aiyar for the appellant relied on the decision in — 'Province of Bombay v. W. I. Automobile Association', AIR 1949 Bom 141 (O) and the English practice on which that decision is based. In the Bombay case Chagla C. J. and Bhagwati J. held that a person not a party to a suit may prefer an appeal if he is affected by the order of the trial Court provided he obtained leave from the Court of appeal. The learned Chief Justice observed as follows:

> "The Civil Procedure Code does not in terms lay down as to who can be a party to an appeal. But it is clear and this fact arises from the very basis of appeals, that only a party against whom a decision is given has a right to prefer an appeal. Even in England the position is the same. But it is recognised that a person who is not a party to the suit may prefer an appeal if he is affected by the order of the trial Court, provided he obtains leave from the Court of appeal; therefore whereas in the case of a party to a suit he has a right of appeal, in the case of a person not a party to the suit who is affected by the order he has no right but the court of appeal may in its discretion allow him to prefer an appeal."

Bhagwati J. referred to the decision of this Court in — 'AIR 1934 Mad 360' (L) and accepted it as authority for the position that no person who is not a party to a suit or proceeding has a right of appeal. But if he was aggrieved by a decision of the Court the remedy open to him was to approach the appellate Court and ask for leave to appeal which the appellate Court would grant in proper cases. The learned Judge cites a passage from the decision in — 'In re Securities Insurance Co.', (1894) 2 Ch D 410 (P), where Lindley L. J. said that the practice of the Courts of Chancery both before and after 1862 was well settled that while a person who was a party could appeal without any leave a person who without being a party was either bound by the order or was aggrieved by it or was prejudicially affected by it could not appeal without leave.

(17) There is abundant authority recognising the existence of such a practice and innumerable instances of such a practice to some of which learned counsel referred us, namely, — 'In re Markham Markham v. Markham', (1881) 16 Ch D 1 (Q); — 'In re Padstow total Loss and Collision Assurance Association', (1882) 20 Ch D 137 at p. 142 (R); — 'Attorney General v. Marquis of Ailesbury', (1885) 16 Q B D 408 at p. 412 and — 'In re Ex Tsar of Bulgaria', (1921) 1 Ch D 107 at p. 110 (T). The position is thus stated in the Annual Practice for 1951 at page 1244:

> "Persons not parties on the record may, by leave obtained on an 'ex parte' application to the Court of appeal, appeal from a judgment or order affecting their interests, as under the old practice."

Halsbury's Laws of England, Vol. 26, page 115, gives the same rule in a different form:

> "A person who is not a party and who has not been served with such notice (notice of the judgment or order) cannot appeal without leave, but a person who might properly have been a party may obtain leave to appeal."

Several instances are referred to in the footnote and the limits of the rule can be gathered from these instances. Leave will not be given where the applicant could not have been a party and application for leave must be made within the time limited for the appeal. The reason for the practice apparently is the principle that a person who could have been made a party and who might have appealed could not afterwards bring an action to declare that the judgment or order was not binding on him (Vide—'In re Hambrough's Estate; Hambrough v. Hambrough', (1909) 2 Ch 620 (U).)

(18) In more or less similar terms the rule and its limits are stated in Seton on Judgments and Orders, 7th Edn., Vol. 1, at p. 824,

> "Where the appellant is not a party to the record he can only appeal by leave to be obtained on motion 'ex parte' from the Court of Appeal..... Leave to appeal will not be given to a person not a party unless his

interest is such that he might have been made a party."

Mr. Kesava Aiyangar of course could not deny that such a practice was well established in England. But he contended that such a practice could not be followed by our Courts, governed as we are by the Civil P. C. and the Letters Patent. We do not see why. The very doctrine on which Mr. Kesava Aiyangar rests his whole case, namely, that a right of appeal is a creature of statute and an appellate Court cannot create a right of appeal is founded on English authorities like—'(1864) 10 HLC 704 (F)'. The provisions as regards appeal in England are not materially different from those contained in the Civil Procedure Code or Letters Patent. In neither of them is there any express mention of persons who could appeal. In our opinion the practice consistently followed by the English Courts is a just and equitable practice and is in no way inconsistent with the doctrine that a right of appeal can only be created by statute. With respect to the learned Judges of the Bombay High Court we agree with them that there is no reason why the practice should not be followed by Courts in India.

(19) Now, what is the test to find out when it would be proper to grant leave to appeal to a person not a party to a proceeding against the decree or judgment in such proceedings? We think it would be improper to grant leave to appeal to every person who may in some remote or indirect way be prejudicially affected by a decree or judgment. We think that ordinarily leave to appeal should be granted to persons who, though not parties to the proceeding, would be bound by the decree or judgment in that proceeding and who would be precluded from attacking its correctness in other proceedings. We can give as an instance the case where an Official Receiver impugnes an alienation by the insolvent and sues to set it aside and fails. If he does not appeal the decision of the trial Court would be final and binding not only on him but also on all the creditors. In such a case, if the Official Receiver does not choose to file an appeal an aggrieved creditor should ordinarily be given leave to appeal if he shows a prima facie case against the order sought to be appealed. A more or less similar test has been applied to cases where a successful party has been allowed to file an appeal against an adverse finding. (Vide—'AIR 1924 Mad 689' (J) and — '62 Cal 701 (K).)

(20) Applying that test, can we say that Ponnalagu Ammani will be bound by the judgment of Subba Rao J. in the application filed by Lakshmi Ammani to which she was not a party? We think not. The Court of Wards cannot be said to have represented her. The judgment of Subba Rao J. was in no sense a judgment 'in rem'. It is binding only as between Lakshmi Ammani and the Government and the Court of Wards. Mr. Venkatasubramania Aiyar when he says that the judgment of Subba Rao J. affects his client adversely, means not that the decision affects her legal rights but that the carrying of it into effect would adversely affect her, that is, if and when the Government and the Court of Wards deliver possession of the properties to Lakshmi Ammani as directed by that judgment. But it will be open to Ponnalagu Ammani to prevent the happening of such a thing by taking other steps. In these circumstances we do not think that this is a fit and proper case in which leave to appeal should be granted. We, therefore, hold that the appeal is incompetent and dismiss it.

A/V.S.B. Appeal dismissed.

A. I. R. 1953 MADRAS 490 (Vol. 40, C. N. 187)

CHANDRA REDDY J.

Periasami Gounder, Appellant v. Vellama Naicker and others, Respondents.

Second Appeal No. 2061 of 1948, D/- 29-10-1952.

(a) Tenancy Laws — Madras Estates Land Act (1 of 1908), S. 107 — "Subordinate to such officer".

A village munsif is a subordinate of the Revenue Inspector holding the sale. (Para 6)

(b) Tenancy Laws — Madras Estates Land Act (1 of 1908), S. 107 — Purchase by manager.

A junior member of a joint family acquires an interest in the property purchased by the manager of the family. In such a case the fact that the junior member was a subordinate of the officer holding the sale renders the sale invalid. AIR 1939 Mad 797, Rel. on. (Para 7)

(c) Tenancy Laws — Madras Estates Land Act (1 of 1908), S. 107 — Nature of sale — (Limitation Act (1908), Art. 12 (b)) — (Civil P. C. (1908), O. 21 R. 73).

The sale under S. 107 is voidable and not void and, therefore, has to be set aside, within the time prescribed by Art. 12(b) of the Limitation Act. Case law discussed. (Para 8)

Anno: C.P.C., O. 21 R. 73 N. 2; Lim. Act, Art. 12 N. 1, 7.

K. S. Ramamurthi and V. Seshadri, for Appellant; V. C. Viraraghavan, for Respondents.

CASES CITED:

(A) ('39) AIR 1939 Mad 797: 1939-1 Mad LJ 678
(B) ('22) AIR 1922 PC 336: 44 Mad LJ 718 (PC)
(C) ('27) AIR 1927 Mad 1135: 101 Ind Cas 89
(D) ('41) 1941-2 Mad LJ 943
(E) ('50) AIR 1950 Cal 63: 54 Cal WN 182
(F) ('08) 11 Cal WN 1011: 35 Cal 61 (FB)
(G) (1841) 9 Dowl 487

JUDGMENT: This second appeal arises out of an action brought by the appellant for partition and separate possession of his 2/5th share in an extent of 1 acre 38 cents situated in Idayakottai Zamin, Madurai district. The suit properties originally belonged to two brothers by name Vellama Naicker and Rangappa Naicker. They conveyed their 2/5 share in the family properties by two sale deeds executed in 1927 and 1929 respectively to one Koolayappa Rowther. As the vendee failed to pay the rent due to the land holder, the properties were brought to sale and were purchased by one Mutha Naicker, the manager of the joint family of which defendants 3 to 9 were members, in 1930 and possession was taken by the auction purchasers after having obtained the necessary sale certificate. In spite of this, Gulam Muhammad, son of the said Koolayappa Rowther, sold them to the plaintiff on 14-8-1943 as if title in this property still inhered in him. On the basis of this sale deed, the present suit is filed for the reliefs mentioned above. On 16-2-1944, defendants 3 to 9 who were the surviv-

ing members of the family of which Mutha Naicker was the managing member, sold the property to defendant 10.

(2) The suit was contested only by defendant 10. He filed a written statement contending that after the revenue sale, Koolayappa Rowther had no title to property and that the auction purchasers, who acquired title to this property, conveyed it to defendant 10 and that in any event as the suit was brought more than 16 years after the revenue sale it was barred by limitation.

(3) The trial Court decreed the suit holding that the revenue sale was hit by S. 107, Madras Estates Land Act & therefore, the vendors did not get any title to the property and consequently they could not convey any title to defendant 10. He also found that in spite of the sale, Koolayappa Rowther, the predecessor-in-interest of the plaintiff continued to be the owner thereof and that the sale in favour of the plaintiff passed valid title to the property. In his opinion the suit was not barred by limitation and the plaintiff could recover possession of the property at any time ignoring the sale.

(4) On appeal, the learned Subordinate Judge came to a contrary conclusion on the effect of S. 107, Madras Estates Land Act on the revenue sale and also on the question of limitation. In the result, he allowed the appeal and dismissed the suit with costs.

(5) The plaintiff, who is dissatisfied with the decree and judgment of the learned Subordinate Judge, has preferred this second appeal. It is urged by Mr. K. S. Ramamurthi in support of the appeal that the revenue sale is hit by S. 107 of the Madras Estates Land Act and is void, and consequently, title to the property still vested in the family of the plaintiff's vendors and that the plaintiff is entitled to recover possession of the same. On the other hand it is submitted on the other side that the sale is not governed by the provisions of S. 107, Madras Estates Land Act.

(6) The first question I have, therefore, to consider is whether the sale is void for contravention of S. 107. S. 107 of the Madras Estates Land Act runs thus:

> "No officer holding a sale of property under this Act and no person employed by or subordinate to such officer shall either directly or indirectly bid for, acquire or attempt to acquire any interest in any property sold at such sale."

It is seen this section expressly prohibits the bidding or the purchasing of the property not only by the officers holding the sale but also by a person subordinate to such an officer. In this case, it was the Revenue Inspector that held the sale and it cannot be denied that a village munsif is a subordinate of the officer, who held the sale. Defendant 6, who was a member of the family of which Mutha Naicker was the manager, was holding the office of the village Munsif at the time the sale was held. The point for consideration is whether the fact that one of the members of the family was a subordinate of the officer holding the sale renders the sale an invalid one.

(7) Section 107, Madras Estates Land Act prohibits either the officer holding the sale or any subordinate of his from acquiring any interest not only directly but also indirectly in the property sold at such a sale. It cannot be controverted that a junior member of a joint family acquires an interest in the property purchased by the manager of the family. The intendment of the section appears to me to be that persons, who have special opportunities of knowing the details about the property, should not be allowed to bid or buy the property as they are likely to misuse the opportunities they have. If the argument that although an officer or his subordinate is prohibited from directly buying or acquiring any interest in the property brought to sale the other members of the family could bid for the property, is accepted, the provisions of the section can be rendered nugatory. It will then be open to the officer concerned to acquire the property indirectly through other members of his family. It looks to me that S. 107, Madras Estates Land Act applies to a case like the present one. This view of mine gains support from a passage in Lewin on Trusts, 15th Edn., p. 799,

> "The partner of a trustee or any other person through whom the trustee may directly or indirectly derive benefit by reason of the purchase cannot purchase the trust property from the trustee."

The principle enunciated there applies equally to a member of a joint family of the officer holding the sale or of his subordinate. There does not seem to be any difference in principle between these two cases. It may also be mentioned that in — 'Veeranna v. Lakshmipati Somayajulu', AIR 1939 Mad 797 (A), a Bench of this Court expressed the opinion that the prohibition contained in S. 107, Madras Estates Land Act is an absolute one and not a conditional one. What emerges from this discussion is that the purchase made by Mutha Naicker was obnoxious to the provisions of the Madras Estates Land Act and, therefore, is an invalid one.

(8) This leads me to the next point whether the sale is void or is voidable. If the sale is void, it need not be set aside, and the plaintiff can recover the property from the auction purchasers or their successors in interest, ignoring the sale. In my judgment, the sale is voidable and not void and, therefore, has to be set aside, within the time prescribed by Art. 12(b), Limitation Act. This view obtains support from various decisions not only of this Court but also of other High Courts as well. In — 'Radhakrishna v. Bisheshar Sahay', AIR 1922 P. C. 336 (B), the provisions of O. 21 R. 72, which contains a prohibition similar to the one in S. 107, Madras Estates Land Act fell to be considered by the Privy Council. Their Lordships expressed the opinion that a purchase at an execution sale by the decree-holder or his agents without the leave of the Court is only voidable and not void and a suit to set it aside must be brought within one year under Art. 12, Limitation Act. This was followed by Sundaram Chetty J. in — 'Chinnakannu Padayachi v. Paramasiva', AIR 1927 Mad 1135(C). There a sale was held in contravention of the provisions of S. 99, T. P. Act corresponding to the present O. 34 R. 14, Civil P. C. and there was also an infringement of the provisions of O. 21 R. 72, Civil P. C. for the reason that the property was purchased by a pleader of the decree-holder without the leave of the Court. The learned Judge held that the sale (which took place prior to 1908) in violation of the provisions of S. 99, T. P. Act and also of O. 21 R. 72 did not make the sale void and it was only voidable, and had to be set aside under the appropriate article of the Limitation Act.

(9) This principle was applied by Somayya J. in — 'Velliappa Chettiar v. Muthu Koundan', 1941 2-M. L. J. 943(D). In this case, the learned Judge was concerned only with the contravention of the provisions of O. 21 R. 72, which runs thus:

> "No holder of a decree in execution of which property is sold shall without the express per-

mission of the Court bid for or purchase the property.

2. Where a decree-holder purchases with such permission, the purchase money and the amount due on the decree may subject to the provisions of S. 73, be set off against one another and the Court executing the decree shall enter up satisfaction of the decree in whole or in part accordingly.

3. Where a decree-holder purchases, by himself or through another person, without such permission, the Court may if it thinks fit, on the application of the judgment-debtor or any other person whose interests are affected by the sale, by order set aside the sale; and the costs of such application and order and any deficiency of price which may happen on the resale & all expenses attending it, shall be paid by the decree-holder."

(10) A case more in point is to be found in the decision reported in — 'Jamuna Prosad v. Motilal', AIR 1950 Cal 63 (E). In that case also, when the properties were brought to sale, the pleader for the decree-holder purchased the properties without the leave of the Court. It was found that the sale was hit by O. 21 R. 73 in that the pleader was an officer of the Court.

(11) Order 21 R. 73 enacts:

"No officer or other person having any duty to perform in connection with any sale shall, either directly or indirectly, bid for, acquire or attempt to acquire any interest in the property sold".

In view of the mandatory provisions of the rule, it was contended that the sale was a nullity. This was met by the learned Judges in the following words:

"It cannot be affirmed as a proposition of universal application that non-compliance with every imperative provision of law renders the proceedings a nullity. The question depends on the nature, scope and object of the particular provision, which has been violated."

The learned Judges further observed that the rule in question was intended for the benefit of the decree-holder and the judgment-debtor and could be waived by them without any infringement of public right or policy. In the result, the learned Judges found that the sale was only voidable and it was valid till it was set aside and not void. They relied upon the decision in — Ashutosh Sikdar v. Beharilal Kirtania', 35 Cal 61 (F.B.) (F). In this context, the observations of Coleridge J. in — 'Holmes v. Russel', 1841-9 Dowl. 487 (G), may be usefully extracted:

"It is difficult sometimes to distinguish between an irregularity and a nullity but the safest rule to determine what is an irregularity and what is a nullity is to see whether the party can waive the objection; if he can waive it, it amounts to an irregularity, if he cannot, it is a nullity."

I express my respectful accord with the principle enunciated in these cases. The provisions of S. 107, Madras Estates Land Act are analogous to those of O. 21 R. 73, C. P. C., and the policy underlying both seems to be the same.

(12) It follows on this discussion that although the sale in question was invalid for the reason that the provisions of S. 107, Madras Estates Land Act were infringed, it was not void in the sense that the plaintiff could recover the property ignoring the sale but was only voidable and was valid till set aside within the time prescribed by Art. 12, Limitation Act.

(13) In this view of the matter, it is unnecessary for me to go into the question whether, if the sale is void, the suit will be governed by Art. 142 or Art. 144, Limitation Act and if Art. 144 is applicable whether the auction purchasers acquired any title to the property by adverse possession. Even if it were necessary to decide this point, I have no hesitation in coming to the conclusion that the original owner Koolayappa Rowther lost title to the property by reason of the auction purchasers having remained in possession of the property for over the statutory period in assertion of title hostile to the real owners. On any ground, the suit is liable to be dismissed. For these reasons, I hold that the decision of the lower appellate Court allowing the appeal filed by the defendants against the judgment of the District Munsif decreeing the suit is right and ought to be affirmed.

(14) In the result, the appeal is dismissed with costs. No leave.

B/D.H. Appeal dismissed.

A. I. R. 1953 MADRAS 492 (Vol. 40, C. N. 188)

RAJAMANNAR C. J. AND VENKATARAMA AIYAR J.

CT. A. CT. Chidambaram Chettiar, Appellant v. CT. A. CT. Subramanian Chettiar & others, Respondents.

Appeals Nos. 115, 199 and 499 of 1944; A. A. O. Nos. 210 and 661 of 1946; 49 of 1947; C.M.P. Nos. 3274 and 3273 of 1946; 5330 of 1948 and 5329 of 1948; Civil Revn. Petn. No. 1247 of 1946 and C. M. P. Nos. 1122 and 7076 of 1947, D/- 14-12-1951.

(a) Arbitration Act (1940), Ss. 21 and 23 — Jurisdiction of Court to refer — Suit including prayer for reliefs in respect of properties in foreign country does not lie nor reference to arbitration can be made — Question of title and prayer for division not pending adjudication on date of reference — Legality of reference — (Civil P.C. (1908), S. 16). AIR 1946 Mad 398, AIR 1932 Mad 462 and AIR 1928 Lah 730, Rel. on. (Paras 10 and 12)

Anno: Civ. P. C., S. 16 N. 6; Arb. Act, S. 23 N. 5.

(b) Arbitration Act (1940), S. 30 — Invalid portion severable from valid part.

Quaere: It does not appear why if the reference and the award consist of distinct and several parts the valid portions should not be upheld. AIR 1935 Mad 1053; AIR 1925 PC 293, Referred. (Para 13)

(c) International Law (Private) — Arbitrator or Court can record admission of title and incorporate it in award or decree but cannot decide title to foreign property — (Civil P.C. (1908), S. 16) — (Arbitration Act (1940), Ss. 21 and 23). Case law Ref. (Para 15)

Anno: Civ. P. C., S. 16 N. 6; Arbn. Act, S. 21 N. 10; S. 23 N. 5.

(d) Arbitration Act (1940), S. 21 — "Matters outside suit" — Reference of "all matters in dispute and all matters and proceedings connected therewith" is not beyond scope of suit — Connected "matters and proceedings" referred is in nature of final prayer for general relief in plaint. (Para 17)

Anno: Arbn. Act, S. 21 N. 16.

(e) Arbitration Act (1940), Ss. 21 and 23 — Stay of final decree granted in appeal against preliminary decree — Court can refer dispute to arbitration during stay — Waiver of benefit of stay by party entitled occurs by agreement to refer — (Civil P.C. (1908), O. 41 R. 5). (Para 18)

Anno: Arbn. Act, S. 23 N. 5; Civ. P.C., O. 41 R. 5 N. 14.

(f) Arbitration Act (1940), Ss. 21 and 23 — Power of Court — Express conferment of power by statute is essential for Court to refer dispute to arbitration. (Para 21)

Anno: Arbn. Act, S. 21 N. 10; S. 23 N. 5.

(g) Arbitration Act (1940), Ss. 21 and 23 — "At any time before judgment is pronounced" — "Judgment" means final, not interlocutory, judgment — Power to refer after preliminary decree exists — Pending appeal has no effect on power to refer — (Civil P.C. (1908), O. 20 R. 18). 7 All 523, Disting. (Paras 22, 23, 24)

Anno: Arbn. Act, S. 21 N. 10; S. 23 N. 5; Civ. P.C., O. 20 R. 18 N. 9.

(h) Arbitration Act (1940), S. 30 — "Is otherwise invalid" — Preliminary decree in partition suit — Defendant not made liable for general accounting but only for money traced into his hands and not spent for family purpose — Reference to arbitration made subsequent to decree — Final award directing defendant to pay on account of mismanagement — Interim award containing finding of mismanagement signed by defendant — Held that final award did not contravene finding of Court in preliminary decree — Held also that defendant had consented to award and cannot challenge it. (Para 35)

Anno: Arbn. Act, S. 30 N. 6.

(i) Arbitration Act (1940), Ss. 30 and 31 — Questions relating to award — Finding of arbitrator not controverted by evidence on behalf of party challenging — Finding must be taken to be correct. AIR 1924 Mad 274, Foll. (Para 35)

Anno: Arbn. Act, S. 30 N. 6; S. 31 N. 4.

(j) Arbitration Act (1940), S. 30 — Misconduct — Dispute relating to partition of joint family property — Arbitrators appointed to effect division making defendants liable for taxes until accounts were taken — Arbitrators in directing defendants to execute indemnity bond in respect of liability do not exceed authority as direction is only incidental to effecting the partition — Nor do they exceed authority in directing interest to be paid by one party to the other from date of settlement of accounts. (Para 35)

Anno: Arbn. Act, S. 30 N. 10.

(k) Arbitration Act (1940), Ss. 17 and 25 — Binding effect of award — Award against father and sons, in dispute relating to partition of joint family properties — Interest of sons not adverse to that of father who consented to award — Held that the sons were also bound by award. (Para 36)

Anno: Arbn. Act, S. 17 N. 20.

(l) Civil P.C. (1908), O. 6 R. 7 and O. 8 R. 9 — Additional written statement — Plea put forward unsubstantial and belated — Defendant not having personal knowledge of matter pleaded or stating how he came by any new materials throwing fresh light on question — Dismissal of application for filing statement held rightly ordered. (Paras 39, 40)

Anno: Civ. P. C., O. 6 R. 7 N. 2; O. 8 R. 9 N. 1.

(m) Hindu Law — Custom — Remuneration to manager amongst Nattukottai Chettis.

A Custom in the Nattukottai Chetti community entitling the manager to decent remuneration for managing the joint family business and properties is an unusual one which runs counter to the fundamental conceptions of a joint family. (Para 41)

(n) Hindu Law — Custom — Nattukottai Chettis — Family custom of making presents to sisters is not a legal obligation. (Para 41)

(o) Hindu Law — Custom — Nattukottai Chettis — Drawings of members of joint family, living separate after marriage, debited to individual accounts — Plea that debits have to be adjusted against shares of each at time of partition according to custom, will not be upheld in absence of evidence fully supporting plea as to its existence — Custom alleged would mean that after marriage members in joint family would not be entitled to maintenance, custom being inconsistent with the rule of Hindu Law. (Paras 42, 45)

(p) Civil P. C. (1908), O. 23 R. 3 and O. 32 R. 7 — Submission to award — Suit against father, major son and minor sons — Reference to arbitration ordered by Court — Award pronounced consented to by major son and father each on his own behalf and by latter on behalf of minor sons as guardian — Sanction under O. 32 R. 7 not obtained — Award can be treated as compromise and decree passed against major son and father only, but not against minors. Case law Ref. (Paras 46, 47)

Anno: Civ. P. C., O. 23 R. 3 N. 9, 18; O. 32 R. 7 N. 5.

K. Rajah Aiyar, for Appellant; K. Bhashyam Aiyangar, for Respondents.

CASES CITED:

(A) ('46) AIR 1946 Mad 398: ILR (1946) Mad 858
(B) ('32) AIR 1932 Mad 462: 55 Mad 689
(C) ('28) AIR 1928 Lah 730: 112 Ind Cas 262
(D) ('35) AIR 1935 Mad 1053: 42 Mad LW 608
(E) ('21) AIR 1921 Mad 709: 14 Mad LW 666
(F) ('25) AIR 1925 PC 293: 49 Mad LJ 812
(G) ('80) 5 Bom 232
(H) ('32) AIR 1932 PC 55: 11 Pat 272 (PC)
(I) ('87) 9 All 108: 1886 All WN 310 (FB)
(J) ('23) AIR 1923 Mad 621: 45 Mad LJ 100
(K) ('47) AIR 1947 PC 117: 1947-2 Mad LJ 304
(L) ('49) AIR 1949 Mad 811: 1949-1 Mad LJ 459
(M) ('47) AIR 1947 Cal 93: ILR (1946) 2 Cal 492
(N) ('40) AIR 1940 PC 11: ILR (1940) 1 Cal 255 (PC)
(O) ('95) 22 Cal 425
(P) ('45) AIR 1945 PC 152: 20 Luck 461
(Q) ('35) AIR 1935 Pat 385: 14 Pat 488
(R) ('36) AIR 1936 All 9: 58 All 565
(S) ('74) 12 Beng LR 266 (FB)
(T) ('81) 3 Mad 78
(U) ('86) 12 Cal 173
(V) ('91) 18 Cal 507
(W) ('47) AIR 1947 All 304: ILR (1947) All 227
(X) ('39) AIR 1939 Pat 526: 18 Pat 193
(Y) ('22) AIR 1922 All 173: 44 All 91

(Z) ('44) AIR 1944 PC 83: 1944-2 Mad LJ 227 (PC)
(ZA) ('36) AIR 1936 Oudh 320: 12 Luck 260
(ZB) ('85) 7 All 523: 1885 All WN 139
(ZC) ('15) AIR 1915 Mad 1223: 39 Mad 195 (FB)
(ZD) ('24) AIR 1924 Mad 458: 46 Mad LJ 145
(ZE) ('37) AIR 1937 Mad 127: 170 Ind Cas 234
(ZF) ('24) AIR 1924 Mad 274: 17 Mad LW 648
(ZG) ('28) AIR 1928 Mad 1025: 51 Mad 800 (FB)
(ZH) ('45) AIR 1945 Mad 294: ILR (1946) Mad 39
(ZI) ('50) AIR 1950 Orissa 169: ILR (1950) Cut 1

VENKATARAMA AIYAR J.: 'C. M. A. No. 210 of 1946:—' This is an appeal by the plaintiff against the judgment and order in I. A. No. 18 of 1945 in O. S. No. 91 of 1941 on the file of the Court of the Subordinate Judge of Devakottah, setting aside an award. O. S. No. 91 of 1941 is a suit for partition instituted by the appellant against his brother defendant 1 and his sons, defendants 2 to 5. The parties belong to Nattukottai Chettiar community and the family is an affluent one having extensive money lending business in Burma. Chidambaram Chettiar the father of the plaintiff and defendant 1 died on 20-8-1926 and at that time the plaintiff was an infant aged about six years, he having been born on 26-9-1920. The 1st defendant who was already associated with his father in the conduct of the business became the manager of the joint family and was in charge of its affairs. On 6-9-1941, the plaintiff sent a notice to defendant 1 calling upon him to effect a division and to render accounts. The demand not having been complied with, the plaintiff instituted the present suit for partition on 24-9-1941.

(2) According to the plaint the assets of the family consisted of immovable properties in British India and Pudukottai being items 1 to 12 and item No. 13 respectively in schedule A to the plaint; of jewels and moveables described in schedule B and two money lending firms at Minla and Sitkwin in Burma mentioned in schedules D and E. It was further alleged in the plaint that Chidambaram Chettiar the father of the plaintiff and defendant 1 had entered large amounts belonging to the joint family in the names of the members of the family male and female in what are called the 'Thanathu maral accounts', that these amounts were invested in various firms or with individuals and that those investments would come to about 15 lakhs. This was the subject of schedule C to the plaint, and the plaintiff claimed a half share therein. It may be noted that the assets mentioned in schedules C, D and E included also immoveable properties in Burma. The family had endowed various properties for performing charities and these are mentioned in schedule F. The plaintiff prayed that in the scheme of partition provision should be made for the management of the charities by all the parties according to their rights. The plaintiff also charged that defendant 1 had in the course of his management manipulated accounts and misappropriated large amounts and secreted them and it was prayed that he should be called upon to account for them.

(3) The 1st defendant filed a written statement on 10-11-1941 on behalf of himself and as guardian of his minor sons, defendants 3 to 5. He admitted the relationship of the plaintiff and the share to which he was entitled and raised various contentions only with reference to the properties available for division. With reference to immoveable properties mentioned in schedule A he pleaded that items 10 and 11 were dedicated to charity and were, therefore, not divisible and that item No. 3 was being used as a school. He also mentioned some more properties as available for partition in schedule 1-A to the written statement. As regards the jewels and moveables mentioned in schedule B the defendants contended that it contained several items not belonging to the family and not in existence and a list of the articles which were available for division was set out in schedule (2). There was a further plea that some of the jewels mentioned in the plaint belonged to the several defendants, to the wife of defendant 1 and to his daughters Nachammai and Sivakami as their own and that they were, therefore, not liable for partition. They are separately set out in schedule 2-B to the written statement. With reference to the 'Thanathu maral' accounts, the defendants set out in some detail the history of the amounts and their investments, in para 6 of the written statement. In paras. 8 and 9 it was admitted that these amounts belonged to the family in whosoever's name the investments might stand and it was added that the true value of these assets would not be 15 lakhs as mentioned in the plaint but only 9 lakhs including lands purchased in Burma and of the value of 2¼ lakhs. Defendants denied that there was any manipulation of accounts or misappropriation of amounts and contended that accounts should be taken only of the assets as they stood on the date of the partition. They also pleaded that the court had no jurisdiction to divide the immoveable properties situate in Burma. Two other pleas put forward by the defendants may also be mentioned. One is

> "that according to the usual practice obtaining among the families of Nattukottai Chettiar community the 1st defendant is entitled to a decent remuneration for the management of the joint family business and properties."

and the other is that provision should be made for future "seer murais" for the sisters and that the remaining assets alone should be divided between the parties. The 2nd defendant who was a major filed a written statement putting the plaintiff to strict proof of the allegations in the plaint and otherwise adopting the written statement of defendant 1.

(4) The plaintiff then filed a reply statement in answer to the contentions put forward by the defendants. Of the several matters mentioned therein, it is sufficient to refer to one plea which alone is material to the present appeals. The plaintiff pleaded that there was a custom in the Nattukottai Chettiar community for a member of the joint family "setting up separate family" after marriage, that monies drawn by him thereafter would be entered in a separate account called 'Pathuvazhi', that at the time of the partition the amounts appearing in the 'Pathuvazhi' account would be debited against the member and that in accordance with this custom the amounts shown in the 'Pathuvazhi' account of defendant 1 should be debited against his share. On those pleadings issues were framed on 13-12-1941 and the suit was posted for trial on 6-2-1942. It underwent

several adjournments and on 2-4-1943 the trial actually commenced. It was then referred to arbitration on 6-4-1943 but that proved abortive and the suit was posted peremptorily for trial on 10-12-1943 and the hearing actually commenced on 11-12-1943. Meantime defendant 2 filed on 6-12-1943 an application under O. 3. R. 9, C. P. C., for leave to file additional written statement. That was numbered as I. A. No. 988 of 1943. Therein defendant 2 alleged "that the deceased Chidambaram Chettiar the father of the plaintiff and defendant 1 herein set apart on 25-3-1925 two sums of money of Rs. 2,10,251-4-0 each separately in the name of the plaintiff and defendant 1 so as to vest the same in them forthwith" and that these amounts and their accretions were not "the property of the family liable to division in this suit." This application was opposed by the plaintiff on the ground that these allegations were inconsistent with the admissions in the written statement that all monies standing in the 'Thanathumaral' accounts were joint family properties available for division, that the petition was belated and not bona fide and that the real object of the defendants was merely to drag on the proceedings.

(5) On 14-12-1943 the Subordinate Judge dismissed this application on the ground that it sought to raise a new and inconsistent plea and that it was really inspired by defendant 1.

(6) Meantime the trial of the suit went on from day to day and was concluded on 15-12-1943 and judgment was delivered on 29-12-1943. The Subordinate Judge held that the claim of defendant 1 for remuneration for management based upon the practice of the community was not well founded; that the custom pleaded by the plaintiff that amounts drawn by members of the joint family and entered in 'Pathuvazhi' accounts should be debited against them was also not established; that, on the question of the jewels available for partition, the commissioner should determine whether the gifts in favour of the several members pleaded by the defendants were true and were reasonable; that the payment of 'seer murais' was not legal but a moral obligation and that no provision need be made therefor at the division; that items 3, 10 and 11 had not been dedicated to charity and were available for division and that defendant 1 was liable to account only for the assets existing on the date of the division but that accounts should be taken on the principles applicable to accounting by managers of joint Hindu families and that provision should also be made for a proper scheme for the management of the family charities. It was also held on issue No. 13 that the Court had no jurisdiction to direct a division of immoveable properties not situated in British India. With these findings the suit was referred to the Commissioner for ascertainment of the properties available for division and for taking of accounts. Against this judgment appeals were preferred to this Court by all the parties, A. S. No. 115 of 1944 by defendant 2, A. S. No. 199 of 1944 by defendants 1, 3 and 5 and A. S. No. 499 of 1944 by the plaintiff. In A. S. No. 115 of 1944 defendant 2 applied in C. M. P. No. 1402 of 1944 for stay of further proceedings in O. S. No. 91 of 1941 pending disposal of the appeal. On this petition an order was passed on 12-4-1944 that there was no need to stay all proceedings in O. S. No. 91 of 1944 and that it was sufficient if the passing of the final decree alone was stayed. Interim stay which had been granted 'ex parte' was also vacated. The result then was that the stage had been set for an enquiry being proceeded with before the Commissioner and for defendant 1 rendering accounts before him. In fact the Commissioner commenced the enquiry and there were preliminary skirmishes before him, resulting in an order Ex. P. 22 dated 9-6-1944 and the filing of a memo by the defendants on 24-6-1944, Ex. P. 23.

(7) On 5-7-1944 the plaintiff filed I. A. No. 356 of 1944 for the appointment of a Commissioner for seizing certain account books which were stated to have been secreted by defendant 1 at his residence. It was ordered on the same day in the presence of the Advocate for defendant 1 and the Commissioner actually went to the place for executing the warrant. At this stage the parties entered into an agreement that the disputes in the suit should be settled by arbitration and that a sum of Rs. 2 lakhs should be paid to the plaintiff on account. That amount was actually paid on 12-7-1944. Ex. P. 9 and a joint application for referring matters in dispute to arbitration was made to the Court on 18-7-1944, I. A. No. 427 of 1944. That application was signed by the plaintiff, defendant 2 and defendant 1 for himself and as guardian of minor defendants 3 to 5. There was also a petition under O. 32, R. 7, C. P. C., that the Court might grant leave to refer the matters to arbitration on behalf of the minor defendants 3 to 5 as it was beneficial to them. On 21-7-1944 the Court passed an order "that all matters in dispute in this suit and all matters and proceedings connected therewith" be referred to the arbitration of Ramanathan Chettiar of Kandanur and Chellappa Chettiar of Kothamangalam.

The arbitrators entered on their duties and passed an interim award on 1-8-1944. It is stated therein that all the parties have agreed to the award and signed it in token of their acceptance. In fact the award is signed not only by the arbitrators but also by the plaintiff, defendant 2 and defendant 1 for himself and as guardian of defendants 3 to 5. The final award which is an amplification of the interim award was made on 6-12-1944 & filed into Court on that date. The defendants being dissatisfied with the award filed I. A. No. 18 of 1945 to set it aside under Ss. 30 and 31, Arbitration Act. They complained that the agreement dated 18-7-1944 to refer to arbitration was brought about by coercion and undue influence, that there was no proper enquiry, that the arbitrators were partial and biassed and that the award was unjust. The validity of the award was also attacked on two grounds which requires special mention. One was based on the fact that the joint family owned immoveable properties in Burma; and on the principle of private international law that Courts in one country would have no jurisdiction to adjudicate on title to immoveable property situated in a foreign country or to direct their division. It was urged that as the reference to arbitration comprised all the matters in dispute in the suit and as division of the immoveable properties in Burma was prayed for in the plaint the reference comprehended a subject over which the Court had no jurisdiction and that, therefore, it was illegal and that in consequence the award was void. Secondly it was

contended that the reference to arbitration was opposed to the orders of the High Court in C. M. P. No. 1402 of 1944. The argument was that stay of passing of the final decree was ordered in A. S. No. 115 of 1944 because defendant 2 had raised a dispute about the partibility of a sum of Rs. 2,10,251-4-0 separately entered in the name of the 1st defendant and that the High Court intended that this controversy should be settled before the final decree was passed and it was contended that as the reference and the award included this item also it was in contravention of the order in C. M. P. No. 1402 of 1944.

The plaintiff opposed this application. He pleaded that there was proper enquiry and that the charges of misconduct were unfounded. He also contended that the reference to arbitration was not open to any objection, that the interim award was consented to by the defendants and that the final award was not liable to be set aside. He accordingly prayed that a decree might be passed in terms of the award. At the hearing of this petition no oral evidence was tendered by the defendants. They were content to rest their case on the documentary evidence and on their legal contentions. The Subordinate Judge held that there was no basis for the charges of misconduct levelled against the arbitrators, that there was due and proper enquiry and that the award was not open to objection on the merits but he agreed with the defendants that the reference to matters in dispute in the suit comprised also questions relating to immoveable properties in Burma and that it was without jurisdiction and that it also included the dispute relating to the sums of Rs. 2,10,251-4-0 entered in the 'Thanathumaral' account of defendant 1 and the plaintiff, and that that was in contravention of the order of the High Court in C. M. P. No. 1402 of 1944 and that therefore the reference was illegal and the award following thereon was void. It is against this order that the plaintiff has preferred C. M. A. No. 210 of 1946.

(8) In this Court apart from supporting the judgment of the Court below on the two grounds aforesaid, Mr. K. Bhashyam Aiyangar the learned counsel for the respondents raised a further contention that under S. 21, Arbitration Act, the power of the Court to refer matters in a suit to arbitration could be exercised only so long as judgment has not been delivered and that where judgment has been pronounced, as it was in this case on 29-12-1943, that power comes to an end and there is no jurisdiction in the Court thereafter to refer the dispute to arbitration and that, therefore, the reference dated 21-7-1944 is without jurisdiction. It was also argued that, even if this contention is to be held to be too wide, the reference to arbitration should at any rate be limited to matters still remaining to be decided and could not include what had been already decided by the Court and as the reference on 21-7-1944 was not so limited it was illegal and so was the award passed thereon. As a branch of the same argument it was contended that the High Court before which the appeals against the preliminary decree were pending has seisin of the cause, that that Court alone had power to refer to arbitration and that the reference by the Subordinate Judge was without jurisdiction. The judgment of the lower Court was also sought to be supported on the ground that the agreement to refer to arbitration was obtained by coercion, that there was no proper enquiry by the arbitrators and that the award was liable to be set aside on the merits.

(9) On these contentions four questions arise for determination:

1. Is the reference bad on the ground that it involved the determination of title to immovable properties situated in foreign jurisdiction?

2. Is the reference bad as being in contravention of the order of the High Court in C. M. P. No. 1402 of 1944?

3. Is the reference bad on the ground that the Subordinate Judge had lost the power to refer matters in dispute to arbitration by reason of judgment having been delivered on 29-12-1943 or on the ground that the reference comprehended matters which had been decided by the preliminary judgment or that the Court had no jurisdiction by reason of the appeals against the preliminary judgment having been pending in the High Court, and,

4. Is the award vitiated by any misconduct or irregularity?

We shall deal with the above questions in the order mentioned above.

(10) On the first question the contentions of the respondent will be found on analysis to resolve themselves into three propositions of law. The first proposition is that the Courts have no jurisdiction to determine questions of title to immoveable properties in foreign countries or to effect a division thereof. This rule has long been well established and is not open to question. In — 'Nachiappa v. Muthukaruppan', AIR 1946 Mad 398 (A), this Court had occasion to consider this question elaborately and the substance of the decision is correctly set out in the headnote which runs as follows:

> "Neither under S. 16 (b), C. P. C., nor under the rules of private international law has a British Indian Court jurisdiction to entertain a suit for partition of immoveable properties situate outside British India (for instance in Ceylon) especially where the partible nature of such properties is disputed. It has no jurisdiction even to declare that the said properties are partible joint family properties. Nor has it power to take such properties into its calculation in adjusting the equities between the parties."

This rule is thus stated in Dicey's Conflict of Laws, (6th Edn., page 141). Rule 20:

> "Subject to the exceptions hereinafter mentioned, the Court has no jurisdiction to entertain an action for
>
> (1) the determination of the title to, or the right to the possession of, any immoveable property situate out of England (foreign land); or
>
> (2) the recovery of damages for trespass to such immoveable."

There are three exceptions to this rule: Where there is a contract or an equity between the parties with reference to immoveable property; where the action is one for the administration of an estate or trust and where the action is for enforcing a maritime lien on a ship, or for damage done to an immoveable property situate out of England.

(11) The learned advocate for the appellants does not contend that the Court of the Subordinate Judge of Ramnad would have jurisdiction either to decide the question of disputed

title with reference to foreign immoveable property or to direct division thereof.

(12) The second proposition is that a Court which has no jurisdiction to determine any matter in controversy in a suit has no jurisdiction to refer it for determination by arbitrators. This stands to reason because the award becomes effective only when a decree is passed thereon and as the Court is bound to pass a decree in terms of the award when it is not open to any objection, to recognise a power to refer the dispute relating to foreign immoveables to arbitration would be to assume jurisdiction to pass a decree with reference to such properties. It will be illogical to hold that what a Court cannot do directly it can do indirectly through the machinery of arbitration. In — 'Krishna Aiyar v. Subramania Aiyar', AIR 1932 Mad 462 (B) the point for determination was whether an award dealing with the immoveable properties both in British India and in Travancore could be filed in a British Indian Court under S. 20 of Sch. 2, Civil P. C., which provides that where any matter has been referred to arbitration without the intervention of the Court and award has been made thereon any person interested in the award may apply to any Court having jurisdiction over the subject-matter of the award and that the award be filed into Court. It was held that the subject matter of the award must be wholly within the jurisdiction of the Court where it is sought to be filed and as a portion thereof was in Travancore the sub-Court at Palghat had no jurisdiction to entertain the application. That no doubt was a case of an award pronounced in an arbitration without the intervention of the Court whereas in the present case the reference is by Court in a pending action but on principle this cannot make a difference because the award in either case would become valid only when a decree of the Court is passed thereon.

The following observations of Ananthakrishna Aiyar J. would be equally applicable to the present case:

"When an application is made under para. 20, notice is given to the other parties to the arbitration; and under para. 21, when a Court is satisfied of certain particulars mentioned therein, the Court shall order the award to be filed and shall proceed to pronounce judgment according to the award. Upon judgment so pronounced, a decree shall follow, and no appeal shall lie from such decree except in so far as the decree is in excess of or not in accordance with the award. Thus the judgment should be in accordance with the award; and the decree that should follow should be in accordance with the judgment. Therefore the decree should be in accordance with the award. The award deals with immoveable property outside British India. The decree also, therefore, should deal with immoveable property outside British India. Has the Court in British India jurisdiction to pass such a decree? 'Prima facie', not."

In — 'Ladharam v. Rallaram', AIR 1928 Lah 730 (C) it was held:

"If a Court is not initially competent to entertain a suit in respect of the dispute which is the subject matter of reference to arbitration, it cannot pass a decree on an award made as a result of such reference by the parties whether before the suit was instituted or during its pendency. In the latter case the Court is incompetent to refer the matter to arbitration."

The appellant did not seriously contest the soundness of this position.

(13) The third proposition of law is that where the reference is invalid in part it is invalid 'in toto' and the award based on such a reference cannot be split up into two parts and upheld in so far as it relates to what could be validly referred, and rejected only as regards what could not be. The decision in—'Lakshminarasu v. Nagamma', AIR 1935 Mad 1053 (D) is relied on in support of this position. In that case the reference to arbitration comprised matters in dispute in suit as well as matters outside the suit. It was held that the reference was illegal and that, therefore, the entire award must be rejected, and the decision reported in — 'Bodachari v. Muniyachari', AIR 1921 Mad 709 (E) wherein it was held that "an award under an invalid reference being itself invalid gives no rights either as an award or as a compromise" was followed. The reason for this rule is not quite obvious. It may be that it will be difficult to disentangle the valid portions from the invalid portions in an award in a partition action or partnership suit. In such a case the award must fail in its entirety. That was the case in — 'Ram Protap Chamria v. Durga Prosad Chamria', AIR 1925 PC 293 (F) which was a partnership action and the reference comprised matters in dispute in suit and other matters. The award was found to be inseparable and was, therefore, rejected. After quoting the observations of Rankin J. as he then was, that the arbitration cannot at the same time relate to matters within the jurisdiction of the Court and matters without jurisdiction, Lord Blanesburgh observed as follows:

"Their Lordships desire to reserve their opinion upon the question whether there may not be exceptions to that comprehensive statement."

It does not appear why if the reference and the award consist of distinct and severable parts the valid portions should not be upheld. It is unnecessary to deal with this aspect of the matter further because the learned advocate for the appellant is prepared to argue his case on the footing that if the reference includes matters beyond the jurisdiction of the Court it should be rejected 'in toto'. His contention is that all these propositions of law have no application to the facts of the present case because there was no dispute about title to immoveable properties in Burma and there was no claim for their partition at the date of reference to arbitration. It has already been mentioned that the title of the plaintiff to a half share in the Burma assets including immoveable properties was unequivocally admitted by the defendants in their written statement and, therefore, there was no question of title in dispute to be adjudicated by the Courts. As for division of the immoveable properties in Burma, it is true that the plaintiff prayed generally for partition of the joint family properties but the defendants contended that the Court had no jurisdiction to divide the properties in Burma and on that contention issue 13 was raised. It runs as follows:

"Whether this Court has jurisdiction to divide immoveable properties of the joint family in Burma?"

The Court held by its judgment dated 29-12-43 that it had no jurisdiction. Against the preli-

minary decree, the plaintiff filed A. S. No. 499 of 1944 but in the appeal he did not challenge the correctness of the finding on issue 13. The decision on this issue had thus become final. The plaintiff had accepted the decision of the trial Court and was content to leave it at that. Thus the position at the date of the reference was that the title to immoveable properties had been admitted and the question of actual division had been finally ruled out. Therefore the reference to arbitration of all the matters in dispute did not comprehend any matter which the Court could not have determined. It involved no adjudication of title to foreign immoveable properties; nor was there any subsisting prayer for division thereof. We are, therefore, of opinion that the reference cannot be held to be illegal on the grounds urged by the respondent.

(14) It is next contended that apart from the reference the award settled questions of title to immoveable properties in Burma and that it was, therefore, void. Paragraphs 1 and 2 of the award relate to properties in Burma including immoveables while para. 3 of the award relates to the immoveable properties in Pudukottah. Paragraph 1 runs as follows:

> "After communications are restored to Burma, the plaintiff and the defendants have to divide the firms in Burma at the places Minhla and Sitquin belonging to them and the lands, godowns, homes, gardens and other properties, items, bank deposits, jewels, moveables, all assets, etc., and the subsequent income attached thereto into two halves and the plaintiff has to take one half and the defendants the other half."

The award, it will be seen, does not purport to divide the immoveable properties in Burma. It expressly reserves the division for a future and a convenient date. It merely records that the plaintiff has to take one half share and the defendants the other half. In para. 2 are set out the various adjustments to be made in the final settlement of accounts with reference to the Burma assets but they do not as such relate to any immoveable properties. It is merely provided that the assets are to be taken equally by the plaintiff and by defendants 1 to 5. Paragraph 3 deals with the immoveable properties in Pudukottah and the award expressly states,

> "since the aforesaid property is situated in Pudukottah state, it has not been divided having regard to the good and bad qualities of the soil. If necessary the plaintiff and the defendants shall have it divided in equal halves later on when required."

It also provides that the plaintiff and the defendants shall enjoy them in equal halves. It is argued on behalf of the respondents that the award purports to give a half share each to the plaintiff and to the defendants in all the Burma assets including the amounts entered in the 'Thanathumaral' account of the plaintiff and defendant 1 and their accretions; that these assets included also immoveable properties; that I. A. No. 988 of 1943 raised the question of the divisibility of these assets and though it was rejected on 14-12-1943 by the Subordinate Judge it was pending decision in A. S. No. 115 of 1943 in the High Court and that, therefore, the question of title to the immoveable property in Burma was in dispute at the date of the reference.

That would be correct if the question of the divisibility of the assets raised in I.A. No. 988 of 1942 could be regarded as a matter in dispute in the suit but I. A. No. 988 of 1943 had been dismissed and so long as that order stood the question sought to be raised therein was not a matter in controversy in the suit. The pleadings in the suit contain an admission of the plaintiff's title to these assets and unless and until the additional written statement of defendant 2 is ordered to be received there was no dispute in the suit with reference to foreign immoveables. The fact that the order in I. A. No. 988 of 1943 was challenged in appeal has not the effect of altering or enlarging the scope of the suit so as to comprehend a dispute in respect of title to foreign immoveables. The question in appeal was not whether those properties are divisible but whether defendant 2 should be permitted to raise that question. There is, therefore, no force in this objection.

(15) It is further contended that under the terms of the award the title of the plaintiff as well as that of the defendants to a half share in the foreign assets including immoveables has been recognised and declared; that such a decision has a force and operation independent of the admissions of the parties on which it is based; that, unlike admissions, the effect of the declaration is to conclude the rights of the parties and that, therefore, it is hit by the rule of private international law, that there is no jurisdiction to declare title to foreign immoveable properties. But it is only a declaration following upon adjudication by the Court, of disputed title to foreign immoveables, that is beyond its jurisdiction and where there is no adjudication, there is no declaration such as is prohibited by the principles of private international law. It is not incompetent either to the arbitrator or to the Court to record an admission of title to foreign properties by the parties and to incorporate it in the award or in the decree. In this connection it will be useful to refer to decisions under S. 17 (b), Registration Act, which provides that non-testamentary instruments which purport to declare title to immoveable properties should be registered. The precise meaning of the word "declare" in that section has frequently come up for judicial consideration. In — 'Sakharam Krishnaji v. Madan Krishnaji', 5 Bom 232 (G) the question arose whether a deed which acknowledged that there had been a partition required registration under S. 17 (b), Registration Act, on the ground that it declared the rights of the parties. Holding that it did not come within S. 17 (b) West J. observed as follows:

> "It implies a declaration of will, not a mere statement of fact and thus a deed of partition, which causes a change of legal relation to the property divided amongst all the parties to it, is a declaration in the intended sense; but a letter containing an admission, direct or inferential, that a partition once took place does not 'declare' a right within the meaning of the section. It does in one sense declare a right; that is, the existence of the right is directly or indirectly stated by the writing, but it is not the expression or declaration of will by which the right is constituted."

This passage was cited with approval by the Judicial Committee in — 'Bageshwari Charan v. Jagarnath Kuari', AIR 1932 P C 55 (H). After

observing that the decision in — '5 Bom 232' (G) had been followed in — 'Jiwan Ali Beg v. Basamal', 9 All 108 (I) and — 'Ranganayaki Ammal v. Virupakshee', AIR 1923 Mad 621 (J), Viscount Dunedin observed as follows:

"Their Lordships have no doubt that this track of decisions is right. Though the word "declare" might be given a wider meaning, they are satisfied that the view originally taken by West J. is right. The distinction is between a mere recital of fact and something which in itself creates a title."

(16) In — 'Lahore Central Co-operative Bank Ltd. v. Quadir Baksh', AIR 1947 P C 117 (K) there was an award in respect of a claim of a Co-operative Society under a mortgage deed and it provided that in default of payment of the amount due the amount might be realised through civil Court by the sale of all the properties. This award was made a rule of Court and a decree was passed in terms thereof. The decree was not registered and the question was raised in execution that as it declared rights to immoveable property it was not admissible under S. 17 (b), Registration Act. The Judicial Committee held that the provision in question in the award merely declared the legal consequences and did not by itself create any right in the immoveable property and that, therefore, it did not require to be registered under the Act. In — 'Krishnamurthi Naidu v. Ramakrishna Naidu', AIR 1949 Mad 811 (L) the parties to the suit entered into a compromise on the basis of the rights under a will and a decree was passed in terms of the compromise. It was held by Satyanarayna Rao J. that the decree did not declare any right within the meaning of S. 17 (b), Registration Act, and that it was admissible without registration. We are of opinion that on the same principle it should be held that the award in question did not declare any rights to immoveable properties in Burma. Mr. K. Rajah Aiyar argued that even if there was in the award an affirmation of title to foreign immoveable properties that was only incidental and that such incidental declarations are not opposed to any principle of private international law. He is supported in this contention by the following passage from Halsbury's Laws of England, Vol. VI, page 220, para 269. The passage runs as follows:

"Where, however, it is only necessary to determine the question of title incidentally an action relating to rights in respect of a foreign immoveable will lie in England."

We are satisfied that the award in this case does not adjudicate upon any disputed title to foreign immoveables and that its validity cannot be impugned on this account.

(17) We may add that it was also suggested that the reference comprised not merely matters in difference in the suit but also "all matters and proceedings connected therewith" and that that went beyond the scope of the suit. This is clearly untenable as the other "matters and proceedings" are merely in relation to the matter in dispute in the suit, and is in the nature of the final prayer for general relief in the plaint.

(18) We shall now deal with the second question whether the reference to arbitration contravenes the order in C.M.P. No. 1402 of 1944. It is not easy to discover the basis for this contention. The order of the High Court stayed only the passing of the final decree in the action. The reference to arbitration is in no sense the passing of the final decree or even the making of the award. The utmost that could be said is that before passing a decree in terms of the award the order in C. M. P. No. 1402 of 1944 might have to be withdrawn. That, however, does not bar the jurisdiction of the Court to refer the matters to arbitration or the jurisdiction of the arbitrators to make an award. It is, therefore, not liable to be set aside as in contravention of the order in C.M.P. No. 1402 of 1944. That order far from staying all proceedings in the Court below directed that they should go on and the interim stay was also vacated for that purpose. There is nothing to prevent the parties themselves settling the matters by compromise notwithstanding this order, and likewise there is nothing to prevent them from agreeing to have their disputes settled by arbitration. As for inclusion of 'Thanathumaral' accounts of defendant 1 and the plaintiff within the scope of the arbitration that would be in accordance with the pleadings in the suit &, therefore, within the jurisdiction of the arbitrators. The filing of A. S. No. 115 of 1944 did not as already stated affect the scope of the suit or of the reference to arbitration. Moreover the order in C. M. P. No. 1402 of 1944 such as it was, was for the benefit of defendant 2 and possibly of the other defendants. That could be waived by them and they having expressly agreed to the reference on 18-7-1944 and again to the interim award on 1-8-1944 it is not open to them to raise any objection on this score. For all the above reasons this objection must be overruled.

(19) The third objection which is the one that has been most strenuously pressed on us is based on the language of S. 21, Arbitration Act, which is in these terms:

"Where in any suit all the parties interested agree that any matter in difference between them in the suit shall be referred to arbitration, they may at any time before judgment is pronounced apply in writing to the Court for an order of reference."

(20) The argument for the respondents is that the Courts possess no inherent jurisdiction to refer disputes in pending actions to arbitration, that it is a power which must be expressly conferred by statute, that S. 21, Arbitration Act, is the enactment which confers such a power on the Courts; that under the terms of that section the power to refer to arbitration can be exercised only "at any time before judgment is pronounced"; that it cannot be exercised thereafter; that in this case on the pronouncement of the judgment on 29-12-1943 the power of the Subordinate Judge to make a reference came to an end. This position is sought to be reinforced by a reference to S. 23 (2), Arbitration Act, which enacts that the Courts shall not deal with matters which have been referred to arbitration except in the manner and to the extent provided in the Act and this, it is argued, indicates that the matter is still capable of adjudication by the Court and would be inappropriate at a stage when there has been a decision by the Court.

(21) It may be conceded that the power to refer to arbitration must be expressly conferred by statute. In — 'Abani Bhusan v Hemchandra', AIR 1947 Cal 93 (M) where the point for determination was whether an appellate Court had the power to refer disputes to

arbitration, there is the following observation in the judgment of Mukherjea J.:

"Whatever the proper view might be, we are bound to apply the law as it stands and as the power of referring a case to arbitration is not one that is inherent in a Court, we must hold that in the absence of any express provision the appellate Court is not competent to exercise it."

The question, therefore, is whether on the terms of S. 21 the reference dated 21-7-1944 is 'intra vires', of the powers of the Court and that has to be decided on a construction of the language of S. 21 in the light of well established principles.

(22) That section provides that where 'in a suit' all the parties agree that matters in difference 'in the suit' shall be referred to arbitration that might be done at any time before judgment is pronounced. What is the meaning of the word judgment in this context? Judgment is defined in S. 2 (9), C. P. C. as the statement given by the Judge of the grounds of a decree or order; and that is wide enough to cover judgments on applications for injunction, appointment of a receiver and so forth; and also judgments in the suit on such questions as court-fees payable on the plaint. It is not contended before us that these are judgments within the meaning of S. 21, Arbitration Act. It is, therefore, clear that judgment in S. 21 does not bear the same sense which it has in the Civil Procedure Code. To ascertain its true import we must turn to the language of the section itself. Section 21 contemplates that "any matter" in dispute in the suit can be referred to arbitration; and therefore a judgment which bars the jurisdiction of the Court to refer "any matter" to arbitration must be a judgment which does not leave "any matter" undecided. In this context, therefore, it can only mean a judgment which finally decides all matters in controversy in the suit; it does not mean an interlocutory judgment which still leaves any of the matters in dispute undecided. Findings on issues, though called judgments are not judgments in this sense; nor are preliminary judgments, even though they decide some of the matters finally, because there are still matters to be decided in the suit. For the purpose of S. 21, Arbitration Act, nothing is a judgment which does not put an end to the suit and so long as an action is pending there can be reference under that section.

(23) It is well settled that a preliminary decree does not put an end to the action. The suit continues until the final decree is passed, the preliminary decree being only a step in the process of the passing of the final decree. This is clearly enacted in the explanation to the definition of decree in S. 2, C. P. C., which runs as follows:

"A decree is preliminary when further proceedings have to be taken before the suit can be completely disposed of.

It is final when such adjudication completely disposes of the suit."

It has been repeatedly held that the provisions of the Civil Procedure Code applicable to pending suits apply to suits in which there has been a preliminary but not a final decree. In — 'Jadunath Roy v. Parameswar Mallick', AIR 1940 P. C. 11 (N) the Judicial Committee had to deal with a partition suit in which a party applied to be impleaded after the preliminary decree and to have his rights adjusted in the final decree. In holding that the application was maintainable, the Judicial Committee observed as follows:

"Their Lordships fully agree with the observation made by the learned Subordinate Judge who passed the final decree in his order of 8th May 1934 whereby he allowed the objections of the appellants to the Commissioner's report on the ground that a partition suit in which a preliminary decree has been passed is still a pending suit and the rights of parties who are added after the preliminary decree have to be adjusted at the time of final decree."

The appellant also relied on the following observations occurring in — 'Dwarakanath Misser v. Barindanath Misser', 22 Cal 425 at p. 432 (O),

"In the present case what the parties applied for was a partition by metes and bounds of the property which was the subject-matter of the suit. The partition has not yet been made and until the partition has been made and the final decree pronounced it could not be said that any decree in terms of the last paragraph of S. 396 has been passed in the case. The order that is made and which was made in this case under the first paragraph of S. 396 has no doubt the force of a decree but the question that we have to consider is whether the proceedings that are taken subsequent to such order being passed for the purpose of effecting a partition are proceedings in the suit itself, or proceedings in execution of the decree. We think that they are proceedings in the suit itself, & not proceedings in execution of the decree."

The question has frequently come up as to whether O. 23, R. 3 is applicable to adjustments made after the preliminary and before a final where a suit has been adjusted the Court shall decree in a suit. Order 23, R. 3 provides that order such adjustment to be recorded and, for this provision to apply, there must be a suit pending. In — 'Madan Theatres Ltd. v. Dinshaw & Co.', AIR 1945 P C 152 (P), the question was raised whether an adjustment made after the preliminary decree in a mortgage suit came within O. 21, R. 2 which provides that the adjustment of the decree should be certified and if not certified within time it could not be taken into account. The Judicial Committee held that the case was governed by O. 23, R. 3 which applies to pending suits and not by O. 21, R. 2 which applies to execution of decrees. Lord Porter observed:

"Their Lordships see no qualification to the wide terms of the Order (O. 23, R. 3) nor any grounds for limiting its application. Admittedly the suit continues until the final decree is passed and there is no time for recording the agreement arrived at as there is under O. 21, R. 2."

In — 'Harihar Prasad Narain Sing v. Gopal Saran Narain Sing', AIR 1935 Pat 385 (Q) which was also a case of an adjustment after the preliminary decree in a mortgage suit had been passed the following observations occur:

"As I have already said, it was conceded by Mr. Das that, if O. 21, R. 2 has no application the application is within the jurisdiction of the Subordinate Judge under O. 23, R. 3 and in my opinion he was right in making that concession. The word "suit" in that rule is not used in any narrow sense but having

regard to the division of the subject matter in the various orders and rules the word "suit" is applied to the proceedings from the beginning of the plaint up to the time when an executable decree has been obtained."

'Inayat Khan v. Harbans Lal', AIR 1936 All 9 (R) is also a case of adjustment in a mortgage suit after the preliminary decree was passed. In applying O. 23, R. 3 the Court observed as follows:

"This is a necessary corollary of the view taken by this Court that a preliminary decree does not terminate the suit, which continues till a final decree is passed. Once a suit is finally disposed of, O. 23, R. 3 cannot have any application; but so long as the suit is pending it is open to the parties to enter into a compromise or otherwise adjust their differences."

(24) The position being well established that the action is pending until a final decree is passed, it follows, that there is jurisdiction in the Court to refer the matters in dispute to arbitration until the final judgment is pronounced.

(25) Mr. K. Bhashyam Aiyangar contended that there were reasons of policy why the Court should not have the power to refer matters in dispute to arbitration after a preliminary judgment is pronounced. He argued that it would be inconsistent with the dignity of a Court that its decision should be reviewed by a tribunal of laymen. He relies on certain observations occurring in — 'Juggeswur Das v. Kritartha Moyee Dossee', 12 Beng L R 266 (FB) (S). There the question was whether under the Civil Procedure Code, Act 8 of 1859, the appellate Court had the power to refer disputes to arbitration. Under S. 312 of that Act the parties may apply to a Court "at any time before the final judgment for an order of reference." A Full Bench of the Calcutta High Court held that the appellate Court had no power under this section to refer disputes to arbitration. The decision as such is not material to this case but the following observations occurring in the judgment of Kemp J. are relied on for the respondents:

"As pointed out by the Chief Justice, if parties are allowed to refer matters to arbitration after a case has been finally disposed of by a Court of justice such a proceeding might tend to bring the lower Courts into contempt."

It may be noted that Couch C. J. observed at page 271 that the word final judgment was used in antithesis to the preliminary judgment in the suit, which means that there could be a reference to arbitration after a preliminary judgment.

In this Court it was held in — 'Sankaralingam Pillai', 3 Mad 78 (T) that the appellate Court could refer the matter to arbitration with the consent of the parties. That no doubt was a decision under Act 10 of 1877 but the followiing observations occurring in that judgment are relevant for the purpose of this question.

"Entertaining all respect for the opinions of the learned Judges of the High Court at Calcutta by whom the case in '12 Beng L R 266 (S)' was decided, we are not convinced by the reasons given by them for holding that an appellate Court might not, with consent of the parties, refer the matters in dispute in the appeal to arbitration."

The decision in '3 Mad 78 (T)' was followed in — 'Bhugwandas Marwari v. Nundlal Sein', 12 Cal 173 (U) and — 'Sureshchandra Banerjee v. Ambica Churn', 18 Cal 507 (V) and until the enactment of the Arbitration Act of 1940 the jurisdiction of the appellate Court to refer disputes to arbitration was not disputed. Thus it is impossible to discover any principle of public policy in negativing the power to refer matters which had been decided by a Court, to arbitration. It is true that under the Arbitration Act, 1940, there is authority for holding that the appellate Court has no power to refer disputes to arbitration. Vide —'Shukrulla v. Rahmat Bibi', AIR 1947 All 304 (W) and 'AIR 1947 Cal 93 (M)'. That, however, does not affect the point now for consideration.

(26) On the other hand it has been the long-standing practice of the Courts to refer partition suits and partnership actions to arbitration even after the preliminary decree is passed. It would cause a revolution in the existing practice if it is to be held that there is no power in the Court to refer such matters to arbitration.

(27) Mr. K. Rajah Aiyar the learned advocate for the appellant referred to a number of cases in which there was reference to arbitration after preliminary decree had been passed and he relied on them as supporting the position that the power to refer to arbitration could be exercised until the suit terminated by the passing of a final decree. In the case in '22 Cal 425 (O)' already referred to there was a reference to arbitration in a partition suit after the preliminary decree and that was relied on as saving limitation. In — 'Radhey Lal v. Kanhai Lal', AIR 1939 Pat 526 (X) the facts were that in a partition suit there was a preliminary decree and thereafter an award was made by certain arbitrators effecting a division of the properties. A decree was passed in terms of that award. The question that arose for determination was whether the appeal against that decree was competent. In holding that the appeal did not lie Fazl Ali J. observed as follows:

"It is next contended that the present case did not fall within the second schedule of the Civil Procedure Code at all because this schedule is intended to apply to those cases only where a decree is based wholly upon the award of the arbitrators, whereas in the present case the final decree is based partly upon a preliminary decree and partly upon the award of the arbitrators. This contention must be negatived on the short ground that there is nothing in the Code to prevent the parties from referring the matter in difference between them to arbitration at any stage of the suit and that it is not quite correct to say that the final decree which has been passed in the suit is not wholly based upon the award of the arbitrators. It is true that the parties agreed among themselves as to their respective shares and this agreement was incorporated in the preliminary decree but the division of the properties which is the subject of the final decree was wholly based upon the award of the arbitrators."

In — 'Ramlal v. Deoraj', AIR 1922 All 173 (Y) the facts were that a decree passed by the Subordinate Judge of Ajmer was taken up in appeal to the District Court and was there confirmed. Thereafter under S. 17, Ajmer Courts Regulation, the case was referred to

the High Court of Allahabad and it was there pending. At this stage the parties filed an application in the District Court asking for a reference of the disputes to arbitration. That was done and resulted in an award. The question was whether there was a valid reference to arbitration. The following observations occurring at page 94 are relied on by the learned counsel for the appellant as supporting his contention:

"In our view the best analogy is that of a preliminary decree and a final decree, and pending the final order of the Ajmer Court on receiving the answers of the High Court to the reference, the suit was still, to adopt the language of the arbitration schedule in the Civil Procedure Code 'pending judgment'..... In our opinion, in spite of the reference to the High Court and not in any way because of the reference to the High Court, or because of anything which the High Court said, this was an arbitration in a suit in which the parties agreed that the matters between them should be referred to arbitration. By para. 1 of sch. II, Civil P. C., they were, at any time before judgment was pronounced, at liberty to apply to the Court which ordered the order of reference."

(28) In — 'Mohinder Singh v. Ramindar Singh', AIR 1944 P C 83 (Z) which was cited on behalf of the appellant there was a reference to arbitration by the appellate Court and in upholding the validity of the award passed thereon the Judicial Committee observed as follows:

"Their Lordships are of opinion that the subject of the submission to arbitration clearly was the whole dispute and not merely the matter of the appeal, and the order of the Court referring the matter confirms this view. In their Lordships' opinion there is no ground for impugning the validity of this award."

That was not a case of a reference of a suit to arbitration after the passing of a preliminary decree and the observations quoted above are, therefore, not apposite to the present case.

(29) The learned advocate for the appellant also called in aid the analogy of O. 23, R. 3, C. P. C., under which it has been held that there can be a compromise of the matters in the suit after the passing of a preliminary decree. The decision in 'AIR 1936 All 9 (R)' has already been referred to.

(30) In — 'Lalta Prasad v. Kedarnath', AIR 1936 Oudh 320 (ZA) the facts were that there was a preliminary decree in a partition suit and against that there was an appeal pending. Then there was a compromise between the parties and the Court of first instance passed a decree in terms thereof under O. 23, R. 3. It was held that as the suit was pending in that Court until a final decree was passed it had jurisdiction to pass the decree under O. 23, R. 3 C. P. C. There is no reason why the same principle should not apply to references to arbitration. It must, therefore, be held that the order of reference dated 21-7-1944 was within the jurisdiction of the Sub Court and that the award could not be impeached on the ground that it was without jurisdiction.

(31) It is next argued that in any event the reference should have been limited to the matters still remaining to be decided and that as it included all the matters in the suit including those already decided it was illegal. It is contended on behalf of the appellant that the award is confined to the matters not decided by the preliminary decree that the decisions of the Court that foreign immoveables could not be divided, that defendant 1 was not entitled to remuneration, that no contribution need be made for 'Seer murais' had all been adopted in the award and that the objection of the respondents had no foundation on the facts of the case and that, therefore, the question did not arise for decision. But it is clear from the award that the arbitrators intended to & did decide all the matters in dispute in the suit. The interim award sets out the several proceedings pending between the parties including A. S. No. 115 of 1944. In para. 43 the award deals with the subject-matter of I. A. No. 983 of 1943 and A. S. No. 115 of 1944. Paragraph 54 provides that A. S. No. 115 of 1944, A. S. No. 119 of 1944 and A. S. No. 499 of 1944 should not be prosecuted and it also decides the question of costs in the appeals. It cannot, therefore, be said that only those matters which were not decided by the preliminary decree were dealt with by award. The reference is certainly general.

(32) Even on the basis that the reference and the award were not limited to matters left undecided by the preliminary judgment, the question still remains whether they are for that reason illegal. No authority has been cited in favour of such a contention. Nor is there anything in the language of S. 21, Arbitration Act, to support it. Under that section all the matters in dispute in the suit could be referred to arbitration without any limit or qualification, provided the three conditions mentioned therein are satisfied, namely, that the reference relates to matters in dispute in the suit, that all the parties interested agree to the reference and the suit has not been disposed of by judgment which, as already held by us, must mean that the suit is pending. There is no further limitation under the section that only those matters in dispute could be referred which have not been decided by the Court. Once the conditions laid down in the section are satisfied the jurisdiction of the Court to refer the entire subject-matter of the suit to arbitration is absolute and unqualified. The reference is accordingly not open to objection on this ground.

(33) It is finally argued that as appeals against the preliminary decree were pending in the High Court it was only that Court that could refer the dispute to arbitration and that the Subordinate Judge had no jurisdiction to make the reference. This contention again is not sought to be supported either by reference to the language of S. 21, Arbitration Act, or by any authority. There is nothing in S. 21 to limit the power of the Court to refer matters to arbitration because of the pendency of an appeal; so long as the action is pending in that Court its jurisdiction to refer is complete. It is contended that it would be inconvenient for two Courts to have concurrent jurisdiction to refer the same matters to arbitration; that it will result in a conflict of jurisdiction, and that there might even be inconsistent awards. But if it is a question of deciding which of two Courts has the power to refer disputes to arbitration there is no reason why the choice should fall on the appellate Court and not on the trial Court. It is contended that in respect of matters decided by the preliminary judgment the jurisdiction vests only with the appellate Court and not with the Court of first

instance but it can equally be contended that in respect of matters not covered by the preliminary judgment the jurisdiction is exclusively vested in the trial Court and not in the appellate Court. Mr. K. Bhashyam Aiyangar on behalf of the respondents relied on certain observations occurring in — 'Nandram v. Fakirchand', 7 All 523 at p. 526 (ZB) as supporting his contention. There the suit had been finally disposed of by the Subordinate Judge and an appeal against that decision was pending in the District Court. The appellate Court made an order calling upon the Subordinate Judge to submit revised findings on certain issues and the hearing on those issues was pending in the sub-court. Then there was a reference to arbitration and the question was whether it was valid. Holding that it was invalid, Mahmood J. observed as follows:

> "I am of opinion that when a Court has disposed of a case and passed a decree upon it, the jurisdiction assigned to the Court ceases, so far as that case is concerned, and can be revived only in the manner and to the extent which the law prescribes."

This observation could have no application when the suit itself has not been finally disposed of. If anything it supports the position of the appellant. Mr. K. Rajah Aiyar referred to the following passage in the judgment of Sundara Aiyar J. in — 'Atchayya v. Sri Seetharamachandra Rao', AIR 1915 Mad 1223 at p. 1230 (ZC)

> "When, therefore, a suit had been disposed of by the first Court and an appeal is preferred, the Court of appeal is seized of the cause and has the powers and duties of the first Court."

When once it is conceded that the action is pending until it is finally disposed of by a final decree, the Court where it is pending has the power under S. 21, Arbitration Act, to refer the matters in dispute to arbitration. This objection must also be overruled.

(34) It now remains to deal with the last objection of the respondents that the award is bad on the merits on account of coercion on the part of the plaintiff and misconduct of the arbitrators.

(35) The respondents put forward five charges under this heading:

1. It was argued that defendant 1 was not a free agent in consenting to the reference to the arbitration and that he signed Ex. P. 12 under coercion and undue influence. The only basis for the charge is that defendant 1 had fixed the marriage of his daughter for 25-8-1944, that the plaintiff having obtained an order for the appointment of a Commissioner to take possession of papers in the possession of defendant 1 on 5-7-1944, defendant 1 consented to the arbitration with a view to avoid humiliation and disgrace. It is difficult to see how any charge of coercion or undue influence could be laid on these facts. The 1st defendant has not gone into the box. The interim award which was pronounced on 1-8-1944 was signed by all the defendants. There were also repeated extensions by the Court of the time for the filing of the award by the arbitrators. Vide Ex. D. 15 series. This charge must, therefore, be rejected as not made out.

2. The second charge relates to the decision in para. 50 of the award that defendants 1 and 2 should pay Rs. 1,75,000 to the plaintiff on account of charges of mismanagement by defendant 1. The contention of the respondents is that the judgment decided that the plaintiff was not entitled to call for general accounts and that, therefore, the decision of the arbitrators was opposed to the finding of the Court. But a reading of the preliminary judgment shows that though the Court held that defendant 1 was not liable to render an account generally nevertheless he would have to account for monies traced into his hands and not proved to have been spent for the joint family purpose in accordance with the principles laid down in — 'Official Assignee, Madras v. Rajabadar Pillai', AIR 1924 Mad 458 (ZD) and — 'Vaikuntam v. Avudiappa', AIR 1937 Mad 127 at p. 129 (ZE). There is no basis for the contention that the plaintiff was not entitled to relief if misappropriation was established and the award of the arbitrators is, therefore, within their province and further this finding was embodied in para. 17-A of the interim award, Ex. P. 15, which recites that defendants 1 and 2 agreed to this and this award is signed by them. The final award only incorporates what had been decided in para. 17-A of the interim award, with the consent of the parties. There is no substance in this objection.

3. The next objection is that the decision of the arbitrators on the question of jewels was opposed to the judgment in the suit which had declared that the Commissioner should decide whether the gifts of the jewels in favour of the several members of the family pleaded by the defendants was true and was binding on the plaintiff. In para. 19 of the award the arbitrators state,

> "We have determined that all the jewels comprised in schs. 2, 2-a and 2-b belong to the family in common and no one has any separate right to them."

That is to say they have rejected the story of the gifts of the jewels to the several members of the family. This is within the directions given in the preliminary judgment. Moreover it is stated in the award that both the parties have accepted this decision. This statement of the arbitrators has not been controverted by any evidence on behalf of the defendants and must be taken to be correct. Vide — 'In re: Narasimhulu Chetti', AIR 1924 Mad 274 (ZF). There were some complaints about the valuation of the jewels but that is not a ground for setting aside the award.

4. The next complaint is about the directions in para. 56 of the award. It is provided therein that in respect of taxes payable by the family in Burma and in India the accounts had been taken till that date; that if there is any refund of the taxes with reference to the prior period the plaintiff will be entitled to half share therein and if any further tax is payable for that period the defendants alone shall be liable to pay the same and that in respect of this obligation the defendants should execute an indemnity bond in favour of the plaintiff. It was contended that the arbitrators whose authority extended to only to effect a division exceeded the same by providing for indemnity bond being executed. The Subordinate Judge has rightly held that this is incidental to effecting a partition and that the arbitrators had not exceeded their authority. Vide para. 28. We agree with this finding. It may also be noted that it is recited in para. 56 that the defendants consented to it.

5. The last objection raised by the defendants is with reference to the award of interest

on the amount payable to the plaintiff from 15-8-1944 to 5-12-1944. The arbitrators state that they have settled the accounts as on 15-8-1944 and the award of interest from that date is within their authority. This objection must, therefore, fail.

(36) Mr. T. M. Krishnaswami Aiyar appearing on behalf of defendants 3 to 5 argued that the award was not binding on defendants 3 to 5 because defendant 1 who acted as their guardian 'ad litem' in the suit did not protect their interests; that he was negligent in not raising the plea that the amounts entered in the 'Thanathumaral' account of defendant 1 belonged only to him and to his branch and that, therefore, the award was not binding on them. The interests of defendant 1 were not adverse to that of defendants 3 to 5 and there is no sound reason for holding that defendants 3 to 5 are not bound by the action of defendant 1.

(37) Thus all the objections put forward by the defendants to the validity of the award fail and there should accordingly be a decree in terms of the award. The order of the lower Court is, therefore, set aside and this appeal is allowed and it is directed that a decree be passed in terms of the award. The appellant is entitled to his costs throughout. The memo of objection is dismissed without costs.

(38) On our finding that the award is valid and that a decree be passed in terms thereof it would be really unnecessary to discuss the questions arising in A. S. No. 115 of 1944, A. S. No. 199 of 1944 and 499 of 1944 and C. M. P. Nos. 3273 and 3274 of 1944 and C. M. A. Nos. 661 and 49 of 1947, and C. R. P. No. 1247 of 1946. But as the matter is one which might be taken in appeal to the Supreme Court we have considered it desirable to hear all these appeals and record our findings thereon.

(39) 'A. S. No. 115 of 1944':— This is an appeal preferred by defendant 2 in O. S. No. 91 of 1941 on the file of the Sub Court, Devakottah, against the preliminary judgment and decree dated 29-12-1943. The facts leading up to this appeal have been set out in our judgment in C. M. A. No. 210 of 1946. The only point that arises for decision in this appeal apart from the contention in A. S. No. 199 of 1944 is about the correctness of the order in I. A. No. 988 of 1943 whereby the Subordinate Judge declined to receive the additional written statement sought to be filed by defendant 2. The plaintiff had alleged in paras. 6 and 8 of the plaint that his father Chidambaram Chettiar had invested joint family funds in the vilasams of the members of the family, male and female and claimed his half share in these amounts and in the accretions thereto. The 1st defendant who is the father of the appellant and manager of the joint family admitted this claim. The 2nd defendant filed a written statement adopting that of defendant 1. After the suit had been pending long and had been posted peremptorily for trial, defendant 2 filed I. A. No. 988 of 1943 seeking to raise a new and inconsistent plea. In the additional written statement which was proposed to be filed it was alleged that the two sums of money of Rs. 2,10,251-4-0 each were separately set apart in the name of the plaintiff and defendant 1 and that

> "by reason of the said transactions the said two sums constituted the individual and separate monies of the respective branches of the plaintiff and the 1st defendant and that they are not the property of the family, liable to division in this suit."

This is inconsistent with the admission made by defendant 1 that those amounts with their accretions are divisible among all the members of the family and that the plaintiff is entitled to a half share therein. The plaintiff opposed this application on the ground that it was inconsistent with the previous statement, that it was belated and that it was defendant 1 who was behind this application. The Subordinate Judge accepted this contention and dismissed the application.

The only point for determination in this appeal is whether there is ground for permitting defendant 2 to put forward his present case. It may be mentioned that even the additional written statement does not disclose any legal plea. The parties belong to a family which has been carrying on hereditarily money lending business & all the assets in the hands of Chidambaram Chettiar would be joint family properties. That being the position, merely setting them apart in the 'Thanathumaral' accounts would not destroy their character as joint family funds. No partition is pleaded for the obvious reason that this formed only a small portion of the joint family assets and all the other properties continued to be joint. No gift is pleaded; of course gift of joint family properties would be void. In fact monies were set apart not merely in the names of the plaintiff and defendant 1 but also in the names of the female members of the family. The additional written statement is open to the objection that it contains really no substantial plea and that it is sought to be filed only with the object of delaying the hearing of the suit.

(40) The 2nd defendant was a minor, a few years old in 1925, when the 'Thanathumaral' accounts were opened. He could have had no personal knowledge about this matter. It is not stated how he came by any new materials throwing fresh light on the question. It is obvious that defendant 1 finding himself concluded by his own admissions has set up defendant 2 to put forward a plea which is as unsubstantial as it is belated. It may also be mentioned that defendant 2 has endorsed his consent to the interim award, Ex. P. 15, in which it is expressly stated that the parties agreed to divide all the 'Thanathumaral' amounts which were the subject-matter of I. A. No. 988 of 1943 and A. S. No. 115 of 1944. We are satisfied that there is no substance in the contentions sought to be raised in I. A. No. 988 of 1943 and that the Subordinate Judge has exercised a sound discretion in dismissing this application. There is no other point in this appeal and it is accordingly dismissed with costs.

(41) 'A. S. No. 199 of 1944':— This is an appeal preferred by defendants 1 and 3 to 5 against the preliminary decree in O. S. No. 91 of 1941, Sub Court, Devakottai. Four contentions were urged in this appeal.

1. The 1st defendant pleaded in para 22 of the written statement that according to the usual practice obtaining in the Nattukottai Chetti community the manager is entitled to a decent remuneration for managing the joint family business and the properties. Issue No. 10 relates to this question. The witnesses examined on the side of the plaintiff deny the existence of any such custom. D. W. 1 and D. W. 2 are

examined on the side of the appellants for proving the custom. D. W. 1 stated that he received some amount as remuneration for the management of a business under an agreement with his brother. He does not speak to any custom prevalent in the community. D. W. 2 merely stated that at a partition between him and his brothers the panchayatdars gave him three jewels towards his remuneration. The custom pleaded is a very unusual one and runs counter to the fundamental conceptions of joint family. The evidence in support of this is absolutely worthless and was rightly rejected by the lower Court. This point must be found against the appellants.

2. It is next contended that the plea of the appellants with reference to the jewels should have been accepted. The Subordinate Judge did not negative the claim of the appellants to the jewels but only directed the commissioner to enquire into the truth of the gifts and about their reasonableness if they were true. The learned advocate for the appellants has been unable to urge anything against the soundness of this finding. It will accordingly be confirmed.

3. The next contention of the appellants relates to item No. 3 in schedule A. There is a school which is being conducted at that place and the appellants want that this charity might be continued. This is opposed by the plaintiff. There is not even a plea in the written statement that this property had been dedicated to charity. This contention must accordingly be rejected.

4. Lastly it is contended that it is customary for members of the family to make presents to sisters and that joint family properties, sufficient for that purpose might be set apart and the balance alone be divided. This is not a legal obligation and the parties might be left to make their own presents as and when occasion arise in accordance with their willingness and ability. The lower Court has rightly rejected this claim. In the result this appeal fails and is dismissed with costs.

(42) 'App. No 499 of 1944': This is the appeal of the plaintiff against the preliminary decree in O. S. No. 91 of 1941 on the file of the Sub Court, Devakottai. The contention raised in this appeal is again a question of custom. It is pleaded in para. 5 of the reply statement filed by the plaintiff in these terms:

> "The plaintiff states that according to the usage and custom of the Nattukottai Chettiars the drawings made by or the expenses incurred on behalf of the individual members of the family after setting up separate family by such member are debited to his individual account so as to equalise the shares of the members of the family in the joint family properties and to be adjusted at the time of the partition."

The separate accounts in the names of the members are called 'Pathuvazhis' and the point for determination is whether there is a custom that the amounts standing as debits in the 'Pathuvazhi' accounts could be debited against the shares of the particular members at the time of the partition. The evidence in the case shows that there is a practice in the Nattukottai Chettiar community for a member of the family to live separately after marriage and whatever he draws from the joint family is thereafter entered in a separate account called 'Pathuvazhi'. The custom as pleaded by the plaintiff is that all the amounts drawn by him and entered in the 'Pathuvazhi' account should be debited against him. The 'Pathuvazhi' account includes amounts drawn by the members for their maintenance. If the custom pleaded by the plaintiff is to be accepted in its entirety it would mean that in a joint family members have no right of maintenance after marriage, a position which is inconsistent with the fundamental character of the joint family. The evidence adduced on behalf of the plaintiff does not, however, go so far.

(43) In Castes and Tribes of Southern India by E. Thurston, (Vol. V page 253) there is the following extract from an article of late Sundara Aiyar J. bearing on this custom:

> "The first and chiefest aim of a Nattukottai Chetti is to make as much money as possible. He does not regard usury as a sin.....As soon as he marries, his father gives him a separate home, or rather compels him to live separately, though often in the same house as his parents. This makes him self-reliant, and produces in him a desire to save as much money as possible. He is given a certain allowance out of the paternal estate, but if he spends more, he is debited with the excess amount."

The existence and scope of this custom came up for decision in 'A. S. Nos. 212 and 214 of 1928' on the file of this Court. Pandalai J. held that the custom was not made out. With reference to the evidence adduced in support of this custom he observed:

> "This bold bid at revolutionising the law of partition among Nattukottai Chetties by giving a novel meaning to their thrifty method of upkeeping family accounts failed miserably."

He went on to hold that the monies spent for the maintenance, marriage and other legitimate joint family expenses could not be debited against the members though they were entered in the 'pathuvashi' accounts. Curgenven J., however, differed. On this difference of opinion the matter came before Madhavan Nair J. who proceeded to decide the case on the footing that the custom had not been made out and granted a decree on the basis of an agreement of the parties.

(44) The next document relied on is Ex. P. 4(a) which is an award of the panchayatdars in O. S. No. 3 of 1936 on the file of the Sub Court, Devakottah. There is a provision in the award that the 'Thanathu' drawings of each party should be debited against them. P. W. 7 is examined in connection with this but he is unable to remember what amounts were drawn in the 'Pathuvazhi' account. If amounts unrelated to joint family expenses had been entered they could be rightly debited against the members. The same criticism applies to Ex. P. 6 which is the report of the commissioner appointed in O. S. No. 73 of 1937. The evidence is not clear as to whether the amounts drawn on the 'Pathuvazhi' account were legitimate joint family expenses or not. The report of the commissioner in O. S. No. 64 of 1935 Ex. P. 8 does not appear to be a case of 'Pathuvazhi' at all and is of no help in determining the point now at issue. The real evidence in support of this custom is vague, indefinite and discrepant. P. W. 1 stated that certain amounts were adjusted by agreement. He also deposed that the eldest member of the family who manages the properties of the fa-

mily is not entitled to any remuneration. P. W. 3 stated that when amounts are spent on individual needs they would be drawn on 'Pathuvashi' account and debited to individuals; they would be in accordance with Hindu law. His evidence does not support the contention that even monies spent for maintenance could be debited against the member. P. W. 4 also stated that whenever monies were required by a member the purpose would be mentioned, that if it is a joint family purpose it would be shown as expenses and if it is a personal expense it would be debited to personal account. This completely destroys the case of the plaintiff. P. W. 5 deposed to his having settled several disputes but he is unable to remember the nature of the disputes or other details.

(45) It will be seen, therefore, that there is no definiteness or certainty about the custom pleaded. According to one version the manager will fix the amount payable to each member when he begins to live separately and it is only the balance that will be debited against him. According to another version the whole of it will be debited. Then again according to one version the joint family expenses would not be debited but only the personal expenses. According to another version all of them will be debited. In this state of evidence and having regard to the fact that the custom is one which is radically opposed to the fundamental conception of Hindu joint family it must be held that the plaintiff has not discharged the burden which lies heavily on him of establishing the custom. That is the conclusion of the Subordinate Judge and we agree with it. In the result this appeal also will be dismissed with costs.

(46) 'C. M. P. Nos. 3274 and 3273 of 1946':— In A. S. No. 115 of 1944 the plaintiff has filed C. M. P. No. 3274 of 1946 under O. 23, R. 3, C. P. C., for an order that the interim award, Ex. P. 15, dated 1-8-1944 be treated as a compromise and a decree passed in terms thereof. It was held in — 'Subbaraju v. Venkataramaraju', AIR 1928 Mad 1025 (ZG) by a Full Bench of this Court that an award in respect of which a decree could not be passed could be treated as a compromise and a compromise decree passed under O. 23, R. 3, C. P. C. This was followed in a case arising out of the Arbitration Act of 1940—Vide — 'Arumuga Mudaliar v. Balasubramania', AIR 1945 Mad 294 (ZH). In — 'Indramani v. Nilamoni', AIR 1950 Orissa 169 (ZI), the decision in — 'Arumugha v. Balasubramania', AIR 1945 Mad 294 (ZH) has been dissented from and it has been held that unless the award is assented to after it is pronounced it cannot be treated as a compromise under O. 23, R. 3, C. P. C., but defendant 2 having consented to the interim award, the plaintiff argues that a decree may be passed as against him under O. 23, R. 3, C. P. C. In our opinion he is entitled to such a decree.

(47) 'C. M. P. No. 3273 of 1946': This is for a similar decree in A. S. No. 199 of 1944. For the reasons already given the plaintiff is entitled to a decree against defendant 1. But as defendants 3 to 5 were minors at the time when the interim award was pronounced and as no sanction of the Court was obtained under O. 32, R. 7, C. P. C., for sanctioning the compromise on their behalf, no decree could be passed as against them under O. 23, R. 3, C. P. C. There can be an order in C. M. P. No. 3273 of 1946 only in these terms.

(48) 'C. M. A. No. 661 of 1946 and 49 of 1947': These two appeals are against application filed in O. S. No. 91 of 1941 for passing a decree under O. 23, R. 3 on the ground that the defendants had consented to the interim award. For the reasons given in C. M. P. Nos. 3274 and 3273 of 1946 these appeals will have to be allowed and a compromise decree passed in terms of the award under O. 23, R. 3 against defendants 1 and 2.

(49) 'C. R. P. No. 1247 of 1946':—The only order that need be passed on this revision is that defendant 1 do put into Court copies of the correspondence for inspection by the plaintiff. He is not bound to show them to the plaintiff before despatching them.

(50 There will be no order for costs in C. M. P. No. 3274 of 1946; C. M. P. No. 3273 of 1946; C. M. A. No. 661 of 1946; C. M. A. No. 49 of 1947 and C. R. P. No. 1247 of 1946. No orders are necessary in C. M. P. No. 7076 of 1947 and C. M. P. No. 1122 of 1947. C. M. P. No. 5329 and 5330 of 1948 are ordered.

B/M.K.S. Order accordingly.

A.I.R. 1953 MADRAS 506 (Vol. 40, C. N. 189)

GOVINDA MENON J.

Hoode Venkataramanayya, Petitioner v. J. M. Lobo, Respondent.

Civil Revn. Petn. No. 135 of 1950, D/- 24-10-1952.

Contract Act (1872), S. 23 — Object opposed to public policy.

A 'Kaikagada' under which certain amount is paid as a consideration with the object that a 'shanbhogue' should not revert to his post and the person making the payment should continue in his place as a 'shanbhogue', is void under S. 23, Contract Act, as its object is opposed to public policy : 30 Mad 530 Rel. on. **(Para 1)**

Anno: Contract Act, S. 23 N. 12.

M. K. Nambiar, for Petitioner; M. L. Nayak and K. Vittal Rao, for Respondent.

CASE CITED:

(A) ('07) 30 Mad 530: 17 Mad LJ 252

JUDGMENT : The learned Subordinate Judge finds as a question of fact that the petitioner paid Rs. 550 to the mother of D. W. 1 only for the sake of continuing as shanbhogue and in consideration of D. W. 1 not reverting to that post. On that finding the question is whether the 'kaikagada' suffers from the infirmity mentioned in S. 23, Contract Act as being opposed to public policy. It has been held in —'Swaminatha Aiyer v. Muthusami Pillai', 30 Mad 530(A), that an undertaking to pay money to a public servant to induce him to retire and thus make way for the appointment of the promisor is practically trafficking in office and as such void under S. 23, Contract Act. Here a sum of money was paid to the mother of the previous shanbhogue in order that the shanbhogue should not revert to the office. The decision in 30 Mad 530(A), applies to the facts of the present case. But Mr. Nambiar contends that this defence was not raised in the reply to the lawyer's notice. Even if that is so, when once it is found on

the evidence, which cannot be disputed here, that the money was paid as consideration for an object, which is opposed to public policy, it cannot be said that the learned Judge erred in dismissing the suit. The civil revision petition is, therefore, dismissed with costs.

B/D.R.R. Revision dismissed.

A.I.R. 1953 MADRAS 507 (Vol. 40, C. N. 190)

SOMASUNDARAM J.

In re Baggiam, Petitioner.

Criminal Revn. Case No. 264 and Cri. Revn. Petn. No. 247 of 1952, D/- 5-11-1952.

(a) Madras District Police Act (24 of 1859), S. 47 — Applicability to City of Madras — (Laws Local Extent Act (15 of 1874), S. 4).

Apart from S. 2, Madras Act 8 of 1867 which made the Madras District Police Act, 1859, applicable to the City of Madras, since 1-9-1867, it is clear from S. 4, Central Act 15 of 1874 that the Madras District Police Act, 1859, applies to the police in Madras City and hence S. 47 of that Act can be invoked in respect of the allegations made against a city constable. (Para 3)

(b) Madras District Police Act (24 of 1859), S. 47 — Charge — Meaning — (Penal Code (1860), S. 211) — (Words and Phrases — Charge).

The word "charge" is not defined either in the Act or in the Code of Criminal Procedure. The ordinary meaning given to it in Wharton's Law Lexicon is "to prefer an accusation against any one".

In S. 211, I. P. C., the charge must be one against any person with having committed an offence. There is therefore no identity of meaning between S. 47, Madras District Police Act and S. 211, I. P. C. with regard to the word "charge" in the two sections. AIR 1937 Mad 808, Rel. on; 26 Mad 640, 32 Mad 258 and AIR 1932 Cal 511, Disting. (Para 6)

A. A. S. Mustapa, for Petitioner; State Prosecutor, for the State.

CASES CITED:

(A) ('03) 26 Mad 640

(B) ('09) 9 Cri LJ 170: 32 Mad 258

(C) ('32) AIR 1932 Cal 511: 59 Cal 334: 33 Cri LJ 631

(D) ('37) AIR 1937 Mad 808: 1937 Mad WN Cr 170: 39 Cri LJ 135

ORDER: The petitioner in this case has been convicted by the Fourth Presidency Magistrate for an offence under S. 47, Madras District Police Act (Act 24 of 1859) and sentenced to a fine of Rs. 30 in default to three weeks' rigorous imprisonment.

(2) The facts of the case may be briefly stated as follows: The petitioner sent a petition, Ex. P. 1, dated 28-5-1951 to the Inspector General of Police alleging therein that P. C. 2144 of B. 2 station was troubling her daily asking for a mamool of Rs. 10, that he was inducing her to run a brothel and that he was taking bribes. The petition was forwarded to the Sub-Inspector of B. 2 station for enquiry. P. W. 2, the Sub-Inspector of B. 2 station inquired into the matter and sent a report that the allegations are false and that they were made with a view to remove the police surveillance on her. Thereupon this complaint was laid in Court against the accused for an offence under S. 47, Madras District Police Act. Both in the enquiry by the Sub-Inspector and before the Court beyond her statement no other evidence was let in in support of her allegations in the petition. In the enquiry before the Sub-Inspector a witness was cited, who did not speak to anything more than that the police constable concerned used to come often to the house of the petitioner and question her in an authoritative manner. In the Court the witnesses cited by her spoke to the fact that they saw the constable one day coming and talking to the accused. The prosecution examined P.C. 2144 in support of its case that the allegations made against him are false. He stated in his evidence that he had taken action against the petitioner under S. 4 (1), Madras Prohibition Act and her brother Mari was also charged by him under S. 75, City Police Act and that he had also taken action against the accused under S. 75, City Police Act in respect of girls kept by her in her house, whom he arrested. He also stated that on account of his taking action against her, her brother and the girls kept by her, she has sent this petition against him. The Sub-Inspector who made the enquiry was also examined by the prosecution and he filed a report which was submitted to the Commissioner of Police. The Magistrate believed the evidence of the constable, P. W. 2 and as the allegations in the petition, Ex. P. 1, were not substantiated by the accused, the Magistrate came to the conclusion very rightly in my opinion that the allegations contained in Ex. P. 1 are false and that they were maliciously made by the accused. The petitioner was therefore convicted under the aforesaid section.

(3) In revision two points of law were canvassed before me: (1) Section 47 is a provision in the Madras District Police Act and it is not applicable to the City as a separate City Police Act governs the conduct of the police officers in the City, and therefore S. 47 cannot be invoked in respect of the allegations made against the city constable; and (2) As under S. 16, Police (Madras City) Act any police officer appointed under the provisions of Act 24 of 1859 (Madras District Police Act), if employed in the City, shall have the same duties, powers and privileges as police officers under the Police (Madras City) Act, and as S. 47 confers a privilege only on a constable employed in the district and that this privilege is not conferred on a city constable by the Police (Madras City) Act this S. 47 cannot apply in respect of a city constable in the absence of a similar provision in the Police (Madras City) Act.

So far as the first point is concerned; it must not be forgotten that the Madras District Police Act is a Central Act passed in 1859 for the better regulation of the police within the territories subject to the presidency of the Fort St. George. Under S. 55 of the Act, it can be made applicable to any or every district by a notification of the Provincial Government published in the official gazette. By S. 2, Madras Act 8 of 1867, the provisions of Act 24 of 1859 (Madras District Police Act) have been made applicable to the persons, who at that time belonged to or would thereafter belong to the town police. By virtue of this provision, since 1-9-1867, when the Madras Act 8 of 1867 came into force, the District Police Act (Act 24 of 1859) is in force in the City of Madras. This is further clear from another Act of the Central Legislature, viz., Act 15 of 1874. That is an Act for declaring the local extent of certain

enactments and for other purposes. Section 4 of the above Act is as follows:

"The enactments mentioned in the second schedule hereto annexed are now in force throughout the whole of the territories now subject to the Government of the Governor of Fort St. George in Council, except the scheduled district subject to such Government."

Act 24 of 1859 is one of the Acts referred to in the second schedule (vide p. 257 of Vol. II of the Unrepealed Central Act, 2nd Edn.). Apart from the Madras Act 8 of 1867, the Central Act 15 of 1874 makes it clear that this Madras District Police Act is applicable to the police in the City of Madras. This covers practically the second point also, though I will deal with it separately.

(4) As regards the second point about S. 16, City Police Act, I do not see how it takes away the right under the Madras District Police Act, which as stated already is applicable to the police in the City of Madras. Section 47 creates an offence in respect of not only allegations made against the police officer, but also for assaulting or resisting any police officer in the execution of his duty and for aiding or inciting any other person so to assault or resist any police officer. This has nothing to do with the privileges of a constable in the City. Even if it is considered as a privilege, I do not see how it can make any difference as the Madras District Police Act applies to the City also. There is therefore no substance in either of the two points raised by the learned advocate for the petitioner.

(5) The only other question is whether the petitioner can be said to have preferred a false or frivolous charge against P. C. 2144. I have already held that the learned Magistrate was justified in coming to the conclusion that the allegations made are false and were maliciously made. The question is whether it is a charge against a police officer.

(6) The word "charge" is not defined either in the Act or in the Code of Criminal Procedure. The ordinary meaning given to it in Wharton's Law Lexicon is "to prefer an accusation against one." What exactly is meant by "charge" has been considered by two decisions of this Court in connection with its meaning in S. 211, I.P.C. The two decisions are — 'Rayan Hutti v. Emperor', 26 Mad 640 (A) and — 'Sessions Judge, Tinnevelly Division v. Sivan Chetti', 32 Mad 258 (B). It has also been considered by the Calcutta High Court in — 'Abdul Hakim Khan v. Emperor', AIR 1932 Cal 511 (C). Both 26 Mad 640 (A) and AIR 1932 Cal 511 (C) have been considered by King J. in — 'Achayya Setti v. Emperor', AIR 1937 Mad 808 (D). As already stated the three decisions in 26 Mad 640 (A); 32 Mad 258 (B) and AIR 1932 Cal 511 (C) referred to by me deal only with the meaning of the word in S. 211, I.P.C. But AIR 1937 Mad 808 (D) deals with the meaning of the word in S. 47, Madras District Police Act. I must say that in S. 211, I.P.C. the charge must be one against any person with having committed an offence. The sense therefore in which the word is used in S. 211, I.P.C. is different from that in which it is used in S. 47, Madras District Police Act. I entirely agree with King J. that there is no identity of meaning between S. 47, Madras District Police Act and S. 211, I.P.C. with regard to the word "charge" in the two sections. The rulings therefore in 26 Mad 640 (A); 32 Mad 258 (B) and AIR 1932 Cal 511 (C) will not apply to a case under S. 47, Madras District Police Act. I would therefore hold that the allegations by the petitioner against P. C. 2144 amount to a false and frivolous charge against him and that they were made maliciously. The lower Court is justified in convicting the petitioner for an offence under S. 47 Madras District Police Act and the sentence is not excessive. This petition is therefore dismissed.

B/D.R.R. Petition dismissed.

A.I.R. 1953 MADRAS 508 (Vol. 40, C. N. 191)

RAJAGOPALAN J.

Sista Venkatachalam, Appellant v. Bhamidipalli Saramma, Respondent.

Second Appeal No. 17 of 1949, D/- 3-11-1952.

Hindu Law — Widow — Nature of estate — (Madras Local Boards Act (14 of 1920), Rules 10 and 5 of Provident Funds Rules framed under Act) — (Provident Funds Act (1925), S. 2(e)).

Insurance policy reassigned to widow, the nominee for the provident fund, under Proviso (d) of R. 10(2) of Provident Fund Rules framed under Madras Local Boards Act — Amount received under the policy by the widow is not a part of provident fund and is not received as her absolute estate — Fact that premium was paid from the fund cannot make it an "increment accruing on such subscriptions" and so Provident fund within the meaning of S. 2(e), Provident Funds Act. (Para 5)

Anno: Prov. Funds Act, S. 2 N. 1.

M. S. Ramachandra Rao and B. Krishna Rao, for Appellant; D. Narasaraju, for Respondent.

JUDGMENT: The plaintiff-respondent in second appeal is the mother of the late Venkatanarayana who died without issue on 21-11-1937. Subhadramma was the widow of Venkatanarayana. On his death, she succeeded to his separate properties which consisted of (1) the amount payable under an insurance policy which Venkatanarayana had taken out and (2) the amount lying to the credit of Venkatanarayana in his provident fund account. Subhadramma acquired two items of immoveable properties. The finding of the lower appellate Court was that item 1 of the two items shown in the schedule to the plaint was acquired by Subhadramma with the money she got from the insurance company and that item 2 was purchased with the monies drawn from the provident fund. Before Subhadramma died she executed the Will under which the defendants-appellants in the second appeal claimed the properties. On the death of Subhadramma Venkatanarayana's mother as the reversioner to the estate of Venkatanarayana sued the defendants for recovery of possession of these properties. Both the Courts held that the will was a genuine document. But the learned District Munsif dismissed the plaintiff's claim holding that the two items of properties should be treated as the absolute properties of Subhadramma. On appeal, the learned Subordinate Judge held that while the amount in the provident fund of the late Venkatanarayana had become the absolute property of Subhadramma when it came to her, she had only a widow's estate in

the amount paid under the policy of insurance. Since it was with that amount that item 1 had been purchased, the learned Subordinate Judge held that the plaintiff was entitled to recover possession of item 1 as reversioner to the estate of the late Venkatanarayana after the death of Subhadramma. The defendants preferred the second appeal.

(2) The only question for determination in this second appeal is whether the learned Subordinate Judge was right in holding that the amount paid under the insurance policy had not become the absolute property of Subhadramma which she could dispose of by her will.

(3) Venkatanarayana was in the service of the District Board as a school teacher. He contributed to the provident fund. He took out a policy No. 24706 in the Lakshmi Insurance Co. It was common ground that contributions to this policy were made out of the amounts lying to the credit of Venkatanarayana in his provident fund. Venkatanarayana assigned this policy to the President, District Board, East Godavari "as security for payment of all sums which under the Local Boards Provident Fund Rules I may hereafter become liable to pay to that fund", Ex. B. (1)(a). On the death of Venkatanarayana, the President of the District Board assigned the policy to Venkatanarayana's heir and widow Subhadramma under Ex. B. 1(b) which ran,

> "I, President, District Board, Rajahmundry, the assignee of the within policy, hereby assign all the benefits of the within policy to Bhammidipalli Subhadrammagaru....."

Rule 10(1) of the Provident Fund Rules framed by the Government under S. 71(g) and S. 199(2)(a) of the Madras Local Boards Act, 1920 ran :

> "At the request in writing of any subscriber, and with the consent of the District Board, any portion or whole of his subscriptions with interest thereon may be invested by the District Board in a policy of life assurance in such office and for such amount and on such terms as may be mutually agreed upon in writing between such subscriber and the District Board."

It was under this rule that the premia for the policy taken out by Venkatanarayana were paid out of the amounts to his credit in his provident fund. Clause 2 of R. 10 ran :

> "Such policy so arranged shall be effected in the name of the subscriber who shall assign the same in favour of the President, District Board, it shall be held and unless reassigned over as provided for in cl. (c) or cl. (d) of the proviso, shall be realised by the District Board and the net proceeds on realisation shall be credited to the account of each subscriber."

Clause (c) of the proviso did not apply; it provided for the contingency of retirement of the subscriber from service; Venkatanarayana died while still in service. Clause (d) of the Proviso to R. 10 ran :

> "On the death of a subscriber while in service, the policy effected on his life shall be reassigned to the nominee appointed by him under R. 5 or to all the nominees appointed by him under that rule jointly specifying the shares to which each of the nominees is entitled."

It was common ground that Subhadramma was the nominee. It was under cl. (d) of the proviso to R. 10 that the President, District Board, executed Ex. B. 1(b) assigning the policy and the benefits accruing thereunder to Subhadramma.

(4) The real question is, did the money payable under the policy become part of the provident fund of Venkatanarayana? If that question is to be answered in the affirmative Subhadramma as the nominee would be absolutely entitled to all the amounts that had been credited to the provident fund of Venkatanarayana. If, however, the question is answered in the negative, the amount collected under the policy of insurance will have to be treated as an item of the estate of the late Venkatanarayana distinct from the amount which lay to his credit in his provident fund, and the nomination under the rules of the provident fund would not govern a devolution of interest in this part of the estate of Venkatanarayana, that is the amount paid under the policy of insurance.

(5) Sub-clause (2) of R. 10 provides for the realisation of the amount payable under the policy of insurance by the assignee, that is, by the President, District Board and for that amount being credited to the Provident Fund of the subscriber, that is Venkatanarayana. The amount payable under the insurance policy was not collected in fact by the President of the District Board, nor was it credited to the provident fund account of Venkatanarayana. It should be remembered that sub-clause (2) of R. 10 is also subject to the proviso. Clause 1(d) of the proviso specifically provided for the contingency of the subscriber dying in service. In that contingency which happened when Venkatanarayana died, all that the President of the District Board could have done was to reassign the policy to the nominee of Venkatanarayana who would be entitled to get all the amounts that stood to the credit of Venkatanarayana in his provident fund account. I am unable to accept the contention, that the effect of the reassignment under cl. (d) of the proviso to R. 10 was to make the amount realised under the insurance policy by the assignee Subhadramma part of the provident fund amount of Venkatanarayana. As I have already pointed out, in fact, at no time was the amount realised under the insurance policy credited to the provident fund account of Venkatanarayana. The mere fact that Subhadramma was the nominee entitled to the whole of the amount that stood to the credit of Venkatanarayana in his provident fund account, is not enough to cover the money realised by Subhadramma on a reassignment of the policy under the provisions of cl. (d) of the proviso to R. 10 as part of the provident fund amount. It was certainly money that belonged to the estate of Venkatanarayana which Subhadramma was entitled to inherit but she succeeded only to a widow's estate therein and no more. The definition of "provident fund" in the Provident Funds Act, 1925 (cl. 2(e)) cannot help the defendants. The amount paid under the insurance policy cannot be viewed as "increment accruing on such subscriptions" within the meaning of cl. 2(e) despite the fact that the premia towards that policy were paid out of the provident fund of Venkatanarayana.

(6) The view taken by the lower appellate Court that the plaintiff was entitled to succeed to item 1 after the death of Subhadramma is correct.

(7) The second appeal fails and is dismissed with costs.

B/M.K.S.

Appeal dismissed.

A.I.R. 1953 MADRAS 510 (Vol. 40, C. N. 192)

CHANDRA REDDI J.

Sri P. M. Ratna Sabhapathi Rao and others, Petitioners v. The State of Madras, represented by Secretary, Local Administration Department and others, Respondents.

Writ Petn. No. 640 of 1952, D/- 15-10-1952.

(a) Municipalities — Madras District Municipalities Act (5 of 1920), S. 43 — Division into wards — Duty of Government.

Government is not bound to adopt all proposals of the Municipality in dividing it into wards but has only to take recommendations of the Municipality into consideration — Municipality after submitting proposal sending subsequent proposal in modification or supersession of the first — Government does not fail to comply with section in accepting earlier proposal and issuing a notification in accordance therewith. AIR 1953 Mad 392, Disting. (Para 5)

(b) Municipalities — Madras District Municipalities Act (5 of 1920), S. 43 — Division into wards — Mala fides — (Constitution of India (1950), Art. 226).

Merely because Voters' lists of different wards as constituted by Government are not exactly equal it cannot be assumed that there is want of bona fides on the part of the Government. (Para 6)

Anno: Civil P.C., App. III, Const. of India, Art. 226 N. 1.

†**(c) Constitution of India (1950), Art. 226 — Persons entitled to apply — (Municipalities — Madras District Municipalities Act (5 of 1920), Ss. 7 and 43).**

Notification ordering redistribution of wards in Municipality — Application by an individual for writ of 'certiorari' when there is no allegation of petitioner's personal interest having suffered is not maintainable on the allegations that notification did not comply with S. 43 and that redistribution was not in public interests: AIR 1953 Mad 94, AIR 1951 SC 41, 48 Cal WN 767 and (1897) 1 QB 498, Rel. on. (Paras 8, 9)

Anno: Civil P. C., App. III, Const. of India, Art. 226 N. 6.

(d) Constitution of India (1950), Art. 226 — Issue of writ 'ex debito justitiae' — (Municipalities — Madras District Municipalities Act (5 of 1920), Ss. 7 and 43).

It is not incumbent on Government either under the District Municipalities Act or under the rules framed for elections to divide wards so as to ensure their equality of voting strength or to make it easy for members of particular community to be elected. There is no violation of natural justice in not manipulating the wards to ensure their success and hence a writ 'ex debito justitiae' will not be issued on the application of a person who has no personal interest. (Paras 10, 11)

Anno: Civil P.C., App. III, Const. of India, Art. 226 N. 1, 6.

†**(e) Constitution of India (1950), Art. 226 — 'Certiorari' — Interference with electoral process — (Municipalities — Madras District Municipalities Act (5 of 1920), Ss. 7 and 43).**

Interference with electoral process is not warranted by Art. 226 — Redistribution of wards is a matter purely within ambit of executive power — Matter is not justiciable and cannot be brought up for writ of 'certiorari' before High Court. (1946) 328 US 549; (1950) 339 US 276 and WP No. 568 of 1952 (Mad), Rel. on. (Para 14)

Anno: Civil P.C., App. III; Const. of India, Art. 226 N. 13.

N. Subramaniam and G. V. Krishna Sarma, for Petitioners; Govt. Pleader, for Respondents.

CASES CITED:

(A) ('53) AIR 1953 Mad 392: (WP No 648 of 1952)
(B) ('53) AIR 1953 Mad 94: (WP No 244 of 1952)
(C) ('51) AIR 1951 SC 41: 1951 SCJ 29
(D) ('44) 48 Cal WN 767
(E) (1897) 1 QB 498: 66 LJ QB 403
(F) (1946) 328 US 549: 90 Law Ed 1432
(G) (1950) 339 US 276: 94 Law Ed 834
(H) ('52) WP No 568 of 1952 (Mad)

ORDER: This petition relates to the Municipal Council, Guntur and is taken out by twelve persons stated to be the members of that Municipality for calling for the records and for quashing the notification issued by the Government in G. O. No. 1298, Local Administration dated 1-7-1952. In 1949 the strength of the Municipal Council, Guntur, was fixed at 32 and as the census of 1951 disclosed an increase in the population, the strength of the Council had to be increased to 36 in view of the provisions of S. 7, District Municipalities Act. This necessitated redivision of the wards into 32. Under S. 43, District Municipalities Act, the Government have to consult the Municipalities concerned before dividing the municipality into wards and doing other things mentioned in that section. Accordingly the Government called for proposals from the Municipality with regard to the division of it into wards and also the wards in which seats if any should be reserved under sub-s. 3 of S. 7 of the Act. On receipt of this communication the Municipal Council passed a resolution on 1-11-1951 appointing a sub-committee of eight of whom two of the present petitioners were members for formulating proposals to be submitted to the Government regarding division into wards. In order to consider the recommendations of the sub-committee, a meeting of the Council was called for on 7-3-1952 and the agenda specifically included the consideration of the proposals of the sub-committee with regard to division of wards. But as there was no quorum, the meeting had to be adjourned. By a notice dated 13-3-1952 the meeting was fixed for 27-3-1952. On that day a point of order was raised that the meeting was not validly summoned as the notice for the meeting and the agenda were not signed by the Vice-Chairman, the basis of the objection being that the Vice-Chairman left the town on the 16th evening and so he could not have signed either the notice or the agenda. But this point of order was ruled out by the Vice-Chairman who was then presiding on the ground that the notice and the agenda were signed on the 13th and there was absolutely no force in the point of order. Thereafter the proposals of the sub-committee were considered and were accepted with slight modifi-

cation and they were communicated to the Government. On 30-5-1952, some members of the Municipal Council sent a requisition for summoning a special meeting for the purpose of reconsidering the resolution of 27-3-1952. Accordingly the special meeting was summoned and at that meeting it was resolved that the resolution of 27-3-1952 should be reconsidered. The meeting was adjourned to 20-6-1952 and on account of some inconvenience to some of the members, the meeting could not be held on the 20th and it was postponed to 20 (23?)-6-1952. On 23-6-1952 at about 11 o'clock when the Council was in meeting, a notice was served on the Vice-Chairman by an advocate informing him that a suit was filed by one of the municipal councillors for an injunction restraining the Municipal Council from reconsidering the resolution passed on 27-3-1952. Immediately the Vice-Chairman read out the notice received by him and adjourned the meeting entering in the minute book that the matter of reconsideration of the resolution was 'sub judice' and left the meeting. It is alleged in the affidavit in support of the petition for the issue of writ of 'certiorari' that 17 members of the Council stayed behind, elected one of them as the president of the meeting and passed a resolution making certain proposals to be forwarded to the Government for the division of the wards. This seems to have been communicated to the Government and it is stated that these proposals were before the Government before the notification now sought to be quashed was issued.

(2) The main grounds of attack against the notification in question are that it is based on the proposals of the municipality made on 27-3-1952 which are inequitable, and unjust and is therefore 'ultra vires' the powers of the Government, that it contravenes the provisions of S. 43 and that the Government acted in a very highhanded and arbitrary manner and were actuated by mala fides in not issuing a notification in accordance with the proposals made on 23-6-1952.

(3) The chief question therefore for consideration is whether the Government disregarded the provisions of S. 43, District Municipalities Act. Section 43 of that Act runs thus:

"43(1): For the purpose of election of councillors to a Municipal Council, the Provincial Government after consulting the Municipal Council may, by notification,

(a) divide the Municipality into wards,

(b) determine the wards in which the seats, if any, reserved under sub-s. (3) of S. 7 shall be set apart, and

(c) declare for whom such seats are reserved.

(2) ....."

We are not concerned with the other provisions of the section. It is seen that under S. 43 all that the Government are required to do before dividing the municipality into wards is to consult the municipality concerned. Before issuing a notification regarding the division, the Government should have the advice of the Municipal Council that is the views of the concerned Municipality with regard to that matter. They are not bound to adopt all the proposals submitted to them in that behalf. All that they have to do before arriving at a decision with regard to division into wards is to take the recommendations of the municipality into consideration they being the final authority and the responsibility being entirely their own. In this case the notification issued on 1-7-1952 is mainly based on the proposals made by the municipality on 27-3-1952.

It is argued by Mr. Subramaniam, vehemently that when fresh proposal were submitted to the Government in supersession or modification of the earlier proposals the Government were bound to act only on the subsequent proposals and could not take into consideration the earlier proposals. I am afraid I cannot give effect to this argument. There is no provision of law in the Act to compel the Government to give effect to the recommendations made by the Municipality. They are not bound to accept all the recommendations of the Municipality in regard to the division. All that they have to do is to consider the proposals before arriving at a decision. Whatever may be the position if the Government were to act in accordance with the wishes or the resolution of the Council and the resolution binding on the Government it is different when the Government have only to consult the municipality before issuing the notification. Under S. 43 the capacity of the Council is only advisory and it cannot insist on the Government accepting the later advice tendered by it in preference to the one that was given earlier. It is for the Government to decide whether they will accept the advice given first or that given subsequently. If the contention put forward on behalf of the petitioners is to be accepted, the position comes to this. If after passing the resolution on 23rd June the municipality again had changed its mind and submitted fresh proposals, the Government would have to give effect to the latest proposals and not to the intermediate proposals. I do not think such a position was ever contemplated by the Legislature when it enacted S. 43, District Municipalities Act. It is not out of place to note in this case that the Municipality met again on 18-8-1952 and passed a resolution submitting proposals which are said to be completely at variance with those submitted on 23-6-1952. If effect is given to the argument of Mr. Subramaniam, the Government can never act promptly and expeditiously.

(4) In support of his contention that there was no consultation by the Government as required under S. 43 of the Act, Mr. Subramaniam relied on a decision of Subba Rao J. in — 'R. Pushpam v. State of Madras', AIR 1953 Mad 392 (A). I do not think that the decision has any bearing on the question for consideration. There the State Government made proposals to the Municipal Council, Arupukottai to reserve two seats for women in wards Nos. 5 and 12. The Municipal Council expressed the opinion that the reservation for women might be made in wards Nos. 5 and 7. The Government instead of making reservation as per the original proposal or accepting Municipal Council's recommendation made the reservation for women in wards Nos. 2 and 12. While holding that there was consultation in regard to ward No. 12 having regard to the fact that the original proposal of the Government included ward No. 12 the learned Judge took the view that there was no consultation in respect of ward No. 2. In the opinion of the learned Judge it could

not be said that there had been any consultation or collaboration between the Municipal Council and the Government as regards ward No. 2.

(5) As I have already pointed out, the principle underlying the case has no application to this case. I think that once the Government had called for proposals and the proposals were submitted it is open to the Government to accept those proposals in preference to those subsequently made. When this is done, it cannot be said that there is no sufficient compliance with the provisions of S. 43, District Municipalities Act. In these circumstances there is absolutely no substance in the contention that the Government disregarded relevant provisions of the Act in issuing the notification on 1-7-1952.

(6) I must also observe that there is absolutely no foundation for the allegations of mala fides and high-handedness made against the Government. The Government acted on the advice tendered by the Municipality and it cannot be said that the action of the Government was mala fide, high-handed or arbitrary. In this connection it cannot be overlooked that the Sub-Committee whose recommendations formed mainly the basis of the notification included two of the petitioners. Further in the counter filed by the Secretary to the Government, Local Administration Department it is stated that the Government considered that the wards as proposed by the Council on 23rd June were equitable and approved those proposals. I do not see any reason why I should not accept this statement. Merely because the voters' lists of different wards are not exactly equal, it cannot be premised that there is want of bona fides on the part of the Government. It is regrettable that mala fides should be attributed to the Government without the slightest foundation.

(7) It was argued by the Government Pleader that even assuming that there was non-observance of the provisions of S. 43, District Municipalities Act, the petitioners have no 'locus standi' to maintain this application. It is submitted that the petitioners cannot be said to be aggrieved or affected by the failure of the Government to comply with the provisions of S. 43, District Municipalities Act even assuming that there was such non-compliance. There seems to be considerable force in this contention of the Government Pleader. It cannot be said that the rights of the petitioners are involved in the failure of the Government to comply sufficiently with the requirements of S. 43 of the Act. They have no direct interest in the matter. It is only the Municipality that can complain of it. The petitioners do not have any personal interest in the matter.

(8) In this connection, I may refer to a decision of a Bench of this Court consisting of the Chief Justice and Venkatarama Aiyar J. in — 'P. Ramamoorthi, In re', AIR 1953 Mad 94 (B). The principle laid down there is that the right which is the foundation of a petition under Art. 226 of the Constitution of a corresponding provision is a personal and individual one and it is the person whose right has been affected by any particular order that can invoke the jurisdiction of this Court under Art. 226 of the Constitution. The learned Judges in that case referred to a decision of the Supreme Court in — 'Chiranjitlal v. Union of India', AIR 1951 SC 41 (C).

(9) In the last mentioned case the validity of the Sholapur Spinning and Weaving Co. (Emergency Provisions) Act passed by Parliament was impugned by a holder of a share in the company by moving for a writ of 'mandamus' and certain other reliefs under Art. 32 of the Constitution. The Supreme Court took the view that an individual share-holder was not entitled to challenge the validity of the enactment which affects the fundamental rights of the company, except to the extent that it constitutes an infraction of his rights. The observations of Fazl Ali J. at p. 44 of the report are pertinent:

> "It has been held in a number of cases in the United States of America that no one except those whose rights are directly affected by a law can raise the question of the Constitutionality of that law."

I may also extract the observations of Das J. in — 'In re Banwarilal Roy', 48 Cal WN 767 (D) in this connection:

> "It is a very well-known form of process and an effective weapon in the judicial armoury for the protection of the rights and franchise alike of the Crown and the subjects."

In this connection the remarks of Wright J. in — 'The Queen v. Lewisham Union', (1897) 1 QB 498 (E) are apposite:

> "This Court would be far exceeding its proper functions if it were to assume jurisdiction to enforce the performance by public bodies of all their statutory duties without requiring clear evidence that the person who sought its interference had a legal right to insist upon such performance."

I therefore think that the petitioners unless they can allege that their personal rights are involved in the notification impugned they cannot maintain this application. It is not alleged how the alleged unequal division has affected the petitioners personally. They do not state that this has in any way resulted in the diminution of the chances of the three petitioners who are said to be seeking election to be returned to the Municipal Council. All that is alleged in the affidavit in support of the petition is that the redistribution of wards is not in the interest of the public.

(10) Mr. Subramaniam cited some cases which have laid down that although a subject not having a personal right involved in the matter may not be entitled 'ex debito justitiae' to the issue of a writ, still it is within the discretion of the Court to issue a writ if it is established that the orders impugned are contrary to the provisions of an enactment or principles of natural justice. I do not think these decisions carry the petitioners very far assuming the dictum laid down in those rulings is correct and also that it has a bearing on the writs to be issued under Art. 226 of the Constitution.

(11) What is alleged in the present petition is that the wards are not so divided as to ensure the return of members of minority communities to the Municipal Council and that the number of voters in some wards is larger than those of other wards. It is nowhere laid down that the wards in a Municipality are to be so divided as to make it easy for the members of a particular community to be returned to the Municipal Council. Nor can it be premised that there is a violation of the principles of

natural justice if the wards are not so manipulated as to ensure the success of the representatives of a particular community in the Municipal election. It is not out of place to mention here that it is complained in the affidavit that one of the wards was so redistributed as to make it easy for a Brahmin candidate to be returned to the Council. There is not much force in the other complaint also. Neither under the provisions of the District Municipalities Act nor under the Rules framed for the holding of elections, is it incumbent on the authorities concerned to divide the wards in such a manner as would ensure the equality of voting strength of the wards.

(12) Even assuming that there is any force in the contention based on the disparity of votes in the matter of redistribution of wards that matter cannot be brought up for writ of 'certiorari'. There are some decisions of the United States Supreme Court which throw some light on this issue. In —'Colegrove v. Green', (1946) 328 U. S. 549: The United States Supreme Court Reports, 90 Law Ed. 1432 at P. 1433 (F) there was a suit in the District Court of Illinois to have a division of Illinois State into congressional districts declared invalid by reason of inequalities in the population of the respective districts. The suit was dismissed by the District Court. While dismissing the appeal preferred against the dismissal of the suit, Frankfurter J. who delivered the judgment of the Court remarked thus:

> "We are of opinion that the petitioners ask of this Court what is beyond its competence to grant. This is one of those demands on judicial power which cannot be met by verbal fencing about 'jurisdiction'. It must be resolved by the considerations on the basis of which this Court, from time to time, has refused to intervene in controversies. It has refused to do so because due regard for the effective working of our Government revealed this issue to be of a peculiarly political nature and therefore not meet for judicial determination."

It is also stated in the judgment that in effect it was an appeal to the Federal Courts to reconstruct the electoral process of Illinois in order that it may adequately be represented in the councils of the nation. Another passage from the same judgment may also be quoted as it is relevant in this context:

> "Nothing is clearer than that this controversy concerns matters that bring Courts into immediate and active relations with party contests. From the determination of such issues this Court has traditionally held aloof. It is hostile to a democratic system to invoke the judiciary in the politics of the people. And it is not less pernicious if such judicial intervention in an essentially political contest be dressed up in the abstract phrases of the law."

I adopt the reasoning of the learned Judges in this case.

(13) The same view is embodied in — 'South v. Peters', (1950) 339 U. S. 276, see United States Supreme Court Reports, 94 Law Ed. 834(G). The residents of the Northern Districts of Georgia filed a suit in the United States District Court for the Northern District attacking statute of Georgia which provided that county unit votes should determine the outcome of primary election, as offending against Fourteenth and Seventeenth Amendments. Under the impugned statute each county was given a number of unit votes ranging from six for the most populous counties to two for most of the other counties and the candidates who received the highest popular vote in the county was to be awarded the appropriate number of unit votes. The ground of attack against the statute was that the votes of the residents of the most populous counties had on the average but one-tenth the weight of those in other counties and this amounted to an unconstitutional discrimination against the residents. The suit was dismissed by the Court below. On appeal this was affirmed by the Supreme Court by a Majority of Judges holding that Federal Courts consistently refused to exercise their equity powers in cases posing political issues arising from a State's geographical distribution of electoral strength amongst its political sub-divisions.

(14) In my view, these rulings embody the sound principles and I express my respectful accord with them. These decisions indicate that questions relating to delimitation of Constituencies are not justiciable, they being matters purely within the ambit of the executive power. It is for the Government to arrange the distribution of wards, taking into consideration various factors, such as compactness of area, the population and the electoral strength etc. There is bound to be disparity between one ward and another in the matter of voting strength as due regard has to be had to various other factors. The voting strength is not the sole criterion in these matters. As pointed out by Subba Rao J. in W. P. No. 568 of 1952 (Mad) (H) in dividing the wards the Government have to take into consideration the administrative convenience, the factor of population, the housing accommodation, the size of the divisions, the geographical position of the streets and other similar factors. It follows on this discussion that the redistribution of wards is not a matter that can be brought up for a writ of 'certiorari' before this Court. Any interference by Courts with electoral process is not warranted under Art. 226 of the Constitution.

(15) I have to state here that just at the time of the close of his reply Mr. Subramaniam wanted to file a petition purported to be one on behalf of the Municipality to come on record. I declined to grant him his request for the reason that it was too late. Further the Chairman cannot come on record without the sanction of the Municipality. So the request of Mr. Subramaniam for permitting him to file an application on behalf of the Municipality to come on record as a party cannot be granted.

(16) For the foregoing reasons I hold that there are absolutely no grounds for the issue of writ of 'certiorari' and for quashing the notification contained in G. O. No. 1298 Local Administration dated 1-7-1952. The petition is accordingly dismissed with costs which I fix at Rs./200.

A/M.K.S. Petition dismissed.

A.I.R. 1953 MADRAS 513 (Vol. 40, C. N. 193)

MACK J.

K. Gopalu Mudali, Petitioner v. A. Venkatesu Mudali and others, Respondents.

Civil Revn. Petn. No. 1153 of 1951, D/- 24-10-1952.

(a) Court-fees Act (1870), S. 7 — Determination of court-fee — Court-fee is to be determined in the first instance on the plaint averments. (Para 2)

Anno: C. F. Act, S. 7 N. 3 Pt. 4.

(b) Court-fees Act (1870), S. 7(xi)(cc) and (v)(d) — Usufructuary mortgage — Lease back to mortgagor — Mortgagor tenant holding over — Sale by mortgagor to third person subject to usufructuary mortgage — Suit by mortgagee for rent and possession against mortgagor and third person (in his capacity as sub-tenant) — Suit held was governed by S. 7(xi)(cc) and not by S. 7(v)(d). (Para 2)

Anno: C. F. Act, S. 7(xi)(cc) N. 2.

(c) Court-fees Act (1870), S. 7(xi)(cc) — Question of title cannot be gone into in a suit for rent brought under S. 7(xi)(cc): AIR 1915 Mad 654, Ref. (Para 2)

Anno: C. F. Act, S. 7(xi)(cc) N. 2 Pt. 10.

D. Narasaraju and K. B. Krishnamurthy, for Petitioner; Government Pleader, for Respondents.

CASES CITED:

(A) ('26) AIR 1926 Cal 504: 91 Ind Cas 488
(B) ('37) AIR 1937 Mad 91: 71 Mad LJ 842
(C) ('15) AIR 1915 Mad 654: 27 Mad LJ 475: 1 Mad LW 641

ORDER: A simple point of court-fee is raised in this civil revision petition. The petitioner is the plaintiff who sued the two defendants for arrears of rent amounting to Rs. 126-0-3 and recovery of possession of the land on the basis of the relationship of landlord and tenant valuing the suit for purposes of court-fee under S. 7, cl. XI (cc), Court-fees Act. The District Munsif upheld the objection taken by the Court-fee examiner that ad valorem court-fee should be paid under S. 7, cl. (v)(d), Court-fees Act.

(2) Court-fee had to be determined in the first instance on the plaint averments. According to the plaint the original owner of the land was defendant 1 who executed an usufructuary mortgage on it in favour of the plaintiff. A year later the plaintiff leased it back to defendant 1 for one year. The plaint alleged that defendant 1 continued therefore in possession as a tenant holding over, and further more that defendant 2 had purchased the land from defendant 1 subject to the usufructuary mortgage. These averments, reasonably and liberally construed simply mean that defendant 1 had conveyed his rights in the land which were only that of a tenant holding over to defendant 2. This appears to be a fair reading of the plaint which in the circumstances would not justify an inference that the plaintiff was seeking to recover possession from a trespasser who was putting up an adverse title. Even enhanced court-fee can be paid on a plaint originally filed on the footing of landlord and tenant if one of the defendants puts up a defence of adverse title and challenges the plaintiff's position as landlord. In such a case the plaintiff can amend his plaint and pay the necessary additional court-fee under cl. 7(v)(d), Court-fees Act for recovery of possession. Even according to the written statements filed, there is nothing to indicate that either defendant 1 or defendant 2 in any way challenged the position of the plaintiff as the usufructuary mortgagee entitled to possession. Defendant 2 in his written statement pleaded that he purchased the land by a registered sale deed from defendant 1 who undertook to discharge the mortgage in question. He at the same time pleaded that defendant 1 had not put him into possession at all. There is a curious allegation in para. 10 of the written statement to the effect that the suit was brought by the plaintiff against defendant 2 maliciously at the instigation of and in collusion with defendant 1. One of the decisions relied by the Court-fee examiner is — 'Hiralal Banerjee v. Surendranath', AIR 1926 Cal 504 (A) by Chakravarthi J. where the plaintiff asked for a declaration of title and also for relief against one of the defendants on the footing that he was a trespasser. It was held that the suit did not come within the scope of S. 7(1), Court-fees Act. In the present case defendant 2 was certainly not impleaded as a trespasser but more in the capacity of a sub-tenant from the original tenant who was holding over. There is some support for this view in — 'Shanmuga Nadar v. Kandasami Nadar', AIR 1937 Mad 91 (B). Mr. Narasimharaju for the Government Pleader has referred me to — 'Balasidhantam v. Perumal Chetti', AIR 1951 Mad 654 (C), which lays down that the question of title cannot be gone into in a suit for rent brought under S. 7(xi)(cc), Court-fees Act. As I read the plaint I find that no question of title is raised. If it arises at the trial it will not be gone into by the trial Court. This petition is allowed and the lower Court order set aside without any order as to costs.

B/G.M.J. Petition allowed.

A.I.R. 1953 MADRAS 514 (Vol. 40, C. N. 194)

GOVINDA MENON J.

Madras Handloom Weavers Provincial Co-operative Society Ltd., Madras, Petitioner v. Dominion of India, represented by General Manager, Madras and Southern Maharatta Railway and another, Respondents.

Civil Revn. Petn. No. 462 of 1950, D/- 31-10-1952.

Railways Act (1890), S. 72 — Execution of Risk Notes A and Z — Shortage in transit — Burden of proving misconduct — (Goods Tariff General Rules, R. 15).

When a consignor executes both the Risk Notes A and B, in view of the principle that a special contract or provision supersedes a general provision or a general contract, the parties are governed by the terms of risk note A which is of a special kind. "The fact that risk note A has been executed raises the presumption that the railway administration insisted on its execution, because the package was either insufficiently packed or liable to leakage and damage.

When the consignor does not make it clear under what circumstances Risk Note A was executed it is incumbent upon him, in order to mulct the railway administration with liability for shortage of goods in transit, to prove misconduct on the part of the Railway servants. He cannot sit quiet and leave the burden on the railway ad-

ministration for showing how the consignment was dealt with during the course of transit and thereafter try to let in evidence of misconduct. AIR 1948 Pat 45, Rel. on. (Paras 4, 5)

Further unless there is any evidence to show that the goods were weighed or that the weight shown in the railway receipt was the correct weight, there is no admission on the part of the railway administration that the weight as shown in the railway receipt has been received or that the description of the goods as furnished by the consignor is correct in view of R. 15 of the Goods Tariff General Rules. (Paras 5 & 6)

Anno: Rail. Act, S. 72 N. 5, 25.

Sriramamurthy, for Petitioner; Sampathkumar, for King and Partridge, for Respondents.

CASE CITED:

(A) ('48) AIR 1948 Pat 45: 1948 Pat WN 36

JUDGMENT: The plaintiff, whose suit for Rs. 113-6-3 being the value of the shortage of goods, due to him from the defendant, inclusive of proportionate freight charges has been dismissed, is the petitioner, in this civil revision petition, and the only question that arises, as the learned District Munsif has stated, is whether the defendant-railway is liable for the alleged loss occasioned to the plaintiff during the transit. There was a consignment weighing 15 maunds 30 seers of textile material from Madura to Bezwada according to the railway receipt, which is marked in the case Ex. B. 5. The plaintiff as the consignee when he took delivery of the goods at Bezwada found that the quantity was short by 22 seers and he took open delivery of it. The present suit is for the recovery of the price of 22 seers of goods. The lower Court has dismissed the suit on the ground that in the absence of proof that the shortage occurred on account of the misconduct on the part of the railway, the plaintiff is not entitled to any relief.

(2) In revision, it is argued for Messrs. John and Row by Mr. Sriramamurthi, that according to the clause in risk note Z the railway administration shall be bound to disclose to the consignor how the consignment was dealt with throughout the time it was in its possession and control and if necessary to give evidence before the consignor is called upon to prove misconduct; but if misconduct on the part of the railway administration or its servants cannot be fairly inferred from such evidence the burden of proving such misconduct will only be on the consignor. What is contended is that in this case the railway administration has not let in any evidence to show how the consignment was dealt with during the time it was in its possession, in transit from Madura to Bezwada. If the railway had let in evidence to show that proper care was taken of the package while it was being transported both over the South Indian Railway and the Madras and Southern Maharatta railway, then the burden shifts to the plaintiff to show misconduct on the part of the railway servants. The argument, therefore, urged is that there is no obligation on the part of the plaintiff to prove any misconduct on the part of the railway administration, and if it is shown that there has been shortage during the course of transit, then the plaintiff is entitled to damages for that shortage.

(3) On the other hand, on behalf of the railway administration Mr. Sampath Kumar of Messrs. King and Partridge has put forward the contention that if the risk note Z had stood alone, probably the plea put forward on behalf of the plaintiff might be of some avail. But, in this case, it is admitted that the consignor had executed another risk note in the form risk note A, which very much reduces and clinches the liability of the railway administration. Risk note A premises by saying that it will be used when articles are tendered for carriage which are either already in bad condition or so defectively packed as to be liable to damages, leakage, or wastage in transit. Therefore, when once risk note A is taken in addition to the ordinary risk note Z, the inference is possible that at the time the package was tendered for transit, it was either in a bad condition or so defectively packed as to be liable to damages. Since both risk notes have been executed, the question is whether the provisions contained in risk note A should prevail over risk note Z. In my view, risk note Z is the general form of risk note for all kinds of goods handed over to the railway administration for transit and risk note A is the particular kind of risk note to be used only in special cases where the package is defectively or insufficiently packed so as to be liable for damages. In view of the principle that a special contract or provision supersedes a general provision or a general contract, we have to take it that the parties have to be governed by the terms of risk note A.

(4) On this aspect of the case, my attention has been invited to a decision of a single Judge of the Patna High Court in —'Governor General of India in Council v. Thakursi Dass', AIR 1948 Pat 45 (A) in which the facts are somewhat similar. There also the consignor had executed two risk notes, risk note A and risk note Z when the railway administration was confronted with a claim for damages, they choose to take their stand on the terms and provisions of risk note A and disclaimed liability. The learned Judge, in disposing of that contention in favour of the railway administration, observed as follows:

> "So much for risk note Z. But in the present case the consignor also executed risk note A, and thereby even further exempted the railway administration from liability. Obviously where two risk notes have been executed limiting the railway's liability, it is open to the Railway administration to take advantage of either, and if under either it can be shown that the railway administration has escaped liability, then the suit must be dismissed, even if some other form of risk note might also have been executed under which it might be held that liability had not been fully taken away. Risk note A is a special form of risk note to be used when articles are tendered for carriage which are either already in bad condition or so defectively packed as to be liable to damage, leakage or wastage in transit."

(5) I have been asked by the learned counsel for the petitioner to dissent from the view taken by Meredith J. of the Patna High Court. But no arguments have been advanced as to why I should dissent from that view. How and under what circumstances the consignor came to execute Risk note A has not been made clear. The fact that risk note A has been executed raises the presumption that the railway administration insisted on its execution, because the package was either insufficiently packed or liable to leakage and damage. In this view, it is incumbent upon the plaintiff in order to mulct the railway administration with liability, to prove misconduct. He

cannot sit quiet and leave the burden on the railway administration for showing how the consignment was dealt with during the course of transit and thereafter try to let in evidence of misconduct. In this case, he has not attempted to prove any misconduct trusting himself to the burden on the railway administration as contained in the clause in risk note Z.

(6) In addition to this, there is a further circumstance in this case that under R. 15, Goods Tariff General Rules, the railway administration does not admit that the weight as shown in the railway receipt has been received or that the description of the goods as furnished by the consignor is correct. The learned District Munsif came to the conclusion that at the time the goods were accepted for transit at Madura, there is no evidence to show that they were weighed or that the weight of 15 maunds & 30 seers was the correct weight. I am, therefore, of the opinion that no interference is called for in revision and this civil revision petition is dismissed but in the cricumstances without costs.

B/D.R.R. Revision petition dismissed.

A.I.R. 1953 MADRAS 516 (Vol. 40, C. N. 195)

RAMASWAMI J.

In re Kakarla Narasayya, Accused-Petitioner.

Criminal Revn. Case No. 900 and Cri. Revn. Petn. No. 885 of 1951, D/- 13-11-1952.

(a) Partnership Act (1932), S. 4 — Agreement may be either express or implied.

(Para 8)

Anno: Partnership Act, S. 4 N. 2.

(b) Penal Code (1860), S. 378 — Removal by accused must be with intent to cause wrongful gain to accused or wrongful loss to another — Burden is on prosecution to show that accused was acting dishonestly — Accused shown to be acting in assertion of a bona fide claim of right — No dishonest intention can be attributed — Mere assertion of bona fide claim is not enough — There must be facts or evidence in order to make out the claim of bona fide right — Proof must be adequate and fair, though not necessarily acceptable or adequate in civil Court — Where there is clear plea and evidence of bona fide title the prosecution should be dismissed and complainant left to civil remedy — Criminal case should also be thrown out when there is doubt regarding the bona fide claim, since the benefit of doubt should go to the accused — But the doubt must be a reasonable one — Test of adequacy of bona fides of claim indicated — Bona fide claim of partnership set up, supported by witnesses — Complainant not making out case that joint possession was converted into exclusive possession by accused — No case of theft held made out.

(Paras 9, 10, 11, 13)

Anno: Penal Code, Ss. 378-379 N. 9, 12, 22.

G. Chandrasekhara Sastry, for Petitioner; Public Prosecutor, for the State.

CASES CITED :

(A) ('38) AIR 1938 Nag 550: ILR (1940) Nag 74
(B) ('37) AIR 1937 Oudh 438: 13 Luck 219
(C) ('29) AIR 1929 All 536: 51 All 827
(D) ('39) AIR 1939 Nag 301: 186 Ind Cas 670
(E) ('41) AIR 1941 Pat 383: 42 Cri LJ 293
(EA) 8 Cri Law Review 275
(F) ('47) AIR 1947 Pat 264: 47 Cri LJ 992
(G) ('38) AIR 1938 Lah 759: ILR (1939) Lah 100
(H) ('23) AIR 1923 Mad 239: 44 Mad LJ 138: 24 Cri LJ 254
(I) ('44) AIR 1944 Pat 274: 46 Cri LJ 83
(J) ('50) AIR 1950 Nag 92: 51 Cri LJ 510
(K) ('71) 15 WR Cr 47
(L) ('71) 16 WR Cr 18
(M) ('71) 16 WR Cr 75
(N) ('88) 15 Cal 390n
(O) (1900) 4 Cal WN 10
(P) ('05) 9 Cal WN 974
(Q) ('06) 10 Cal WN CCXXXIII
(R) ('10) 5 Ind Cas 794: 14 Cal WN 408
(S) ('17) AIR 1917 Cal 648: 44 Cal 66: 17 Cri LJ 456
(T) ('17) AIR 1917 Pat 40: 39 Ind Cas 475: 1 Pat LW 155: 18 Cri LJ 507
(U) ('17) AIR 1917 Cal 98(2): 38 Ind Cas 318(1): 18 Cri LJ 286
(V) ('17) AIR 1917 UB 2(2): 38 Ind Cas 739: 2 UBR 124 18 Cri LJ 355
(W) ('18) AIR 1918 Cal 668: 40 Ind Cas 732: 18 Cri LJ 732
(X) ('16) AIR 1916 All 196: 14 All LJ 399: 35 Ind Cas 167: 17 Cri LJ 295
(Y) ('15) AIR 1915 Sind 25(1): 30 Ind Cas 1003: 16 Cri LJ 715
(YA) ('97) 1897 Rat UN Cri C 920
(Z) ('05) 2 Cri LJ 754: 28 Mad 304
(ZA) ('27) AIR 1927 Pat 385: 28 Cri LJ 760
(ZB) ('35) AIR 1935 Sind 115: 36 Cri LJ 1310
(ZC) ('33) AIR 1933 Oudh 50: 34 Cri LJ 547
(ZD) ('50) AIR 1950 Orissa 196: 51 Cri LJ 1333
(ZE) ('30) 31 Cri LJ 1222: 1930 All LJ 457
(ZF) ('40) AIR 1940 Pat 588: 41 Cri LJ 509
(ZG) ('22) AIR 1922 Pat 265: 21 Cri LJ 374
(ZH) ('28) 109 Ind Cas 229: 29 Cri LJ 501 (Cal.)
(ZI) ('28) AIR 1928 Rang 113: 6 Rang 54: 29 Cri LJ 603
(ZJ) (69) Rat UN Cr C 22
(ZK) ('88) 1888 All WN 97
(ZL) ('41) AIR 1941 Nag 105: ILR (1942) Nag 281
(ZM) ('87) 1 Weir 408: 10 Mad 186

ORDER : This is a criminal revision case filed against the conviction and sentence of the learned Sub-Divisional First Class Magistrate of Peddapur in C. A. No. 53 of 1951 confirming the conviction and sentence of the Additional Stationary Sub-Magistrate, Rajahmundry in C. C. No. 343 of 1950.

(2) The facts are :— The complainant has purchased Musurumilli Bamboo Coupe No. 1 for the year 1949-50, i.e., for the year ending 30-6-1950 for Rs. 5000/- in auction held by the Forest Department and was working the Coupe through the men engaged by him. He was getting the stock of bamboos from the Coupe to Gokavaram and stocking them in the site of one Dasari Bulliah. This site was held under a lease of the accused from whom the complainant has taken it on an annual rent of Rs. 35/- for the purpose of securing the bamboos therein. The complainant noticed that the stock in the depot was being diminished, having been misappropriated by the accused and so he asked his agent at Gokavaram to stock the bamboos in another site and accordingly on

5-12-1949 at 9 a.m. when 12 bandies of bamboos arrived from the Coupe and they were being directed towards the new site the accused interfered and threatened the cartmen and the agent and got the stock forcibly unloaded in the old yard and misappropriated them. Out of the 12 bandies, four bandies consisted of 748 plain bamboos and the remaining 8 bandies contained 2681 sugarcane bamboos and they were worth about Rs. 400/-.

(3) The complainant is said to have reported this matter to the Forest Range Officer who in his turn reported the matter to the Station House Officer, Gokavaram. The Police did not investigate the offence. Hence the private complaint by the complainant.

(4) The case for the accused was that himself and the complainant were doing business conjointly, that though the contract stood in the name of the complainant he (accused) had a share therein by private understanding and that he did not commit the offence of theft.

(5) The accused examined three witnesses who gave the following information. D. W. 1 Majeti Ramarao, a resident of Ramannapalam testified that he worked in the concern as a clerk for writing accounts for five months and that the accused and P. W. 1 have got equal shares in the business, that the accused used to receive the stock from the Coupe at the depot in Gokavaram and conduct sales while P. W. 1 acted as cash keeper. D. W. 2 Garugu Parvathisam a resident of Gokavaram, deposed that he was present at the time of auction of the Coupe when P. W. 1 and the accused came to an understanding to have half share each in the Coupe and that they were running the business on that footing. D. W. 3 Dasari Satyanarayana of Gokavaram swore that the Coupe was purchased in the name of P. W. 1 and that the site on which the material received from the Coupe was being deposited belonged to him and that accused told him that he had a share in the business and that it appeared to him that the accused and P. W. 1 were jointly conducting the business.

(6) The learned Sub-Magistrate came to the conclusion that it was established by P. W. 1 that he was the contractor of the Coupe and that the accused only claimed a share in the business by private understanding with P. W. 1 and that even conceding for a moment that the accused had a share in the business privately he cannot on that ground claim publicly a title over the produce in the Coupe when no written agreement between them to that effect was got executed. Therefore, he convicted the accused for an offence under S. 379, I. P. C. in regard to the acts which were not disputed and sentenced him to pay a fine of Rs. 100/-.

(7) The learned Sub-Divisional Magistrate, on appeal, confirmed the conviction and sentence on the foot of the following reasoning :

"In appeal before this Court the learned defence counsel argued that the accused and the complainant are partners in the bamboo-business and that the evidence on record does not disclose the offence under S. 379, I. P. C. But I cannot agree to these arguments. The plea that the appellant is partner and a share-holder along with the complainant is an obvious invention and after-thought. He has not produced a scrap to prove his contention. I therefore reject this argument as untenable. I agree with the learned Stationary Sub-Magistrate that the appellant has committed the offence of theft.

(8) There is no doubt that the reasoning of the learned Sub-Divisional Magistrate cannot commend itself to us as sound. The essentials of partnership are that there must be a business and there must be an agreement to share the profits of the business and the business must be carried on by all or any of the partners acting for all : — 'Suganmal v. Mt. Umraobi', AIR 1938 Nag 550, at p. 553(A) and —'Tajammul Hussain v. Ahmed Ali', AIR 1937 Oudh 438 at p. 448(B). This agreement necessary for creation of a partnership may be either express or implied : —'Mirza Mal v. Rameshar', AIR 1929 All 536(C); —'Jakiuddin v. Vithoba', AIR 1939 Nag 301(D). In this case the contention of the accused is that the contract was taken in the name of P. W. 1 because the rules require that the contract cannot be taken in the name of undisclosed persons or by unregistered firms and that the business was actually carried on by reason of an agreement as a partnership. There is no point in saying that this is an invention and afterthought because the accused can put forward this defence only when he appears before Court and after disputes had arisen. This version of the accused is spoken to by no less than three persons and the learned Sub-Magistrate and the Sub-Divisional Magistrate have not assigned any reason for discrediting the testimony of these witnesses. On this version set up by the accused & supported by three witnesses whose testimony has not in any way been discredited, the fact emerges that the accused committed the acts complained of in his role as a partner.

(9) Section 379, I. P. C., requires that the removal of the property from the possession of another should be with intent to cause wrongful gain to himself or wrongful loss to the other person. Dishonest intention is the gist of the offence : — 'Jay Mahto v. Emperor', A. I. R. 1941 Pat. 383 (E). It is the intention of the taker which must determine whether the taking or removing of a thing is theft. Thus where the tenant cuts down trees standing on his own holding bona fide believing that he is entitled to them though as a matter they might belong to the Zamindar, there is no theft. — 'Emperor v. Dorilal', 8 Cri. Law Review 275 (EA). Therefore when a person is prosecuted for the offence of theft, it is for the prosecution to show that he was acting dishonestly. If the circumstances show that he was acting in the assertion of a bona fide claim of right, a dishonest intention cannot be attributed to him and the offence of theft would not stand made out : — Bhagwan Sahai v. Divisional Forest Officer', AIR 1947 Pat. 264 (F); — 'Bachittar Singh v. Rahim Baksh', A. I. R. 1938 Lah. 759 (G). In India the chief forms in which a bona fide claim of right can be set up are the following : (a) where the accused believes the thing to be his own : and (b) when the dispute is between the landlord and tenant; — 'Srinivasalu Reddiar v. Govinda Goundan', AIR 1923 Mad 239 (H). In these cases it is not enough for an accused to assert that he removed the property under a bona fide claim of right; the Court must also find that the plea is not a mere pretence to cover an otherwise unjustifiable act but his claim to the property is based on certain and culpable facts. The claim must not be mala fide; — 'Harihar Narain Singh v. Bankey Singh', AIR 1944 Pat. 274 (I). A claim of right asserted in defence for prosecution for theft must be an honest one; — 'Rainu v. The Crown', AIR 1950 Nag. 92 (J). In other words, there must be something more than a mere assertion or an untested and uncorroborated statement from the dock in order to make out the claim bona fide right; — 'Nasib Chowdry v. Nannoo Chowdry', 15 W. R. Cr 47 (K); — 'Rienno Singh v. Kali Churn Misser', 16 WR Cr 18 (L); — 'Huris Chunder Das v. Bolai

Audhicary', 16 WR Cr 75 (M); — 'In the matter of Madhab Hari', 15 Cal. 390 n (N); — 'Jagat Chandra Roy v. Rakhal Chandra Roy', 4 Cal WN 10 (O); — 'Hari Bhuimali v. Emperor', 9 Cal W. N. 974 (P); — 'Chaitan Charan v. Kalachand', 10 Cal. WN CC XXXIII (Q); — 'Dhirendra Mohan v. Emperor', 14 Cal WN 408 (R); — 'Suraj Ali v. Afran Ali', AIR 1917 Cal 648 (S); — 'Sadasiv Singh v. Emperor', AIR 1917 Pat. 40 (T); — 'Imam v. Emperor', AIR 1917 Cal. 98 (2) (U);—'Lakanaw v. Emperor', AIR 1917 UB 2 (2) (V); — 'Udai Narain v. Ramanath', AIR 1918 Cal. 668 (W); — 'Bhagwat Saran v. Emperor', AIR 1916 All. 196 (X); — 'Lunidomal v. Emperor', AIR 1915 Sind 25 (1) (Y); — 'Queen Empress v. Hari Bapuji', 1897 Rat Un Cr C 920 (YA); — 'Alagarasawmi Thevan v. Emperor', 28 Mad 304 (Z).

It is sometimes stated that where property is removed in assertion of a contested claim of right, however ill-founded that claim may be the removal does not constitute theft. But this is the English law which requires proof of felonious intent to constitute theft. To prevent the taking from being felonious the claim of right must be honest one though it may be unfounded in fact; (1938) 107 L. J. K. B. 448 (452); Halsbury's Laws of England, Edn. 2, Vol. IX, page 497. The mens rea requisite for an offence under S. 379, is set out in the section itself and we cannot travel beyond it. So it is not the Indian Law, and even as an English rule it rejects a mere pretention unless it was bona fide; and presumably there can be no bona fide claim if it was wholly ill-founded; 14 Cal. WN 408 (R)'. Such a claim might be asserted by anybody even a thief. So the mere plea by an accused that the property with the theft of which he is accused is his own property, unsupported by proof or by some circumstances which do not indicate that there is truth in the statement, is insufficient. The claim must be tried and determined by the Court and must be proved by evidence to be fair and adequate though not necessarily acceptable or adequate in a civil Court for the making or refusing of a decree, — 'Bhan Prasad v. Baraham Deo', AIR 1927 Pat. 385 (ZA). A mere colourable pretence to obtain possession of property cannot therefore be put forward as a bona fide claim of right. — 'Bhurasingh v. Emperor', A. I. R. 1935 Sind 115 (ZB) ; — 'Gudar v. Emperor', AIR 1933 Oudh 50 (ZC); — 'Sada Panigrahi v. Raghunath Das', AIR 1950 Orissa 196 (ZD.) In such a case the jurisdiction of the Criminal Court is not ousted; — 'Madan Lal v. Emperor', 1930 All LJ 457 (ZE); and — 'Advocate-General, Orissa v. Bhikari Charan', AIR 1940 Pat. 588 (ZF).

But in case of a clear plea of bona fide title the Court should leave the parties to have their rights determined by a Civil Court and throw out the criminal case; — 'Bhim Bahadur Singh v. Emperor', AIR 1922 Pat. 265 (ZG). But even where the bona fides of the claim is doubtful, the benefit of the doubt must be given to the accused and the criminal case thrown out. Not be it noted of every doubt for everything relative to human affairs and dependent on human evidence is open to some possible or imaginary doubts—but a reasonable doubt. Reasonable doubt is that condition of mind which exists when the Magistrates cannot say that they feel an abiding conviction, a moral certainty of the truth of the charge. For it is not sufficient for the prosecution to establish a probability even though a strong one according to the doctrine of chances, he must establish the fact to a moral certainty—a certainty which convinces the understanding, satisfies the reason, and directs the judgment. As was said by Cockburn C. J. in the 'Tickborne case' it must not be the mere doubt of a vacillating mind, that has not the moral courage to decide upon a difficult and complicated question and takes shelter in an idle skepticism—or as S. 4, Evidence Act has it a fact is said to be not proved when after considering the matters before it the Court either does not believe it to exist or considers its existence so improbable that a prudent man ought under the circumstances of the particular case, act upon the supposition that it does not exist. This is essentially a question of fact and is dependent for its decision upon the circumstances of each case. 'AIR 1923 Mad 239' (H).

The fact that the accused had repeatedly and for a length of time asserted his claim to the property would be some evidence of bona fides for it will then connect the taking with that claim. But the mere fact that a claim was boldly asserted and persisted in after it has received 'quietus' from the Court would not make it bona fide. Thus where a Magistrate issued an injunction to the accused but this he disregarded: Held that it is impossible to find that he acted under bona fide claim of right — 'Sreenibash Mahata v. Emperor', 29 Cr. L. J. 501 Cal (ZH). It may be material in considering as a question of fact whether the claim was a bona fide claim to consider whether or not there was any right at all because the complete absence of right and circumstances such as the Court would be justified in saying could not have led any reasonable man to a belief that he had a right: — 'AIR 1923 Mad 239' H.

Similarly to test the adequacy of the bona fides of the claim it may be considered whether in asserting his right to some property which a person believes to be good, he does something which he knows he has no right to do, e. g., by taking the law into his own hands and removing the property from the possession of his opponent who claims the property for himself: — 'Rangaswami v. Emperor', AIR 1928 Rang 113 (ZI); 9 Cal WN 974 (P); —'Reg v. Bhichajee', Rat UN Cr. C. 22 (ZJ); AIR 1916 All 196 (X) and —'Queen-Empress v. Sheomeshur Rai', 1888 All WN 97 (ZK). In such a case the bona fides might be destroyed by the fact that the proper course for accused would have been to have had recourse to the Civil Court and not taken the law high-handedly into his own hands and remove the property. In all these cases the nature and extent of the right claimed must be shown before it can be permitted to have the effect of arresting the case in progress; it must be made to appear that it is not a mere cobweb right that is set up but that it is such as to raise a real and substantial doubt as to whom the property belongs.

(10) In the instant case the bona fide claim of right is set up on the foot of a partnership. In a partnership each partner is part owner of the business in the same way as each member of a joint family is a co-owner in the family estate. He is not a mere servant or agent employed for a special purpose; and being an owner he has as much right to enjoy and use the joint property for his own benefit as any other co-owner; —'Suganchand & Co. v. Laduram Balakisandas', AIR 1941 Nag 105 (ZL). This assertion of a partnership seems to be something more than a colourable pretence as it is supported by the evidence of three witnesses who have not been discredited by both the Courts below.

(11) It is not also the case for the complainant that though the taker was in joint possession of the property that joint possession had been converted into exclusive possession amounting to theft. The accused would have been guilty of committing

theft in such a case: — 'Queen-Empress v. Ponnurangam', 10 Mad 136 (ZM). It must however be joint possession which is converted into exclusive possession and not merely joint title. In this respect the law of this country is not different to the English law under which there may be criminal conversion of partnership property so as to amount to theft; see 31 and 32 Vict., C. 116, S. 1.

(12) This case-law is only an amplification of illustration (p) to S. 378, I. P. C:

"A, in good faith, believing property belonging to Z to be A's own property takes that property out of Z's possession. Here, as A does not take dishonestly, he does not commit theft."

It embodies only the principle contained in S. 79, I. P. C., which protects acts done by a person justified, or by mistake of fact believing himself justified, by law.

(13) In the result, the removal of the property was in the assertion of a bona fide claim of right and which by evidence was shown to be more than a mere colourable pretence to obtain or get possession of the property, though probably it might turn out to be one which would not stand the test in a Civil Court. This defence is valid and negatives dishonest intention which is the gist of the offence of theft.

(14) The conviction and sentence of the accused cannot be supported and are hereby set aside and the accused is acquitted. The fine amount, if collected, will be refunded to him.

B/R.G.D. Conviction and sentence set aside.

A.I.R. 1953 MADRAS 519 (Vol. 40, C. N. 196)

RAMASWAMI J.

In re Puthiya Purayil Ammad Kunni Moideen, Appellant.

Second Appeal No. 1986 of 1952, D/- 2-12-52.

Malabar Law — Pre-emption — Price.

The othidar is entitled to a right of pre-emption by paying a reasonable price to the mortgagor selling the properties and the price need not be the price which is offered by a stranger. (Case law discussed). (Para 7)

D. A. Krishna Variar and P. V. Raman Variar, for Appellant.

CASES CITED:

(A) ('82) 5 Mad 198
(B) ('84) 7 Mad 309
(C) ('92) 15 Mad 480: 2 Mad LJ 231
(D) ('85) 7 All 23: 1884 All WN 216
(E) ('12) 17 Ind Cas 337: 38 Mad 67

JUDGMENT: Both the lower Courts found that the othidar in this case was entitled to a right of pre-emption by paying a reasonable price to the mortgagor selling the properties and that the price need not be the price which is offered by a stranger.

(2) In support of his contention that this raises a point of law and that the price which the mortgagor ought to receive is the price which is offered by a stranger, the learned Advocate for the appellant relied upon five decisions. The first decision is — 'Cheria Krishnan v. Vishnu', 5 Mad 198 (A), decided by Kernan and Kindersley JJ. In this decision it was held that

"an otti mortgagee, if he avails himself of his right of pre-emption, must pay whatever sum is bona fide offered to the jenmi for his equity of redemption; but the ottiholder is entitled to be fully informed as the circumstances and amount of the offer before electing to buy; public notice of, and the option of bidding at, a court-sale of the jenmi's right do not constitute a valid offer of pre-emption so as to deprive the ottiholder of his right of pre-emption, if he does not purchase the jenmi's right."

This is based on the principle that the ottiholder should not be driven to give any fancy price at an auction and that he is entitled to the advantage which his position gives him. In other words, the price contemplated under this decision is reasonable price and not competitive price.

(3) The next decision is — 'Vasudevan v. Keshavan', 7 Mad 309 (B). In this decision a jenmi (mortgagor) having conveyed certain land upon tenure (mortgage, of which the right of pre-emption and the option of making further advances are incidents) created a further charge on the land, without giving the veppuholder the option of making the advance required. In execution of a decree against the jenmi a judgment creditor brought to sale the right of the jenmi in the land subject to the further charge. In a suit brought by the veppuholder to set aside the auction sale on the ground that his right of pre-emption was injured thereby, it was held that the suit would not lie. There is no observation in the judgment of Turner C. J. throwing any light whether the veppuholder is entitled to pay a reasonable price or competitive price.

(4) The third decision is — 'Amotti Haji v. Kunhayan Kutti', 15 Mad 480 (C), decided by Muttuswami Aiyar and Best JJ. In this decision an ottidar in Malabar was held to lose his rights of pre-emption if he refuses to bid at a court-sale of the land comprised in his otti, held in execution of a decree against the Karnavan and senior anandravan of the tarwad, in which the jenmi right is vested, after having been specially invited to attend and exercise that right, and makes no offer to take the property for a long time after the court-sale. The decision turned upon the simple point that the right of the othidar for pre-emption is a case of election and the court-sale created necessity for the appellant's election to buy or not to buy and after once electing not to buy he cannot be permitted to change his mind and assert his right for pre-emption. There is no decision regarding the othidar having to pay either a reasonable price or a competitive price.

(5) The fourth decision — 'Bhairon Singh v. Lalman', 7 All 23 (D), is irrelevant for the purpose of this case apart from the fact that we do not know the scope of the right of pre-emption in the case which was under consideration in the Allahabad High Court. That was a case where the plaintiff in a suit to enforce the right of pre-emption alleged that the true consideration for the sale was less than the amount stated in the sale deed. It was found that he made no communication to the vendor after he became aware that a sale was being negotiated nor did he make it known to him that while he stood upon his pre-emptive right he declined to pay the price stated in the deed, because it was not the consideration agreed on between the vendor and the vendee (unreasonable as opposed to reasonable price). It was held that the plaintiff was bound, instead of remaining silent, to communicate to the vendor that he was prepared to purchase at the price within a reasonable time and not hav-

ing done so he must be taken to have countenanced the completion of the bargain with the vendee and to have waived his right of pre-emption.

(6) The fifth decision is — 'Mammali v. Kunhipakki Haji', 38 Mad 67 (E), in which at p. 70 it is pointed out as follows:

"We mention that in some of the cases, viz., in 5 Mad 198 (A), 7 Mad 309 (B) & 15 Mad 480 (C), language is used which might imply that the right of pre-emption consists in a right to have an offer made by the owner of the property to sell the property to the othidar for the same price for which he has contracted to sell to a third person. We might have some hesitation in saying that this is an accurate definition of the nature of the right, because such a definition if strictly pursued to its logical conclusions might lead to difficulties and complications. We however refrain from pronouncing any definite opinion on that point as the learned Advocate-General says that if it be found that his client had knowledge of the sale more than six years before the institution of the suit he would not be prepared to contend in the facts of this case that the suit would still be within time, because no offer was made to him by the owner of the property before the auction sale."

The decision also does not support the contention of the appellant.

(7) On the other hand, both the lower Courts have relied upon the observations of Sundara Aiyar J. in his commentary on Malabar and Aliyasanthana Law (1922 Edn.), para. 186, wherein it is stated:

"The point is left open whether the right of ottidar is to purchase at the same price as is offered by the stranger, or at a reasonable price, the inclination of their Lordships' opinion being in favour of the latter view. It was so laid down by Mr. Holloway as Sub-Judge in A. S. No. 64 of 1859 (Tellicherry.)"

There is no other decision contrary to the conclusion arrived at by both the lower Courts.

(8) There is no point of law and this second appeal is dismissed.

B/D.H. Appeal dismissed.

A.I.R. 1953 MADRAS 520 (Vol. 40, C. N. 197)

RAJAMANNAR C. J. AND VENKATARAMA AYYAR J.

B. N. Viswanathan and another, Appellants v. Tiffin's Baryt Asbestos and Paints Ltd. by their Agents and Secretaries, The Indian Trades and Investments Ltd. and others, Respondents.

O. S. Appeal No. 56 of 1952, D/- 16-10-1952.

(a) Companies Act (1913), S. 83B — Company can delegate to Board of Directors its power to appoint directors — Delegation is binding on company — Legally constituted Board of Directors not in existence or not willing or unable to act — Delegation lapses and members can appoint directors — This is their inherent right: Case law discussed. (1913) 108 LT 665, Doubted and Disting. (Paras 3, 8)

Anno: Com. Act, S. 83B N. 1.

(b) Companies Act (1913), Ss. 76 and 83B — No validly appointed directors at time of annual meeting — Members can elect one at such meeting. (Paras 12, 14)

Anno: Com. Act, S. 83B N. 1, S. 76 N. 1.

(c) Companies Act (1913), Sch. 1 Table A, Reg. 78 — Article of Company in words of Reg. 78 — Held on facts that one of the two directors should have retired at the general meeting. (Para 11)

(d) Companies Act (1913), S. 79(1) — According to an Article of Association member whose name had not been in the register for continuous period of two months immediately preceding the date of meeting, not entitled to vote or to be reckoned in a quorum — Article held illegal being contrary to S. 79(1)(e). (Para 15)

Anno: Com. Act, S. 79 N. 3.

(e) Companies Act (1913), S. 79(2)(g), Sch. I, Table A Regs. 65, 66 — Right to vote by proxy — It is not common law right — It is determined by Articles of Association which is a contract between share-holder and company. (Para 17)

Anno: Companies Act, S. 79 N. 2.

(f) Companies Act (1913), S. 79 — Proxy — Relationship between proxy and share-holder is that of agent and principal — Contract Act (1872), S. 182. (Para 19)

Anno: Com. Act, S. 79 N. 2; Contract Act S. 182 N. 7.

(g) Companies Act (1913), S. 79(2)(g), Sch. I, Table A, Reg. 65 — Proxy can be validly given only to person who is a member of company, in the absence of a provision to the contrary in the Articles. (Para 19)

Anno: Companies Act, S. 79 N. 2.

(h) Companies Act (1913), S. 30 — Tort — Wrong done, confined to one share-holder of company — Only such share-holder can complain — Other share-holders on behalf of himself and others, not being the individuals to whom wrong is done, cannot maintain an action for that wrong. (Para 15)

(i) Companies Act (1913), S. 79 — Adjournment — Meeting is to be conducted in accordance with Articles of Association — Articles giving authority to adjourn — Chairman can adjourn meeting with consent — Share-holder pressing for adjournment — He cannot afterwards complain about the adjournment — (Evidence Act (1872), S. 115). (Para 24)

Anno: Comp. Act, S. 79 N. 3; Evid. Act, S. 115 N. 3(c), 26.

K. Raja Aiyar, for Appellants; G. Radhakrishnan and G. Vasanta Pai, for Respondents.

CASES CITED:

(A) (1913) 29 TLR 449: 108 LT 665
(B) (1936) 105 LJ Ch 385: (1936) Ch 640
(C) ('50) AIR 1950 PC 81: 77 Ind App 128
(D) (1884) 53 LJ Ch 353: 25 Ch D 320
(E) (1914) 83 LJ Ch 646: (1914) 1 Ch 895
(F) (1916) 85 LJ Ch 305: (1916) 1 Ch 532
(G) (1882) 51 LJ Ch 731: 21 Ch D 183
(H) (1939) 108 LJ Ch 231: (1939) Ch 719
(I) (1914) 83 LJ Ch 760: (1914) 1 Ch 883
(J) ('32) AIR 1932 Mad 100: 61 Mad LJ 724
(K) (1944) 113 LJ Ch 264: 1944 Ch 346
(L) (1946) 1 All ER 586: 1946 AC 459
(M) ('53) AIR 1953 Mad 467

(N) (1878) 48 LJ Ch 65: 9 Ch D 610
(O) (1883) 48 LT 334: 23 Ch D 14
(P) (1917) 2 Ch D 41, affirmed in appeal in (1917) 2 Ch 261: 86 LJ Ch 713
(Q) (1893) 62 LJ Ch 825: (1893) 3 Ch 385
(R) ('52) AIR 1952 Mad 515: 64 Mad LW 1072
(S) (1859) 4 De G & J 158: 45 ER 62
(T) ('51) AIR 1951 Mad 831(2): 1949-1 Mad LJ 662

VENKATARAMA AYYAR J.: The question that arises for determination in this appeal is the validity of the election of the respondents as directors of a company called "Tiffin's Barytes Asbestos and Paints Limited", at a meeting of the general body held on 26-2-1951. The facts are not in dispute. The company was incorporated in 1945 and its first directors were five persons named in Art. 49. One Veeramani was co-opted as a director and the strength of the directorate was thus raised to six. At the first annual meeting which was held on 24-6-1946 all the directors retired as provided in Art. 53 and were re-elected. Before the next general body meeting which was held on 27-8-1947 three of the directors had resigned and a fourth resigned at that meeting with the result that the strength of the directorate became reduced to two. The next general body meeting was held on 30-12-1948 and thereafter no annual meeting was called. It was in this state of affairs that one of the shareholders Mrs. Ananthalakshmi Ammal filed Appln. No. 3898 of 1950 under S. 79 (3), Indian Companies Act for a direction that a general body meeting might be convened by a Commissioner and that an independent chairman might be appointed to preside over the meeting.

On 27-11-1950 Krishnaswami Nayudu J. passed an order that the annual general body meeting be held on 28-1-1951 in accordance with the articles of association of the company, Ex. P-1. He, however, refused the prayer for the appointment of an independent chairman to preside over the meeting and against this portion of the order Mrs. Ananthalakshmi Ammal preferred O. S. A. No. 118 of 1950. By the order which was passed in the said appeal on 11-1-1951 an advocate Mr. Sanjeevi Naidu was appointed as chairman of the meeting with power to scrutinise the proxies. The company then took out an application, Appln. No. 139 of 1951 for postponing the meeting which had been fixed for 28-1-1951 to a later date on the ground that the accounts were not ready. On 16-1-1951 Krishnaswami Nayudu J. passed an order directing the meeting to be held on 18-2-1951.

On that date the Commissioner proceeded to the premises of the Company for the purpose of holding the meeting. Plaintiff 1 moved that the meeting be adjourned. The register of members, the share transfer books of the company and the proxies were in the possession of Veeramani who had been functioning as a director and he refused to hand them over to the chairman with the result that it became impossible for the chairman to proceed with the meeting. He accordingly adjourned it to 26-2-1951 and applied to the Court for directions in the matter. On 22-2-1951 Mack, J. passed an order directing the company to produce all the books at the meeting on 26-2-1951.

On that date the books of the company were produced; the meeting was actually held and at that meeting defendants 2 to 7 were elected as directors. The plaintiffs then filed Appln. No. 1135 of 1951 for setting aside the election on various grounds. On 27-3-1951 Krishnaswami Nayudu J. dismissed this application and referred the petitioners to a suit. The present suit has accordingly been filed by the plaintiffs who are two share-holders of the company on behalf of themselves and other share-holders of the company for a declaration that the election of defendants 2 to 7 as directors at the meeting held on 26-2-1951 was void on the several grounds set out in the plaint. Balakrishna Ayyar J., who heard the suit disagreed with the contentions put forward on behalf of the plaintiffs and dismissed the suit with costs. Against that decision the plaintiffs have preferred this appeal.

(2) Several contentions were urged by Mr. K. Rajah Ayyar in support of this appeal. It was firstly argued that the power which the general body has under the articles of the company is only to appoint directors in place of those who retire at the annual meeting; only one director actually retired at the meeting held on 26-2-1951 and that therefore the election of six directors was beyond the competence of the meeting; that there was no proper notice that six directors were to be elected at the meeting and that there was not even a resolution to that effect. Hence, it is urged, the election of defendants 2 to 7 is void. The complaint that there was not clear notice to the members that six directors were going to be elected is without substance. Ex. P-6 is the notice of the meeting to be held on 18-2-1951 and item 2 therein is as follows: "To elect directors. Mr. A. S. Padmanabhan retires at the meeting." It was argued that read as a whole Ex. P-6 would mean that a director is to be appointed in place of A. S. Padmanabhan who was to retire and that it would not convey the meaning that six directors were to be elected. We are unable to agree with this contention. The retirement of A. S. Padmanabhan is stated as a fact and the notice does not state as is usual "to elect a director in place of Padmanabhan who retires." The business to be transacted under item No. 2 is generally to elect directors and not to elect a director. This objection is, therefore, overruled.

(3) A more substantial objection to the validity of the election of the defendants is that the power of the general body is limited to electing a director in the place of one who retires at the annual meeting under Art. 53, that the power to appoint other directors vests under Art. 58 exclusively with the Board of Directors and that in consequence the general body could appoint only one director in the place of A. S. Padmanabhan who retired at the meeting.

The Articles of the company material for the purpose of this contention are 47, 53 and 58. They are as follows:

"Art. 47: "The number of directors inclusive of the Director (Ex-Officio) shall not exceed 10 nor be less than 3. The quorum for a directors' meeting is 3. The quorum of a committee meeting shall be determined by the directors."

"Art. 53: "The directors nominated by the Agents and secretaries shall be Ex-Officio directors of the company and shall not be subject to retirement by rotation nor shall the clause relating to directors' share quali-

fications be applicable to him. The first directors of the company (except the ex-officio directors) shall hold office till the annual general meeting in 1946 when the whole of the directors shall retire from office and in every subsequent year one-third of the directors for the time being or if their number is not three or a multiple of three, then the number nearest to one-third shall retire from office. The directors to retire in every year shall be those who have been longest in office since their last election but as between persons who became directors on the same day those to retire shall (unless they otherwise agree among themselves) be determined by lot. A retiring director shall be eligible for re-election.

Art. 58: "If there be any vacancy in the directorate or if it is found necessary to increase the directorate so as not to exceed the maximum number the board may from time to time fill such vacancies by co-opting others as directors".

On these articles it is argued for the appellants that the power to appoint directors had been delegated to the board of directors under Art. 58 subject only to Art. 53 and that the exercise of that power by the general body was in contravention of the articles and was, therefore, void. Reliance is placed on the decision in — 'Blair Open Hearth Furnace Co. Ltd. v. Reigart', (1913) 108 L T 665 (A). In that case, at an extraordinary meeting of the company, resolutions were passed increasing the number of directors and electing two additional directors. The company filed a suit for a declaration that under the articles of the association the general body had no power to appoint the two additional directors, and that the election of the defendants was, therefore, illegal. Article 82 of the Company's articles provided that the number of directors shall not be less than two or more than seven. Article 85 provided that at the ordinary meeting every year one director shall retire and the meeting at which any director shall retire shall fill up his place. Article 93 provided

> "Any casual vacancy in the office of director may at all times be filled up by the board by the appointment of a director. The directors may from time to time appoint additional directors but so that the total number of directors shall not exceed the prescribed maximum."

On a construction of these articles it was held that the company had delegated its power of appointment of directors to the board and that it could not itself exercise it. The ground for the decision is thus stated by Eve J.:

> "I think the express power contained in Art. 93 excludes the possibility of implying a concurrent power under Art. 82 and in my opinion the company has by its constitution delegated to those of its members who for the moment constitute the board the sole right of appointing additional directors and that is so whether such additional directors are necessary to make up the number to the maximum number fixed by the original article or to any other number which the company may from time to time determine on as the maximum. As a matter of construction, therefore, I think that the plaintiffs are right and that it was not within the power of the company to do that which it purports to have done at the meeting of the 14th March and on this ground alone the relief sought on the motion must in my opinion, be granted."

Articles 82, 85 and 93 which were construed in — '(1913) 108 L T 665' (A) are substantially identical with Arts. 47, 53 and 58 in the present case and the appellants accordingly argued that the reasoning and the decision in — '(1913) 108 L T 665' (A) would directly apply to the instant case.

(4) Now it is doubtful how far the decision in — '(1913) 108 L T 665' (A) can still be considered to be good law. Its correctness was doubted in — 'Worcester Corsetry Ltd. v. Witting', (1936) Ch 640 (B) in which the articles were similar to those in — '(1913) 108 L T 665' (A) with the difference that the company had also adopted Arts. 83 and 85 in table A in the Companies Act of 1908.

(5) Article 83 runs as follows:

> "The company may from time to time in general meeting increase or reduce the number of directors, and may also determine in what rotation the increased or reduced number is to go out of office."

Article 85 provided that

> "The directors shall have power at any time, and from time to time, to appoint a person as an additional director who shall retire from office at the next following ordinary general meeting, but shall be eligible for election by the company at that meeting as an additional director."

On these articles the question arose whether the appointment of two more directors at an extra-ordinary meeting of the general body was 'ultra vires' of the powers of the general body. Farwell J. held, following the decision in — '(1913) 108 L T 665' (A) that the general body had no power to appoint the additional directors. On appeal this decision was reversed on the ground that in — '(1913) 108 L T 665' (A) there was nothing in the articles corresponding to Art. 83 in table A and that that article conferred on the general body a general power to elect additional directors. In this view it became unnecessary to pronounce on the correctness of the decision in — '(1913) 108 L T 665' (A). But Lord Hanworth M. R. remarked

> "I am bound to say that I find some little difficulty in seeing that the power must be either in the one or in the other; but be that as it may, we have to interpret the articles of association as we find them."

Lawrence L. J. observed:

> "This Court is not concerned upon the present occasion to say whether the construction put upon the articles in — '(1913) 108 L T 665' (A) by Eve J. was right or not; we have here to see what is the true meaning of the articles of the plaintiff company."

In — 'Ram Kissendas v. Satya Charan', AIR 1950 P C 81 (C) the general body passed a resolution appointing seven new directors in addition to the existing four. The validity of this resolution was disputed in an action by the shareholders. Articles 109, 111 and 128 of the Company were in substance similar to Arts. 82 and 93 which were considered in — '(1913) 108 L T 665' (A). There was also an additional Article No. 126 corresponding to Art. 83 in Table A which had been adopted by the company in — '(1936) Ch 640' (B). The Privy Council held on a construction of the articles that the election of new directors by the gene-

ral body was valid. The decision in — '(1913) 108 L T 665' (A) does not appear to have been cited before the Board but in view of the fact that the articles in — 'AIR 1950 P C 81' (C) are similar to those in — '(1936) Ch 640' (B) and that — '(1913) 108 L T 665' (A) differed from both in not having anything corresponding to Art. 83 of Table A in — '(1936) Ch 640' (B) or Art. 126 in — 'AIR 1950 P C 81' (C) it is not possible to hold that — '(1913) 108 L T 665' (A) is opposed to the decision in — 'AIR 1950 P C 81' (C).

(6) In Palmer's Company Precedents (Edn. 16, page 573) it is stated that:

"The articles may, however, be so expressed as to relegate the power of appointing new directors to the directors to the exclusion of a general meeting."

and — '(1913) 108 L T 665' (A) is quoted as authority for this position with a note that the correctness of the decision had been doubted in — '(1936) Ch 640' (B). In Buckley on Companies Acts (Edn. 12, page 885) the position is thus stated:

"It has been held that an article in similar form amounts (in the absence of an article corresponding to Art. 94 ante) to such a delegation to the directors of the power of appointing additional directors as to preclude the company in general meeting from appointing such directors".

The authority quoted again is the decision in — '(1913) 108 L T 665' (A) but the decision in — '(1936) Ch 640' (B) is noted against it. Article 94 referred to in the above quotation corresponds to Art. 83 in Table A. The position, therefore, is that the decision in—'(1913) 108 L T 665' (A), is of doubtful authority though it has not been overruled.

(7) In this case it has to be noted that the articles of the company provide that

"the regulations of table A of Sch. I of the Indian Companies Act of 1913 shall apply to this company except in so far as otherwise provided for hereunder."

Regulation 83 in table A of Sch. I runs as follows:

"Subject to the provisions of Ss. 83-A and 83-B of the Indian Companies Act, 1913 the company may from time to time in general meeting increase or reduce the number of directors and may also determine in what rotation the increased or reduced number is to go out of office."

This regulation must, therefore be read as part of the articles of the company. In — '(1936) Ch 640' (B), it was the existence of this article which was held to distinguish it from the decision in — '(1913) 108 L T 665' (A) where there was no such article. In — 'AIR 1950 PC 81' (C) also there was an article 126 corresponding to Regn. 83 and the power of the general body to elect additional directors was confirmed. The decision in — '(1936) Ch 640' (B) and — 'AIR 1950 P C 81' (C) rather than the decision in — '(1913) 108 L T 665 (A) will apply to the present case.

(8) It was further argued by Mr. Vasantha Pai on behalf of the respondents that even if the power to appoint additional directors is exclusively vested in the board of directors under Regn. 58 the resolution of the general body appointing defendants 2 to 7 as directors should be upheld because there was at the time of the meeting no board of directors which could validly function under the article and the general body had inherent power, which it could then exercise, to appoint directors for enabling the company to function. In support of this contention he cited the decisions in — 'Isle of Weight Rly. Co. v. Tahordin', (1884) 25 Ch D 320 (D); — 'Barron v. Potter', (1914) 1 Ch 895 (E); —'Foster v. Foster', (1916) 1 Ch 532 (F) and — 'Munster v. Cammell Co.', (1882) 21 Ch D 183 (G). In (1884) 25 Ch D 320 (D) the share-holders of a company sent a requisition for the convening of a general body meeting to remove the directors and to appoint fresh directors in the vacancies. Section 89 corresponding to Art. 58 in the present case conferred on the directors the power to fill up vacancies in the directorate. The question was whether this power could be exercised by the members of the company at its general meeting. In answering it in the affirmative Cotton L. J. observed:

"Then it is said that there is no power in the meeting of share-holders to elect new directors for that under S. 89 the power would be in the remaining directors. The remaining directors would, no doubt, have that power if there was a quorum left. But suppose the meeting were to remove so many directors that a quorum was not left, what then follows? It has been argued that in that case, there being no board which could act, there would be no power of filling up the board so as to enable it to work. In my opinion that is utterly wrong. A power is given by S. 89 to the remaining directors "if they think proper so to do, to elect persons to fill up the vacancies". I do not see how it is possible for a non-existent body to think proper to fill up vacancies. In such a case a general meeting duly summoned for the purpose must have power to elect a new board so as not to let the business of the company be at a deadlock."

With this opinion Lindely L. J. agreed. Fry L. J. observed:

"In my judgment it is quite impossible to read S. 89 as the only section relating to the filling up of vacancies in the office of directors. That applies only where there are remaining directors, and those remaining directors think proper to exercise their powers. That does not in my judgment deprive the general meeting of the power to elect directors, where there are no directors or where the directors do not think fit to exercise their powers."

In '(1914) 1 Ch 895 (E)' the facts were that the board of directors of a company consisted of two persons, Mr. Potter and Mr. Barron. Owing to their differences no meeting of the Board could be held and nothing transacted. Then at an extra-ordinary meeting of the shareholders two additional directors were appointed. The question was whether this was valid. The articles of the company provided that the number of directors should be not less than two and not more than ten and that the directors should have the power to appoint additional directors but there was no article corresponding to Art. 83 conferring on the company a power to increase or decrease the number of directors. In this respect the articles of this company are similar to those in '(1913) 108 L T 665 (A)'. It was accordingly contended on the

strength of that decision that the general body had no authority to appoint additional directors. This contention was overruled and it was held that as there was a deadlock in the administration resulting from the fact that the directors were unwilling to exercise their powers the company had the inherent power to take necessary steps to ensure the working of the company and to appoint additional directors for the purpose. Warrington J. observed:

"The argument against the validity of the appointment is that the articles of association of the company gave to the board of directors the power of appointing additional directors, that the company has accordingly surrendered the power, and that the directors alone can exercise it. It is true that the general point was so decided by Eve J. in '(1913) 108 L T 665 (A)' and I am not concerned to say that in ordinary cases where there is a board ready and unwilling to act it would be competent for the company to override the power conferred on the directors by the articles except by way of special resolution for the purpose of altering the articles. But the case which I have to deal with is a different one. For practical purposes there is no board of directors at all. The only directors are two persons, one of whom refuses to act with the other and the question is, what is to be done under these circumstances? If directors having certain powers are unable or unwilling to exercise them—are in fact a non-existent body for the purpose—there must be some power in the company to do itself that which under other circumstances would be otherwise done. The directors in the present case being unwilling to appoint additional directors under the power conferred on them by the articles, in my opinion, the company in general meeting has power to make the appointment. The company has passed a resolution for that purpose."

This decision was followed in '(1916) 1 Ch 532 (F)' where the general body had appointed a managing director which power was vested under Art. 99 in the board of directors. The Court found that there were only two persons who could be appointed as managing directors and owing to disagreement between them the board had been "reduced to the position that it was unable owing to internal friction and faction to appoint anybody as managing director."

Following the decision in '(1914) 1 Ch 895 (E)' the Court held that the question relating to the appointment of the managing director was one with which the general meeting of the company could deal and that having regard to the circumstances recourse must be had to the general meeting and the appointment by the general body must accordingly be upheld.

In '(1882) 21 Ch D 183 (G)' certain vacancies which had occurred in the directorate before the annual general meeting were filled by the directors after that meeting and this appointment was attacked as illegal on the ground that the power of the board to fill vacancies could be exercised only before the next annual meeting and if not so exercised it lapsed and became incapable of exercise thereafter. Article 80 of the company corresponding to Art. 53 in the present case provided that the general meeting should have the power to fill vacancies arising by reason of the annual retirement of directors and Art. 84 conferred on the board power to fill vacancies. On a construction of these articles it was held that the appointment of directors by the general body was valid. The decision by itself, therefore, has no bearing on this point. But the following observations of Fry J. are relied on in support of the position that the company has a general and inherent power to appoint directors. He observed:

"I am far from saying that a general meeting might not have filled up the casual vacancy, although, as I have pointed out Cl. 80 only requires the general meeting to fill up the vacancies created by the retirement in rotation but nevertheless the general powers of a general meeting are so large that I certainly do not mean to determine that if they had been so minded, they might not have filled up the casual vacancy."

In this connection the following observations of Lawrence L. J. in '(1936) 1 Ch 640 (B)' might also be quoted

"The company has an inherent power to nominate and appoint its own directors unless that is in any way restricted by the contract contained in the articles of association. Unless you can find that that inherent power has been handed over by the company to the directors, I think they retain that power as a natural result of their having the power to increase their board of directors."

According to Buckley on Companies Act, p. 885, the result of the authorities is that the decision in '(1913) 108 L T 665 (A)' will not apply

"if owing to a deadlock or otherwise there is no board capable of making the necessary appointments."

In Palmer's Company Precedents (p. 573) it is stated that the company has the power to appoint additional directors "where owing to differences between the directors no board meeting could be held for the purpose". The principles laid down in the authorities discussed above may be summed up thus:— A company has inherent power to take all steps to ensure its proper working and that, of course, includes the power to appoint directors. It can delegate this power to appoint directors to the board of directors and such delegation will be binding upon it but if there is no legally constituted board which could function or if there is a board but that is unable or unwilling to act then the authority delegated to the board lapses and the members can exercise the right inherent in them of appointing directors.

(9) In this view the question arises whether at the time of the annual meeting there was legally in existence a board of directors who could act. The appellants contend that there was, while the respondents deny it. The facts material for this contention may now be stated. It has already been mentioned that the first directors of the company were five persons named in Art. 49 which number was raised to six by the co-option of Veeramani under that article, that all of them retired at the annual meeting held on 24-6-1946 and were re-elected. Under Art. 53 a third of the directors had to retire at every annual meeting. Before the next annual meeting which was held on 27-8-1947 three of them had resigned. Of the remaining three two directors Padmanabhan and Veeramani retired at that meeting and were re-elected. The third director resigned at that meeting and thus the strength of the directorate

became reduced to two. Section 83A, Companies Act is as follows:— "Every company shall have at least three directors". Article 47 provides that the number of directors inclusive of the Director (ex-officio) shall not be less than three and that was also the number prescribed as quorum for a meeting of the directors. Thus after 27-8-1947 there was no board which could act except for the purpose of filling up vacancies under Art. 62. Admittedly no directors were co-opted in 1948 and the position on 30-12-1948 when the last annual meeting was held was that there were only two directors; both of them had been elected at the annual meeting held on 28-8-1947 and one of them had to retire at that meeting. Veeramani retired at that meeting and was re-elected. Thereafter there was no annual meeting.

(10) The plaintiffs contended that on 30-12-1949 one Dakshinamurthy was co-opted as a director, Ex. P-9, that he resigned on 18-6-1950 Ex. P-10 and that on 12-8-1950 one Murugappa Chettiar was co-opted in his place, Ex. P-11 and that there were thus three directors, Padmanabhan, Veeramani and Murugappa Chettiar who could act at the time of the annual meeting in 1951. But if the annual meeting had been convened in 1949 as it should have been Padmanabhan would have been bound to retire under Art. 53. But it is argued on behalf of the appellants firstly that Art. 53 contemplates the existence of at least three directors and it could not apply when their number fell below that minimum. The decision in — 'In re Moseley and Sons Ltd.', (1939) Ch 719 (H) was quoted in support of this position. There Art. 94 provided that "At every succeeding ordinary general meeting one-third of the directors or if their number is not a multiple of three, then the number nearest to but not exceeding one-third, shall retire from office". The strength of the directorate became reduced to two and the question was whether either of them ceased to be a director under this article. In holding that neither of them vacated the office Simonds J. observed:

> "The article in my judgment does not provide for the retirement of a director unless one of two conditions is satisfied: either there must be a number which is one-third of the directors, or there must be a number which is nearest to but does not exceed one-third. Here it is clear that neither of those conditions is satisfied. There are two directors and therefore, you cannot find a number which is one-third. There are two directors and therefore you cannot find a number which is nearest to but does not exceed one-third."

(11) It will be seen that this decision was based on the words "but not exceeding one-third" and in the absence of similar language in Art. 53 it must be held that even one of the two directors should have retired at the meeting.

It is next argued that as no meeting was actually held in 1949 Art. 53 would not apply and Padmanabhan would continue to be a director. The respondents contend on the other hand that the directors could not take advantage of their own default and continue in office beyond the period when they would have retired, if they had done their duty and called for a meeting in accordance with Art. 29. This contention is supported by the decision in — 'In re Consolidated Nickel Mines Ltd.', (1914) 1 Ch 883 (I); — 'Srinivasan v. Subramania Iyer', AIR 1932 Mad 100 (J); — 'Kanssen v. Rialto (West End) Ltd.', (1944 Ch 346 (K) and — 'Morris v. Kanssen', (1946) A C 459 (L). These decisions were followed by this Court in — 'Ananthalakshmi Ammal v. The Indian Trades & Investments', AIR 1953 Mad 467 (M). It must accordingly be held that Padmanabhan ceased to be a director at the end of year 1949. On the same reasoning it must also be held that Veeramani ceased to be a director by the end of 1950. This conclusion furnishes also the answer to a contention of the appellants that at least Veeramani was in office as director on 26-2-1951, and there could have been an election at the most of only five directors.

(12) Then there is the case of Murugappa Chettiar who is put forward as the third director. It is stated that Dakshinamurthy was co-opted on 30-12-1949 but it does not appear in whose place he was co-opted and as four directors who retire in 1946 and 1947 had all been elected at the annual meeting held on 24-6-1946 their term of office would have expired under Art. 53 during the year 1949 and Dakshinamurthy whose co-option must have been in their place could not hold office beyond 1949. At any rate as he resigned on 18-6-1950 his rights do not merit any further consideration. It would follow from this that the co-option of Murugappa Chettiar in the place of Dakshinamurthy on 12-8-1950 must be held to be inoperative because the vacancy in which Dakshinamurthy could have been co-opted had itself come to an end under Art. 53. It is unnecessary to refer to the various infirmities in the appointment of Murugappa Chettiar as a director which are referred to in the judgment of Balakrishna Iyer, J. We agree with him that Murugappa Chettiar was never validly co-opted as director, and it was not merely a case of defective appointment as director but of no appointment at all. We must accordingly hold that there was at the time of the annual meeting on 26-2-1951 no director validly in office and on the principle laid down in '(1884) 25 Ch D 320 (D)' and '(1914) 1 Ch 895 (E)' the members had the right to elect the directors at the annual meeting.

(13) One other contention relating to this part of the case remains to be considered. It was contended that by the time the annual meeting was held on 26-2-1951 the place of Murugappa Chettiar as a director was no longer vacant and therefore the election of six directors was invalid. The argument of the appellants may thus be stated—the general meeting was convened for 18-2-1951. On that day it was adjourned to 26-2-1951. Article 43 provides that if at any meeting at which an election is to take place, the places of the vacating directors are not filled up, the meeting shall stand adjourned till the same day in the next week at the same time and place and if at the adjourned meeting the places of the vacating directors are not filled up the vacating directors or such of them as have not had their places filled shall be deemed to have been re-elected at the adjourned meeting. The contention is that under this article the meeting should have been adjourned from 18-2-1951 to 25-2-1951 and if on that date there was no election the vacating directors must be deemed to have been re-elected; therefore on 25-2-1951 Murugappa Chettiar became re-elected as director. We do not agree with this contention.

Article 43 will apply only when there is a meeting held and as none was held before 26-2-1951 it has no application. Moreover in the view we have taken that there was no director who was in office on the date of the meeting there is no scope for applying Art. 43.

(14) It was also urged that Regn. 50 in Table A of Sch. 1, Companies Act provides that the election of directors other than those who retire, that is under Art. 53, must be by a special resolution, there was none such in this case and that, therefore, the election is illegal. But under Art. 33 of the Articles of the Company, which prevails over Regn. 50 no special resolution is required for election of directors. In the result we hold that the election of defendants 2 to 7 as directors is valid and not open to any objection.

(15) It is next contended that members who were entitled to vote at the meeting had been excluded from exercising their right and that, therefore, the proceedings are illegal. In Appln. No. 139 of 1951 as part of the order adjourning the meeting originally fixed for 28-1-1951 to 18-2-1952 Krishnaswami Nayudu, J. gave the following directions:

> "But I consider that if it is made clear that the register as on 28-11-1950 will be the register that will be taken into consideration for the purpose of finding out the members who are entitled to vote or to be reckoned in a quorum, the apprehension on behalf of the respondent will disappear. To this course the Company could have no objection." (Ex. P-4).

It was in pursuance of this direction that the chairman declined to permit members who were not on the register of the company on 28-11-1950 to vote at the meeting. The contention of the appellants is that this direction is opposed to S. 79(1)(e) of the Companies Act which provides

> "any share-holder whose name is entered in the register of share-holders of the company shall enjoy the same rights and be subject to the same liabilities as all other share-holders of the same class."

Article 46 of the Articles of the Company runs as follows:

> "No member shall be entitled to vote nor be reckoned in a quorum when his name has not been in the register for a continuous period of two months immediately preceding the date of the meeting."

The direction made in Ex. P. 4 is obviously in accordance with this article. But S. 79(1) provides that the provision contained therein shall have effect "notwithstanding any provision made in the articles of the company in this behalf" and the contention of the appellants that Art. 46 is illegal must be accepted.

It is contended on behalf of the respondents that the order in Appln. No. 139 of 1951 was made at the instance of the company and that the order has become final and that, therefore, its validity cannot now be questioned. The appellants reply that the share-holders were not as such parties to this application and that their rights could not be concluded by an order to which they were not parties. We are inclined to agree with this contention. But the question is whether this contention is open to the plaintiffs. They were on the register of the company on 28-11-1950 and they were allowed to exercise their right of voting. Therefore they are not persons adversely affected by the direction contained in Ex. P-4. Their complaint is that two members Srinivasa Pillai and Narasimham whose names had been placed on the register after 28-11-1950 had sent their proxies on 25-1-1951 and that those proxies had been wrongly rejected. Assuming that Srinivasan Pillai and Narasimham had validly been admitted as members—a point on which Balakrishna Iyer, J. had held against them—it is obvious that when their proxies were rejected they were the persons who were wronged and that, therefore, they are the only persons who can make a complaint of it and not other shareholders.

In — 'Pulbrook v. Richmond Consolidated Mining Co.', (1878) 9 Ch D 610 (N) the plaintiff who had been elected as a director complained that he had been excluded by the company from taking part in the management and sued for an injunction. The company contended that the action was not maintainable except in the name of the company. Overruling this contention Jessel, M. R. held that when the wrong complained against is individual to the share-holder he was the person who was entitled to maintain the action and observed:

> "But in a case of an individual wrong, another shareholder cannot on behalf of himself and others, not being the individuals to whom the wrong is done, maintain an action for that wrong."

That is precisely what the plaintiffs seek to do in this action. They are not themselves wronged and they seek to sue on behalf of themselves and others.

(16) It may also be mentioned that even if the votes of Srinivasam Pillai and Narasimham are counted in favour of the plaintiffs' group and against defendants 2 to 7 the result of the election would not be affected and on this ground also this objection must be overruled.

(17) Another contention pressed on behalf of the appellants is that at the general meeting held on 26-2-1951 two persons Ramachandran and Narayanaswami who were not members were allowed to take part in the proceedings and record votes, on the strength of powers of attorney which they had obtained from two members Mrs. Ananthalakshmi Ammal and Sri N. Sri Ram respectively and that the same was illegal and vitiated the entire proceedings. It is well settled that the right of a member of company to vote by proxy is not a common law right and that it is determined solely by its articles which constitute a contract between him and the company.

(18) In — 'Harben v. Phillips', (1883) 23 Ch D 14 (O) where the nature of the right which a member possessed to vote by proxy was discussed Cotton, L. J. observed:

> "But the whole of Mr. Benjamin's argument really depended on this, that there was a right independently of contract to vote by proxy. I cannot accede to that."

Bowen, L. J. observed:

> "that there is no common law right on the part of a member of a corporation to vote by proxy. We know, of course, that in many cases a man may do through another person what he may lawfully do himself.....But when persons agree to act together in the conduct of a business the way in which that

business is to be carried on must depend in each case on the contract, express or implied which exists between them as to the way of carrying it on."

(19) In — 'Maclaren v. Thompson', (1917) 2 Ch D 41 (P) Astbury, J. observed:

"There is no inherent or equitable right in any share-holder to vote by proxy; such right, if it exists, must be found in the contract binding the share-holders generally, that is, in the company's regulations or constitution and it then exists only in the form and subject to the limitations therein appearing."

Vide Halsbury's Laws of England, Vol. 8 (2nd edn.) page 61, para. 108. The question then simply is what do the articles say on this matter? Article 38 is as follows:

"On a demand of pool every member present in person or by proxy or by attorney shall have one vote."

Under S. 79(2)(g) of the Companies Act "a proxy must be a member of the company", and Art. 44 (65?) in Table A provides "No person shall be appointed a proxy who is not a share-holder" and these provisions are applicable to the present case there being nothing in the articles of the company inconsistent therewith. Therefore, there is no doubt that a proxy can validly be given only to a member.

But the respondents argue that Art. 38 clearly recognises that a member can be present in person or by proxy or by attorney and that, therefore, the attorneys form a class distinct from proxies and to them there is no limitation that they should be members. Mr. K. Rajah Ayyar contends on behalf of the appellants that in law the status of a proxy is only that of an agent, that no distinction can be made between a proxy and an attorney and that they are synonymous words. He refers to item 48 in Schedule I to the Stamp Act which deals with the powers of attorney not being a proxy & item No. 52 which deals with proxy and argues that this is a recognition that proxies are only a form of power of attorney. He also relies on the observations of Lindley, J. in — 'English Scottish & Austraian Chartered Bank In re', (1893) 3 Ch 385 (Q) that a "proxy there means some agent properly appointed" and the decision of Satyanarayana Rao and Chandra Reddi, JJ. in — 'Narayanan Chettiar v. Kaleswara Mills', AIR 1952 Mad 515 (R) where it was held that the relationship between a share-holder and a proxy is that of a principal and an agent. That undoubtedly is so but the question is what do the words "By proxy or by attorney" in Art. 38 mean? Clearly they cannot be held to be synonymous because the words actually used are "By proxy or by attorney", and not "by proxy or attorney". The argument of the appellants involves the rejection of the words "by attorney" as meaningless surplusage. But it is unnecessary to pursue this matter further because there is a clear ground on which this contention of the appellants must fail. It appears from the voting list appended to the Commissioner's report that even excluding the votes cast by the two non-members Narayanaswami & Ramchandran the defendants get 10120 votes as against 4078 obtained by the plaintiffs' group. The result of the election has not been affected by this irregularity and therefore, it cannot be set aside.

(20) Objection is next taken to the inclusion of proxies which were deposited on 14 and 15-2-1951. These proxies were cast in favour of the defendants. The contention is that as the meeting was originally fixed for 28-1-1951 as per Ex. P. 3 the proxies should have been deposited under Art. 68 in table A at least 72 hours before the meeting and therefore, those deposited on the 14th and 15th should be rejected. Article 42 of the company's articles provides that the instrument appointing proxy shall be deposited at the registered office of the company not less than 72 hours in advance of the meeting or the adjourned meeting; else it is invalid."

(21) It is argued that this article is opposed to regulation 66 which is obligatory and therefore void. Reliance was also placed on the decision in (1917) 2 Ch 41 affirmed in appeal in (1917) 2 Ch 261 (P) that an adjourned meeting was only a continuation of the original meeting and that proxies which could not be used at the date of the original meeting could not be used at the adjourned meeting. But the short answer to this contention is that though the date of the meeting was originally fixed for 28-1-1951 it was not actually held on that date by reason of the order dated 16-1-1951. Ex. P-3; that there was no notice even given of that meeting and that the meeting which was held on 18-2-1951 can in no sense be said to be an adjourned meeting.

(22) The contention that there had been no valid nomination of defendants 2 to 7 as directors because it was not made seven days before the meeting is again based on the assumption that there was a meeting on 28-1-1951 and that the meeting held on 18-2-1951 is the continuance thereof. There was no meeting on 28-1-1951 and therefore there can be no question of an adjourned meeting on 18-2-1951. It is conceded that the nominations are in time if the date of the meeting is 18-2-1951 and not 28-1-1951.

(23) It is finally contended that Sanjeevi Naidu the Commissioner who was appointed to preside over the meeting which was fixed for 18-2-1951 had no authority to adjourn it to 26-2-1951 and that, therefore, the proceedings of the meeting held on 26-2-1951 are void.

(24) In Halsbury's Laws of England, Vol. V, page 359, para. 588 (2nd End.), the law is thus stated:

"Except where empowered by the regulations of the Company, the chairman cannot adjourn the meeting nor dissolve it while any of the business for which it was called remains untransacted."

In this case Art. 35 provides that the chairman may with the consent of the meeting adjourn it from time to time. It is not now disputed that Mr. Sanjeevi Naidu obtained the consent of the meeting to adjourn it. It is suggested that the order appointing him does not confer upon him power to adjourn the meeting. But the meeting is to be conducted in accordance with the Articles of Association and the chairman had the authority to adjourn the meeting under Art. 35. Moreover the plaintiffs themselves pressed for adjournment and it is not open to them to make a complaint of it. In — 'Burt v. The British Nation Life Assurance Association', (1859) 45 E R 62 (S), it was held that

"a plaintiff who has a right to complain of an act done to a numerous society of which he is a member, is entitled to sue on behalf of

himself and all others similarly interested though no other may wish to sue; so although there are a hundred who wish and are entitled to sue, still, if they sue by a plaintiff who is personally precluded from suing, the suit cannot proceed although other persons on whose behalf the suit was instituted might maintain the action as plaintiff."

This principle was applied in this Court by Satyanarayana Rao and Panchapagesa Sastri JJ. in — Nagappa Chettiar v. Madras Race Club', AIR 1951 Mad 831 (2) (T). The plaintiffs having moved for an adjournment of the meeting cannot be heard to object to it. They do not even state that they have been prejudiced in any manner. This objection also must be overruled. In the result the appeal fails and is dismissed with costs.

B/R.G.D. Appeal dismissed.

A.I.R. 1953 MADRAS 528 (Vol. 40, C. N. 198)

VENKATARAMA AIYAR J.

Anaithalayan, Petitioner v. Marudamuthu, Respondent.

Civil Revn. Petn. No. 1427 of 1949, D/- 7-11-1952.

Civil P.C. (1908), O. 9, R. 13, Proviso (Mad) and O. 5, R. 17 — Applicability.

Proviso applies to all cases in which there is failure to observe provisions as to service of summons under O. 5, including the failure to affix summons on outer door on refusal to sign acknowledgment. In all such cases if it be proved that the defendant had notice of the date of hearing in sufficient time to appear and answer the plaintiff's claim, it will be an irregularity, such as will be cured by the proviso. AIR 1952 Cal 10, Disting. (Para 4)

Anno: C.P.C., O. 9 R. 13 N. 18.

C. A. Seshagiri Sastry, for Petitioner; R. Desikan, for Respondent.

CASE CITED:

(A) ('52) AIR 1952 Cal 10: 55 Cal WN 349

ORDER: The respondent instituted O. S. No. 302 of 1946 in the Court of the District Munsif, Namakkal, for recovery of possession of certain properties and for mesne profits, and the same was decreed 'ex parte' on 16th September 1946.

(2) The defendant then applied in I. A. No. 835 of 1946 to set aside the decree passed 'ex parte' on the ground that the summons was not duly served on him. The facts as found by the Courts below are that the summons was tendered to the defendant on 14-9-1946, and that he refused to sign the acknowledgment. The contention of the petitioner is that the process-server must either take an acknowledgment from the defendant or affix the summons to the outer door of the house and that as neither was done, there was no due service of summons as required by O. 5, R. 17 and that, therefore, the Court was bound to set aside the 'ex parte' decree under O. 9, R. 13. The Courts below met this contention by reference to the proviso to O. 9, R. 13 enacted in Madras. The proviso runs thus:

"Provided further that no Court shall set aside a decree passed 'ex parte' merely on the ground that there has been an irregularity in the service of summons if it be satisfied that the defendant had notice of the date of hearing in sufficient time to appear and answer the plaintiff's claim."

The Courts below have held that the defendant had notice of the hearing in sufficient time and that the failure to affix the summons on the outer door was only an irregularity. They accordingly dismissed the application to set aside the 'ex parte' decree.

(3) Mr. Seshagiri Sastri, the learned advocate for the petitioner contends that the proviso to O. 9, R. 13 applies only when there is merely an irregularity in the service of summons but that the failure to take an acknowledgment or to affix the summons is much more than an irregularity; and that it is an illegality vitiating the entire service and that the proviso has accordingly no application. In support of the position that the failure to affix the summons amounted to an illegality, he relied upon the decision in — 'Ganeshmal v. Kesoram Cotton Mills Ltd.', AIR 1952 Cal 10 (A). That case arose under the Arbitration Act. An award having been filed into Court, notice thereof was directed to be given to the party. The summons was tendered to the party but he refused to receive it. No acknowledgment by him was taken nor was summons affixed on the outer door. An 'ex parte' order was passed and an application was filed for setting aside the 'ex parte' order on the ground that the provisions of O. 5, R. 17 had not been complied with. This petition was opposed on the ground that non-affixing of a copy was only an irregularity and that it was not a ground for setting aside the order. It was held, on a review of the authorities, that the failure to affix a copy amounted to much more than an irregularity; and that the procedure laid down in O. 5, R. 17 must be strictly followed and if it is not followed, the decree must be set aside under O. 9, R. 13. The judgment refers to the contrary view taken in some of the Courts but holds that the provisions of O. 5, R. 17 are mandatory and must be strictly complied with.

(4) The question is whether this decision can be applied to the present case which is governed by the proviso to O. 5, R. 13 enacted in Madras. Though it is true that in AIR 1952 Cal 10 (A) the failure to observe the procedure is described as something more than an irregularity, I am of opinion that the matter really falls under the proviso to O. 9, R. 13. It is difficult to see to what cases the proviso can be applicable if it is not to apply to cases like this, where the provisions as to service of summons are not complied with strictly. In my opinion, the proviso applies to all cases in which there has been a failure to observe the provisions as to service of summons under O. 5. In all such cases if it be proved that the defendant had notice of the date of hearing in sufficient time to appear and answer the plaintiff's claim, it will be an irregularity, such as will be cured by the proviso.

(5) In view of the finding that the petitioner had knowledge of the date of hearing, the application for setting aside the 'ex parte' decree under O. 9, R. 13 was rightly dismissed by the Courts below.

(6) This revision fails and is dismissed with costs.

B/K.S. **Revision dismissed.**

A.I.R. 1953 MADRAS 529 (Vol. 40, C. N. 199)

MACK AND KRISHNASWAMI NAYUDU JJ.

Polavarapu Venkataswami, Appellant v. Nalluri Venkayya, Respondent.

Appeal No. 668 of 1948, D/- 22-10-1952.

(a) Limitation Act (1908), Art. 116 — Suit for damages for breach of covenant of title and quiet possession — Limitation.

After obtaining a decree against the defendant, where an auction-purchaser brings a suit for possession of property against the plaintiff who has purchased the property from the defendant and the auction-purchaser succeeds, the symbolical possession given to the auction-purchaser in an execution proceeding between the auction-purchaser and the defendant, unknown to the plaintiff, does not give the plaintiff a cause of action for his suit for damages for breach of title and quiet possession against the defendant. Such a suit being governed by Art. 116, limitation begins to run against the plaintiff from the date of the appellate decree obtained by the auction-purchaser against the plaintiff. AIR 1918 PC 151, Ref. (Paras 4, 5)

Anno: Lim. Act, Art. 116 N. 15 Pts. 18, 19.

(b) T. P. Act (1882), S. 55 — Breach of covenant for title and quiet possession — Suit by buyer for damages — Relevant date for assessment of damages — (Contract Act (1872), S. 73).

The principle of S. 73, Contract Act is made applicable to breaches of covenant of title even as regards immovable properties. In a suit instituted for recovery of damages for breach of covenant for title and quiet possession, the damages must be ascertained on the date of the suit and not on any other date prior to it. It is always open in such a case for the buyer to have two causes of action, to recover the consideration paid together with interest on the basis of failure of consideration or to recover damages on the breach of covenant by reason of the indemnity implied in the covenant of title. So the plaintiff, claiming damages for the loss of property, must be given the property or its value on the date when he makes the demand by instituting a suit. AIR 1930 All 771 and AIR 1921 Mad 384, Rel. on; AIR 1935 Mad 636 and AIR 1943 Mad 150, Disting. (Para 6)

Anno: T. P. Act, S. 55 N. 9 Pt. 56; Cont. Act, S. 73 N. 22.

K. Umamaheswaram, for Appellant; C. A. Vaidhyalingam and P. Rajeswaran, for Respondent.

CASES CITED:

(A) ('18) AIR 1918 PC 151: 46 Cal 670 (PC)
(B) ('30) AIR 1930 All 771: 52 All 604
(C) ('21) AIR 1921 Mad 384: 44 Mad 167
(D) ('35) AIR 1935 Mad 636: 68 Mad LJ 588
(E) ('43) AIR 1943 Mad 150: 207 Ind Cas 285

KRISHNASWAMI NAYUDU J.: The defendant is the appellant and the appeal is against the decree of the learned Subordinate Judge of Bapatla in O. S. No. 30 of 1947, the decree being for damages for breach of covenant of title and quiet possession. 2 Acres 84 cents of dry lands originally belonged to one Jalambhotlu, who leased it to the plaintiff's father for a period of 25 years under Ex. A-1 dated 4-10-1921 on an annual rental of Rs. 76 subject to a payment of quit rent out of the maktha amounting to Rs. 2-5-6. The property owned by Jalambhotlu was of the extent of 3 acres and odd. After the death of Jalambhotlu his widow Sitaramamma, who acquired absolute rights to the property under a will left by her husband, conveyed 2 acres 84 cents out of the 3 acres and odd owned by Jalambhotlu to the defendant under a sale deed, Ex. B-2 dated 24-6-1932 for a consideration of Rs. 1250. The property was already subject to an attachment before the judgment in O. S. No. 170 of 1932, a suit instituted by one Subbamma against Sitaramamma, for recovery of a sum of Rs. 500. Subsequently a decree was also passed in the suit. On 15-9-1933 the defendant conveyed 2 acres and 84 cents of lands to the plaintiff under the original of Ex. B-3 for Rs. 1200. Out of the consideration, a sum of Rs. 500 was received by the defendant for the purpose of discharging the decree debt in O. S. No. 170 of 1932, in which there was already an attachment pending against the property. But after the sale deed, obviously, the defendant having received the amount of Rs. 500 did not pay and satisfy the decree in O. S. No. 170 of 1932 and further proceedings in execution of the decree appear to have been taken and two acres and 84 cents of lands were sold on 9-11-1936 and symbolical possession was taken in favour of the auction-purchaser. The defendant instead of paying and settling the decree in O. S. No. 170 of 1932 appears to have launched himself in litigation by filing a claim petition and after dismissal of the claim petition by instituting a claim suit O. S. No. 508 of 1933 in the District Munsif's Court, Ongole, which was dismissed on 28-11-1935. He filed an appeal against that decision, A. S. No. 4 of 1936, which likewise was dismissed on 16-8-1937. Not content with this, he appears to have filed S. A. No. 142 of 1938 in this Court, which received a similar fate of dismissal on 11-2-1941. It may be mentioned that in not one of these proceedings started by the defendant, the plaintiff was a party.

(2) The auction-purchaser by the strength of his purchase of the property in court auction instituted O. S. No. 112 of 1943 in the District Munsif's Court, Ongole, against the plaintiff for recovery of the makthas or the lease amount due upto 1943, i.e., a total sum of Rs. 612-12-0. The plaintiff resisted the suit on the strength of his title and possession by the purchase under the original of Ex. B-3, but the suit was decreed in favour of the auction-purchaser on 30-9-1943. The plaintiff appealed in A. S. No. 31 of 1944 on the file of the Subordinate Court of Bapatla and the appeal was dismissed on 16-1-1945. The period of 25 years lease also expired on 4-10-1946 and the auction-purchaser took actual possession on 22-3-1947. The present suit for breach of covenant of title and quiet possession was instituted on 11-4-1947. The plaintiff claimed a sum of Rs. 9500 as damages for the breach. The suit was resisted by the defendant in his written statement. He denied that there was any covenant of title and on the other hand pleaded that there was an agreement not to claim compensation or damages in regard to warranties of title, possession and enjoyment except in regard to any alienations made by himself of the suit property and also raised a plea of limitation besides questioning the quantum of damages claimed by the plaintiff. The lower Court held in favour of the plaintiff and decreed the suit for Rs. 9500 and hence this appeal.

(3) There contentions were urged on behalf of the appellant. All the three contentions that were

raised in the lower Court were urged before us and as regards the first of the contentions that there was no covenant of title and quiet possession and enjoyment, there was not much argument by the Counsel on behalf of the appellant, as undoubtedly there could not be any doubt that in this case even apart from any specific covenant as to title in the document, by virtue of S. 55, cl. (2), Transfer of Property Act, the defendant must be deemed to have contracted with the plaintiff, that the interest, which he professed to transfer under the sale deed, Ex. B-3, to the plaintiff subsisted and that he had power to transfer the same. There is always an implied covenant as to title and quiet possession and enjoyment in all sales of immovable properties, unless it is shown that there is an express contract to the contrary by the terms of the document, such covenant for title would subsist and would enure to the benefit of the purchaser, if there should be a breach of that covenant at any subsequent stage. Very properly the learned Counsel did not press his argument on this issue and we have no doubt in holding that there was such a covenant. An attempt was made in the lower Court to cull out from the terms of Ex. B-3 a contract to the contrary, which very properly has been rejected by the lower Court as there could not be any means of any contract to the contrary which could be ascertained from the terms of Ex. B-3.

(4) The only two other questions that are required to be determined in this appeal are whether the suit is barred by limitation and whether the damages awarded are excessive. On the first of these questions as to limitation, it is contended that the starting point of limitation must be taken to be 9-11-1936, the date of sale held in execution of the decree in O. S. No. 170 of 1932, & in any event 11-3-1937, the date when the auction-purchaser purports to have obtained symbolical delivery of the property. In our view, none of these dates should be relied on to fix the cause of action. As whatever might have been the declarations made by the Court as to title relating to this property, such a declaration was made in the absence of the plaintiff and in the proceedings to which the plaintiff was not a party and it could not be expected that in so far as he was concerned the title has been decided as against him. Equally so, as regards possession, since what was delivered was only symbolical possession as nothing more could be given to the auction-purchaser. And it is not in evidence that the plaintiff was aware of this delivery of possession symbolically and in the absence of such evidence, it is not safe to hold that the cause of action had arisen on the date of the order or on the date of the effecting of this symbolical delivery to the auction-purchaser, which was on 11-3-1937.

(5) It is, therefore, for consideration as to what will be the relevant date on which the plaintiff's cause of action could be said to have arisen. For the first time in 1943 by the institution of O. S. No. 112 of 1943 by the auction-purchaser for the recovery of the rent on the strength of his purchase at the court auction, the plaintiff's title to the property was in issue and he contested the suit on the strength of his own title and a decision was given against him by the first Court on 30-9-1943. The matter was taken up in appeal and finally concluded on 16-1-1945, when it could reasonably be said that the matter has been conclusively decided against the plaintiff in so far as the title to the property was concerned. Article 116, Limitation Act which is applicable to a case of this kind provides for a period of six years from the date of the breach of the covenant, the covenant here being not only the covenant for title but the covenant for possession also. If the cause of action is within six years from any of these two dates, the plaintiff would perfectly be in time. We are inclined to hold that until the determination of the appeal on 16-1-1945, it could not reasonably be held that the title of the plaintiff has been conclusively determined against him and found in favour of the auction-purchaser, in view of the plaintiff having filed an appeal questioning the decision of the first Court. In these proceedings it must be stated that the plaintiff was in fact fighting out the case of the defendant and trying his best to see if he could have his title established against the auction-purchaser in O. S. No. 170 of 1932, though the defendant had failed initially in the claim petition and subsequently in the proceedings which he instituted and conducted. Our attention is however invited to a decision in —'Juscurn Boid v. Pirthichand Lal', AIR 1918 PC 151 at p. 153(A), where the following observations of the Privy Council are relied upon in support of the contention that the cause of action must be deemed to have arisen on the date of the disposal of the suit in the first Court. Sir Lawrence Jenkins delivering the judgment observes at p. 153 as follows :

> "Their Lordships feel no doubt that as between these two decrees (a decree of the first Court and a decree of the appellate Court), this is the correct view, for whatever may be the theory under other systems of law, under the Indian Law and procedure an original decree is not suspended by presentation of an appeal nor is its operation interrupted where the decree on appeal is one of dismissal."

Sir Lawrence Jenkins proceeding observed :

> "There may be circumstances in which a failure to get or retain possession may justly be regarded as the time from which the limitation period should run, but that is not the case here."

So either the date of the first decree or the date when the plaintiff failed to retain possession would be relevant for the purpose of ascertainment as to the relevant dates of cause of action under Art. 116, Limitation Act. In either case, the present suit is in time, the suit having been instituted on 11-4-1947 within six years from 30-9-1943 or from 22-3-1947, which was the date when the auction-purchaser actually took vacant possession. The suit is well within the time provided by law.

(6) The question as to whether the damages are excessive would to a great extent depend upon the determination of the question as to what should be the relevant date on which the damages have to be ascertained, that is, as to the date on which the value of the lands has to be fixed. Mr. Umamaheswaram, the learned counsel for the appellant contends that the date of delivery of possession to the auction-purchaser 11-3-1937, that is when symbolical delivery was made, should be the date on which the market-vaule of the lands has to be fixed. In the view which we have already taken, that would not be the proper date to be relied upon for the purpose of limitation. We are unable to agree that that date should be taken for fixing the market-value of the property. The only other alternative which the counsel for the appellant suggests as the relevant date is 30-9-1943 when the decree for the maktha was passed in the suit instituted by the auction-purchaser. As regards this question, the date for the purpose of limitation, which ordinarily will be the date of breach of the covenant of title, could not be treated as the date also for assessing the

damages, that is for fixing the market-value of the lands in respect of which the breach has been occurred. The principle of S. 73, Contract Act is made applicable to breaches of covenant of title even as regards immovable properties, and it is sought to be contended placing reliance on S. 73, Contract Act that the quantum of damages must be ascertained on the date of the breach as in a contract for sale of goods, where there is a breach of contract, the difference between the contract price and the market price on the date of the breach would be the ordinary mode of assessing the damages. But in applying the principle to breach of covenant of title relating to immovable properties, it is necessary to consider whether Courts are prevented from holding that the relevant date would be the date on which he makes the claim for damages, that is the date of the suit. All that S. 73 provides is that when a contract has been broken, the party who suffers by such breach is entitled to receive, from the party who has broken the contract, compensation for any loss or damage caused to him thereby, which naturally arose in the usual course of things from such breach. Applying the principle one has to see what is it that the plaintiff has lost by the failure on the part of the defendant to implement the covenant for title regarding the sale of the property to the plaintiff. What the plaintiff has lost is the property which he is entitled to get back, but which he could not secure for the reason the defendant is not in a position to deliver back possession of the property or to show good title to it. It is therefore the property, that the plaintiff has lost and which he must get back and when asked for it he must get it or its value in terms of money, and when therefore a suit is instituted for recovery of damages, the damages must be ascertained on the date of the suit and not on any other date prior to it. It is always open in cases of breaches of covenant of title or quiet possession, for the plaintiff to have two causes of action, to recover the consideration paid together with interest on the basis of failure of consideration or to recover damages on the breach of covenant by reason of the indemnity implied in the covenant of title. When the plaintiff has recourse to the latter i.e., claiming damages for the loss of property, he must be given the property or its value on the date when he makes the demand by instituting a suit. We consider that to be the reasonable and suitable view to be taken in cases of this kind relating to damages arising out of the breach of covenant of title and our view finds support in the decisions reported in —'Mahomed Siddiq v. Muhammad Nuh', AIR 1930 All 771(B), and in —'Dhadha Sahib v. Muhammad Sultan Sahib', AIR 1921 Mad 384(C). The learned counsel, however, relied on the decisions reported in —'Alagarappa Reddiar v. Alagirisami Naick', AIR 1935 Mad 636(D) and in —'Muthu Goundan v. Mottayan', AIR 1943 Mad 150(E), but the question there did not arise in the manner in which it has been raised in the present case. In those cases the contention was as to whether the damages were to be ascertained on the date of the sale or on the date of the breach and not on the date of the dispossession or on the date of the suit as is the case before us. We have, therefore, to find out what the market-value of this property would be on 11-4-1947, the date of the suit.

(7) The evidence as regards the value is discussed by the learned Subordinate Judge and he has arrived at the figure of Rs. 9500 mainly basing his conclusion on two documents of sale, Exs. A-10 and A-11, both dated 12-10-1946, of lands of the same quality and which are situated adjacent to the suit lands. Ex. A-10 is a sale of about 1½ acres of land to one P. Rangiah for Rs. 7000, Rs. 4000 having been paid by way of cash and Rs. 3000 by way of promissory note executed in favour of the vendor. Ex. A-11 is in favour of P. W. 2 of an extent of 97 cents for a price of Rs. 4000. On the basis of these two sale deeds there can be no doubt that the sum of Rs. 9500 is the reasonable figure that could be fixed as the value of the property and as claimed by the plaintiff. It is pointed out by Mr. Umamaheswaram, that in or about 1940 or 1941 from the evidence of the witnesses P. Ws. 3 and 4 it is evident that an acre was sold for Rs. 400 and for Rs. 1000. No sale deeds are produced in respect of these transactions; but accepting the evidence of these witnesses that in 1940 or 1941 the prices of these properties ranged from Rs. 400 to Rs. 1000 per acre, that would not be sufficient to hold that the prices continued at the same rate in 1947 when the suit was instituted. The evidentiary value of Exs. A-10 and A-11 cannot be underestimated. It is suggested however that in Ex. A-10, part of the consideration was paid by way of promissory note, which is not of any consequence, since it is ordinarily common in land transactions that part of the price is paid in cash and the balance of the price by way of promissory note. It is also pointed that P. Ws. 1 and 2 are near relations of the plaintiff and it is likely that these two documents might have been brought into existence to support the claim of the plaintiff in this suit. But the fact remains that a sum of Rs. 4000 in cash has been paid by the vendor in Ex. A-11 before the Sub-Registrar of Assurances, which it is very difficult for the appellant to get over. That these dry lands have risen phenomenally in value is evident from the fact that they have been used for raising tobacco, which is a paying commercial crop, in this part of the State and this is also evident from the fact that though the same lands were leased to the plaintiff's father for a sum of Rs. 76 per annum, after the auction-purchaser secured possession he appears to have leased it for an amount of Rs. 300. Mr. Umamaheswaram relied on this prior evidence on the side of the plaintiff and contended that the proper mode of ascertainment of the market-value in this case should be by capitalising the annual rental which the property was fetching. Capitalising the annual rental value of Rs. 300 at 20 times, he submitted that a sum of Rs. 6000 would be the reasonable market-value. We would have been inclined to take the annual rental value as the basis and fix the market-value, but for the fact that there is the other evidence in this case which gives us a clear indication of the market-value of the lands in the locality on the relevant date in about 1946 or 1947. Further it must be stated that there is no evidence on the side of the defendant to disprove that the value of the lands has not increased as has been shown in this case by the evidence on behalf of the plaintiff and the documents relied by him in support of his contentions. We do not therefore feel justified in disagreeing with the valuation fixed by the lower Court at Rs. 9500, which appears to be the reasonable market-value on the date of the suit.

(8) In the result the appeal is dismissed with costs.

B/V.S.B. Appeal dismissed.

A.I.R. 1953 MADRAS 532 (Vol. 40, C. N. 200)

RAMASWAMI J.

Subbaiah Maistry, Accused-Petitioner v. The Corporation of Madras by its Sanitary Inspector, S. Brady, 21 Divn., Aynavaram, Complainant-Respondent.

Criminal Revn. No. 505 and Cri. Revn. Petn. No. 474 of 1952, D/- 5-11-1952.

Municipalities — Madras City Municipal Act (4 of 1919), Ss. 287, 349(13), 357 — Licence fee or tax — Essential difference between licence fee and tax pointed out — Held that sum of Rs. 5/- levied upon every dhoby inside the Madras Corporation was a licence fee and not a tax: Case law discussed. (Paras 5, 16)

S. Mohankumara Mangalam and A. Madhavan, for Petitioner; State Prosecutor, for the State.

CASES CITED:
(A) ('52) AIR 1952 Mad 764: 1952-2 Mad LJ 410
(B) ('52) AIR 1952 Mad 395: 1952-1 Mad LJ 208
(C) ('31) AIR 1931 PC 217: 9 Rang 440 (PC)
(D) ('30) AIR 1930 Rang 282: 8 Rang 143
(E) ('30) AIR 1930 Mad 55: 57 Mad LJ 71: 52 Mad 764
(F) ('31) AIR 1931 Mad 497: 61 Mad LJ 748
(G) ('32) 1932 Mad WN 873
(H) ('43) AIR 1943 Mad 191: ILR (1943) Mad 521
(I) (1937) 300 US 290: 81 Law Ed 653

ORDER: The point taken by Mr. Mohan Kumaramangalam in this case is whether the fee of Rs. 5/- levied upon every dhoby inside the Madras Corporation is a licence fee or a tax.

(2) There is no dispute before me that if this levy is construed as a tax this revision has got to be allowed and if this is construed as a licence fee this revision has got to be dismissed.

(3) In order to determine whether this sum of Rs. 5/- levied is a licence fee or a tax — I need not point out that this sum of Rs. 5/- is levied as a licence fee — we have got certain tests which have been elaborately gone into and laid down by my Lord the Chief Justice in — 'Varadachari v. State of Madras', AIR 1952 Mad 764 (A). The learned Chief Justice has reviewed the entire case-law on the subject and has delimited the boundary line between a licence fee and a tax.

(4) The learned Chief Justice points out:

"It is now well established that there is a fundamental difference between a tax and a licence fee. The issue of licences to regulate particular branches of business or specified trades or occupations and other matters is part of what in American Constitutional law is called the 'police power' of the State. See — Anantakrishnan v. State of Madras', AIR 1952 Mad 395 (B). For the grant of a licence a fee may be charged to cover probable expenses; which may have to be incurred for the regulation of the particular trade or business or calling in respect of which the licence is required. The licence fee is not intended to raise revenues for the general purpose of the authority levying the fee. For such purposes the levy should be in the shape of a tax. The licence fee must be reasonable, whereas, a tax need not be."

(5) Courts have often dealt with the question whether a particular licence fee is reasonable or not. Though, ultimately the decision in each case must depend upon the particular facts of that case, certain general tests have been formulated to decide whether a particular fee is reasonable in the circumstances. In laying down these general principles Courts have always kept in view the essential difference between a licence fee and a tax, namely, that in the case of a licence fee imposition is intended to reimburse the authority in any amount expended by it in respect of the particular business or matter which is intended to be regulated, whereas a tax is the recognised method of raising revenues for general purposes. It is useful to refer to some of the decided cases, on the point and we shall begin with the ruling of the Privy Council in — 'Pazundaung Bazaar Co., Ltd. v. Municipal Corporation of Rangoon', AIR 1931 PC 217 (C). That was given on an appeal from the judgment of the Rangoon High Court reported in — 'Municipal Corporation of Rangoon v. Pazundaung Bazaar Co., Ltd.', AIR 1930 Rang 282 (D). Under the City of Rangoon Municipal Act the Corporation had power to charge licence fees for private markets. The question was whether the licence fee imposed was unreasonable. Heald, Offg. C. J., rejected the contention of the owners of the private markets who were protesting against the levy that the only charges recoverable by way of licence fees were the cost of the papers on which the licences and receipts were printed together with the costs of printing and writing thereon and the cost of such inspection as was directly connected with the licences themselves. He held (and Mya Bu, J. concurred with him) that the licence fee may reasonably cover the cost of all special services necessitated by the duties and liabilities imposed on the corporation in respect of the supervision and regulation of private markets. The Privy Council agreed with this statement of law.

(6) In — 'Corporation of Madras v. Spencer & Co., Ltd.', AIR 1930 Mad 55 (E), this Court held that a licence fee imposed by the Corporation of Madras for storing spirits was unreasonable because the imposition was not with a view to pay for the expenses in connection with the licences but was obviously done to increase the revenue of the Corporation from liquor. The learned Judges accepted the view of the trial Judge, Beasley J. (as he then was) that licence fees were leviable as compensation to the Corporation for the expenses incurred in the issue of licences and the general regulation of the trades and other occupations which were licensed and that there must be some relation between these expenses and the amount of fees leviable. In the case before them they found on the evidence which had been adduced that the expenses of supervising the places where foreign liquor was stored were practically nil.

Reilly J. enunciated two general principles which may be useful to determine whether licence fees can be held to be reasonable or not, namely:

"If we accept the proposition that the power of charging licence fees cannot be used for taxation, then we must say that as a whole the fees charged by the Corporation must not be very much in excess of what the duties cast upon them and their staff in connection with the licences cost them. There is the cost of issuing the licences; there is

the cost of inspecting the premises to see whether they are suitable for the purpose proposed; and there is the subsequent cost of inspecting the premises to see that they are being used properly and that the conditions and restrictions imposed by the Commissioner are observed. But, roughly speaking, if the fees are charged at so high a rate that as a whole they bring in very much more than the cost of these operations to the Corporation, then I think, we can rightly say that they are unreasonable. There is another principle. Although it is almost impossible for the Corporation itself to ascertain, when they are issuing a number of licences to persons engaged in different trades and occupations, exactly what is the cost of any particular licence or of licences for persons engaged in particular trades or occupations — and certainly we could not attempt anything of that sort — yet, surely it would be unreasonable if they so fixed the fees that the whole cost incurred by them in connection with all the licences or a grossly disproportionate part of it was imposed on one particular trade or a few particular trades. These principles, I think, may be of help in ascertaining whether a particular fee is reasonable or not."

Of course it is not for a Court to minutely assess and fix what in its opinion is the proper fee. All that the Court can do is to hold whether a particular fee is reasonable or not.

(7) Practically the same principles were reiterated in a subsequent decision of this Court in the — 'Municipal Council, Kumbakonam v. Ralli Brothers', AIR 1931 Mad 497 (F). It was held that the licence fee should be commensurate with the extra cost entailed by granting the licences and exercising such supervision as was necessary to see that its terms were complied with. But the fees should not be so assessed as substantially to contribute to the general revenues of the local body.

(8) The decisions above cited were all discussed in — 'Kunhambu v. Local Fund Overseer, Chirakkal', 1932 Mad WN 873 (G), in which it was again laid down that the licence fee should not be converted into a tax for the purpose of raising revenue and the licence fee should bear a definite and well-recognised relation to the expenses incurred by the licencing authority.

(9) The decision in — 'Indian Sugars and Refineries Ltd. v. Municipal Council, Hospet', AIR 1943 Mad 191 (H), relied upon by the learned Advocate-General does not lay down any different principle. The following observations of Wadsworth J., are apposite :

"It is, we think, well settled that a licence fee for carrying on a particular trade or industry should not be regarded a form of taxation the extent of which is to be governed purely by revenue considerations. The licence fee should bear as nearly as possible a relation to the cost of issuing the licence and the cost of supervising the trade or of any special measures rendered necessary by the character of that trade. We doubt whether the Municipality would be justified in increasing the licence fee chargeable upon a particular industry merely by reason of the cost of ordinary municipal services to which that industry is entitled by virtue of its position as a tax-payer in the Municipality. But if the industry involves special sanitary precautions, a special supervising agency or such like expenditure, it is, we think, reasonable to take this expenditure into account in fixing the amount of the fee. When a supervision agency is necessary for a number of industries, it will always be difficult to say how the cost is to be apportioned and, so long as the apportionment is to be made on a reasonable basis it is not for the Courts to interfere with the way in which it has been achieved."

(10) Substantially similar principles have been laid down by the Supreme Court of the United States. It is sufficient to cite one instance, namely, the decision in — 'Ingles v. Morf', (1937) 300 US 290: 81 Law Ed 653 (I), in which a permit fee was held to be invalid because it bore no reasonable relation to the total cost of regulation to defray which it was collected.

(11) Bearing these principles in mind, let us examine the facts of the present case on the foot of the additional evidence which was called for and which has been submitted.

(12) The evidence on record clearly shows the following facts. Individual dhobies are not being licensed. But when soiled and washed clothes are stored and clothes are ironed, a licence fee is imposed with reference to the premises wherein this laundry business is carried on. The authority for the Madras Corporation for doing so is to be found in the publication filed by the learned State Prosecutor under the style and name of "Corporation of Madras, Bylaws and Rules under the Madras City Municipal Act and the Public Health Act" printed at Rathanam Press, University Printers, 11 Badrian Street, G. T. Madras, in which at page 66 we find printed the bylaws under S. 349 (13), Madras City Municipal Act, 1919, regulating the premises used for washing soiled clothes and keeping soiled clothes for the purpose of washing them and keeping washed clothes. There is no doubt that the accused Subbiah Maistry in this case, on 16-2-1952 and subsequently had run a laundry in a hut at S. S. Devar, 3rd Street, wherein he resides without a licence from the Commissioner of the Madras Corporation as required by S. 287, Madras City Municipal Act and that he thereby committed an offence punishable under S. 357 of the said Act. Mr. S. Brady, the Sanitary Inspector attached to Division No. 21, Aynavaram, has given evidence that he inspected the hut occupied by the accused and he found that the accused was storing soiled and washed clothes and that he was also ironing the clothes. A notice was, therefore, issued and the accused not having taken out a licence this prosecution has been launched. Therefore, the only point for determination is whether the fee of Rs. 5/- imposed has to be construed as a licence fee or a tax.

(13) The evidence in this case clearly shows that this sum of Rs. 5/- is only a licence fee and not a tax and here are the reasons.

(14) The Corporation has filed a statement Ex. P. 2 which shows (i) the designation and number of officers employed or connected with the licensing of trades; (ii) The total amount of expenditure incurred by the Corporation by way of pay and allowances; (iii) The percentage of work attributable to licensing; (iv) The proportionate cost for the work rendered by them; the figures being taken out of the budget estimate for 1952-1953 (Ex. P. 3). Ex. P. 2 does show the amount derived from

building licences. Ex. P. 5 is the schedule of licence fees now in force. The substance of this information can be summarized as follows: There are 724 licensed laundries in Madras. The total fee collected from them at Rs. 5/- per laundry is Rs. 3620. The total fee collected by way of licence fees in respect of all trades except private markets is Rs. 6,35,994. The total expenditure involved in the licensing of trades, businesses, etc., is Rs. 7,10,000/- as shown in Ex. P. 2. The percentage of expenditure connected with the licensing and supervision resulting therefrom shown in these statements makes out clearly that the licence fee collected does not result in raising revenue for the general purposes of the Corporation but covers only the probable expenses which are being incurred for the regulation of this particular calling for which licence is required.

(15) The Corporation through P. W. 2 has indicated the services rendered in the shape of granting of licences and exercising such supervision as is necessary to see that its terms are complied with and these give us an indication of the cost entailed. The evidence of P. W. 2, the Assistant Revenue Officer, shows the elaborate and multiferious work entailed in the issue of licences and the supervising work relating thereto which falls upon the Health Department, the Revenue Department, the Electricity Department, and the Works Department. Issue of licences, entails previous enquiries, inspections, verifications and serving of various processes, considerable expenditure of stationery and printing and book-keeping are involved. Then after the issue of licences the premises are inspected frequently throughout the year to see that the conditions of the licence are observed. In the case of refusal of licence, the party can appeal to the Standing Committee whose members use the Corporation motor van for the purpose of inspection. Then when there is failure or non-compliance with the terms of licence or when licences are not taken out, again much work is involved on the supervising agency in the matter of launching prosecutions and carrying them through various Courts. In other words, the evidence of P. W. 2 shows and the figures given by the Corporation indicate that the licence fee collected does not cover more than the expenses involved in the licensing of the business and that no part of this amount becomes a part of the general revenue of the Corporation, thereby making a licence fee a substitute for a tax.

(16) In the result, on the evidence on record I have come to the conclusion that the sum of Rs. 5/- levied upon every dhoby inside the Madras Corporation is a licence fee within the ambit of the decision in — 'AIR 1952 Mad 764 (A)' and is not a tax. This revision case is dismissed.

B/D.H. Revision dismissed.

A.I.R. 1953 MADRAS 534 (Vol. 40, C. N. 201)

RAMASWAMI J.

In re Pachiripalli Satyanarayana, Accused-Petitioner.

Criminal Revn. Case No. 189 and Cri. Revn. Petn. No. 175 of 1952, D/- 9-9-1952.

Madras Prohibition Act (10 of 1937), S. 4(i) (a) — "Possession" — Its meaning and implication — Possession by one of joint family — Presumption as to — (Evidence Act (1872), S. 114, ill. (a)) — (Words and Phrases).

The word 'possession' implies a physical capacity to deal with the thing as we like to the exclusion of every one and a determination to exercise that physical power on one's own behalf. It implies dominion and consciousness in the mind of the person having dominion over an object that he has it and that he can exercise it. Possession must be conscious and intelligent possession and not merely the physical presence of the accused in proximity or even in close proximity to the object. (Paras 7, 11)

In the case of a family living jointly in the same house the head of the family is presumed to be in possession of any illicit article found in the house. The presumption is rebuttable and the weight attached to it must vary according to circumstances. It can be easily rebutted by showing that the room or receptacle in question was in the particular and exclusive possession of one member of the joint family. Similarly, where two or more persons are charged with joint illegal possession it is incumbent on the State to prove (a) that each of the accused had either physical or constructive possession of the property or (b) that one or more of them had possession thereof either physical or constructive on behalf of themselves and the other accused to the knowledge of the latter. Case law referred. (Para 12)

L. S. Veeraraghava Ayyar, for Petitioner; Public Prosecutor, for the State.

CASES CITED :

(A) ('29) AIR 1929 Rang 121: 7 Rang 11: 30 Cri LJ 753
(B) ('28) AIR 1928 Lah 272: 29 Cri LJ 481
(C) ('33) AIR 1933 All 437: 34 Cri LJ 930
(D) ('34) AIR 1934 Lah 718: 36 Cri LJ 300
(E) ('34) AIR 1934 Oudh 200: 35 Cri LJ 973
(F) ('30) AIR 1930 Cal 668: 32 Cri LJ 245
(G) ('23) AIR 1923 Mad 50 (1): 45 Mad 842: 24 Cri LJ 152
(H) ('40) AIR 1940 All 449: ILR (1940) All 657: 42 Cri LJ 59
(I) ('42) AIR 1942 Oudh 270: 43 Cri LJ 406
(J) ('36) AIR 1936 Lah 758: 37 Cri LJ 939
(K) ('37) AIR 1937 Pesh 73: 38 Cri LJ 838
(L) ('14) AIR 1914 Cal 396: 40 Cal 898: 23 Ind Cas 25 (SB)
(M) ('31) AIR 1931 Oudh 115: 32 Cri LJ 699
(N) ('41) AIR 1941 Nag 296: 43 Cri LJ 62
(O) ('36) AIR 1936 Sind 44: 37 Cri LJ 546
(P) ('29) AIR 1929 Sind 9: 29 Cri LJ 924
(Q) ('37) AIR 1937 Sind 154: 38 Cri LJ 796
(R) ('07) 29 All 598: 6 Cri LJ 23
(S) ('93) 15 All 129: 1893 All WN 48
(T) ('49) 4 Dom LR (All) 264
(U) ('47) AIR 1947 Sind 192: 48 Cri LJ 556
(V) ('34) AIR 1934 Bom 16: 35 Cri LJ 523
(W) ('30) AIR 1930 Lah 884: 31 Cri LJ 352
(X) ('42) AIR 1942 Cal 464: 43 Cri LJ 793
(Y) ('49) AIR 1949 Assam 73: 51 Cri LJ 51
(Z) ('35) AIR 1935 Pesh 68: 36 Cri LJ 1437
(ZA) ('34) AIR 1934 All 548: 35 Cri LJ 428
(ZB) ('29) AIR 1929 All 705: 30 Cri LJ 523
(ZC) ('31) AIR 1931 Mad 490(2): 32 Cri LJ 967
(ZD) ('37) AIR 1937 Rang 434: 39 Cri LJ 278
(ZE) ('15) AIR 1915 Cal 719: 42 Cal 1153: 16 Cri LJ 9
(ZF) ('34) AIR 1934 All 129: 35 Cri LJ 1395

ORDER: This is a criminal revision case which has been filed against the conviction and sentence of the learned District Magistrate, Visakhapatnam in C. A. No. 30 of 1951, confirming the conviction and modifying the sentence in C. C. No. 1046 of 1950, Sub Magistrate, Visakhapatnam.

(2) The facts are: The petitioner-accused before us was the Head Establishment Clerk, D. T. O's Office, Bengal-Nagpur Railway. He is an elderly man who is suffering from heart trouble and is also said to be otherwise sickly. This accused has got a grown up son who has been examined as D. W. 4 in this case and that son's wife is one Jayalakshmi, who has not been examined. The accused and his son and daughter-in-law all lived in the same house and the evidence is that they are undivided and the accused is the tenant of that house. It is in these circumstances that the following incident took place.

(3) P. W. 1 Sri G. N. Brahma, who is the Inspector of the Special Police Establishment of the Government of India with headquarters at Puri on information received in regard to certain other matters, with which we are not concerned here and which might well be guessed, obtained a search warrant from the District Magistrate, Visakhapatnam, on 4-12-1949, and searched the house of the accused.

(4) In the course of the search on 5-12-1949 in the presence of the then Stationary Sub Magistrate, who has been examined as P. W. 5, Mr. S. N. Singh, Section Controller of B. N. Railway, Waltair, who was residing close to the house of the accused and who has been examined as P. W. 3, the local Sub-Inspector Mr. C. V. Naidu and the Railway Sectional Officer, Mr. S. J. Naidu attached to the Special Folice Establishment with headquarters at Puri and who has been examined as P. W. 2, 2½ bottles of Haywoods Fine Brandy, VAT No. 4, were found in the house of the accused. The half bottle M. O. 1 was found in the bottom drawer of the mirror almirah in the southernmost room of the house of the accused. The full bottles with the original company seals were found in the iron safe in the same room. They were seized along with other articles concerned in the other case for which the search was made in the first instance and a search list Ex. P. 1 was prepared. These bottles of brandy were handed over along with a report the same day by the Special Establishment Police Inspector P. W. 1 to the local Prohibition Sub-Inspector Mohamad Lal Sherif, examined as P. W. 4. This prohibition Sub-Inspector came to the spot took up the investigation and prepared another Panchayatnama and which has also been signed by the aforesaid persons. It is not disputed that before the search the person of the searching officers was searched by the Magistrate as well as by the outside witness Mr. S. N. Singh. The accused was present at the time of the search. On 5-12-1949 the Prohibition Sub-Inspector enquired the accused in regard to the recovery of these bottles of brandy and possession of the same by him. The accused in Ex. P. 4 stated that he was suffering from fever and that he was unable to give any statement. The accused was again called upon to appear and give a statement on 7-12-1949 and in regard to which also he sent a report Ex. P. 5 that he was still sick and was unable to give a statement.

(5) On the accused being charge-sheeted for an offence under Section 4(i)(a), Madras Prohibition Act that he was found to have been in possession of two full bottles of brandy in his iron safe and a half bottle in a mirror almirah in his house without being covered by permit, he came forward with the version that these bottles were found in the southern room of the house and that his only son, who is D. W. 4, and his wife Jayalakshmi are living separately in that house in that separate room and that the keys for these receptacles were in the possession of Jayalakshmi and that the accused had nothing to do with that southern room or the receptacles and that he should not be construed to have been in possession of these brandy bottles within the meaning of the Madras Prohibition Act rendering him liable to be convicted under S. 4(i)(a).

(6) Therefore the short point for determination in all the Courts is whether the prosecution has brought home possession of these brandy bottles to this accused.

(7) The word 'possession' as can be summarized from Chaps. 13 and 14 (Pages 236-267) of Sir John Salmond's Jurisprudence, Chap. 11 (Pages 162-174) of Holland's Jurisprudence and Markby's "Elements of Law", Chap. 9 (Pages 177-203) implies a physical capacity to deal with the thing as we like to the exclusion of every one and a determination to exercise that physical power on one's own behalf. These two elements, physical and mental, are described by Roman Jurists as 'corpus' and 'animus' respectively.

(8) But as the Authors of the Indian Penal Code point out in their Note appended to their draft of the Indian Penal Code

> "We believe it to be impossible to mark with precision by any words the circumstances which constitute possession. It is easy to put cases about which no doubt whatever exists and in which the language of lawyers and of the multitude would be the same. It will hardly be doubted for example that a gentleman's watch lying on the table in his room is in his possession, though it is not in his hand and though he may not know whether it is on his writing table or on his dressing table; as little it will be doubted that a watch which a gentleman lost a year ago on a journey and which he has never heard of since is not in his possession. It will not be doubted that when a person gives a dinner his silver forks while in the hands of guests are still in his possession; and it will be as little doubted that the silver forks are not in his possession when he has deposited them with a pawn-broker as a pledge. But between these extreme cases there will be many cases in which it will be difficult to pronounce with confidence whether the property is or that it is not in a person's possession."

(9) A person may have possession of a thing through his representative provided (i) the representative has physical control over the thing; (ii) the physical control is exercised on behalf of the principal; and (iii) the principal agrees to such exercise.

(10) It is not necessary, however, as shown in the above illustration that this physical power of dealing with the thing should be retained at every moment of time. It would be enough for the purpose of retaining possession if that physical power can be produced at any moment the possessor wishes it. Possession is

lost with the loss of physical control. Similarly, it is not necessary that the intention to possess should be constantly in the mind of the person exercising possession. It is enough if the determination to keep is not lost. As soon as that mental element ceases to exist the possession is lost.

(11) The case-law on the subject to which we have got to resort to — because the Indian Penal Code does not define the word 'possession' though S. 27 says that when property is in the possession of a person's wife, clerk or servant on account of that person, it is in that person's possession — is not always clear. But if these cases are rightly studied the principle to be deduced therefrom regarding possession is that a man has not the possession of that the existence of which he is unaware of. Possession implies dominion and consciousness in the mind of the person having dominion over an object that he has it and that he can exercise it. Possession must be conscious and intelligent possession and not merely the physical presence of the accused in proximity or even in close proximity to the object: — 'Shwe Kyo v. Emperor', AIR 1929 Rang 121 (A); — 'Dula Singh v. Emperor', AIR 1928 Lah 272 (B); — 'Ram Charan v. Emperor', AIR 1933 All 437 (C); — 'Kuldipchand v. Emperor', AIR 1934 Lah 718 (D); — 'Lakhan Singh v. Emperor', AIR 1934 Oudh 200 (E); — 'Cyril C. Baker v. Emperor', AIR 1930 Cal 668 (F); — 'Jayaramulu Naidu v. Emperor', AIR 1923 Mad 50 (1) (G); —'Emperor v. Abdul Rahman', AIR 1940 All 449 (H); — 'Surju Prasad v. Emperor', AIR 1942 Oudh 270 (I) and — 'Sundar Singh v. Emperor', AIR 1936 Lah 758 (J).

(12) The difficulty under this head arises when prohibited articles are recovered from places under joint family possession. It is now, however, well settled that in the case of a family living jointly in the same house the head of the family is presumed to be in possession of any illicit article found in the house: 'Emperor v. Mir Ahmad', AIR 1937 Pesh 73 (K); — 'Weston v. P. M. Das', AIR 1914 Cal 396 (SB) (L); — 'Emperor v. Mast Ram', AIR 1931 Oudh 115 (M); — 'Harbans Singh v. Emperor', AIR 1941 Nag 296 (N). The presumption is rebuttable and the weight attached to it must vary according to circumstances. It can be easily rebutted by showing that the room or receptacle in question was in the particular and exclusive possession of one member of the joint family. Similarly, where two or more persons are charged with joint illegal possession it is incumbent on the State to prove (a) that each of the accused had either physical or constructive possession of the property or (b) that one or more of them had possession thereof either physical or constructive on behalf of themselves and the other accused to the knowledge of the latter: — 'Narumal Dayaldas v. Emperor', AIR 1937 Sind 44 (O); — 'Mataro v. Emperor', AIR 1929 Sind 9 (P) and — 'Dodo Racho v. Emperor', AIR 1937 Sind 154 (Q).

(13) This is the line of decisions arising under four important heads viz., (a) Section 114, Indian Evidence Act — Illustration (a); (b) Arms Act; (c) Abkari Act and (d) Opium Act. It will be remembered that under S. 114, illustration (a), in order to draw the presumption the possession must be exclusive. But where stolen goods were found in a house inhabited by a joint Hindu family composed of a father, his son, and grandson and the circumstances were such that it was very improbable that such property could possibly have been placed where it was found without the connivance of some or all the members of the family, held that under the above circumstances the conviction of the managing member under S. 411, Penal Code was a proper conviction: — 'Emperor v. Budhlal', 29 All 598 (R) — 'Queen Empress v. Sangam Lal', 15 All 129 (S) referred to.

(14) In — 'Algoo Misir v. Rex', 4 Dom L R (All) 264 (T) Saran J. held that

"to render a person liable to conviction under S. 19(f), Arms Act, arms should be recovered from his possession or control. Merely because arms are found in a house belonging to a family, it cannot be said that the head of the family who is in possession of the house must also be in possession of the arms in the rooms in the house and is therefore liable. It has to be proved by evidence that the room in which the arms or the offending articles are found or are recovered were indeed in possession of that person or was under his control. It has to be proved that some particular person or individual was in possession or control of the room or that portion of the house from which the arms were recovered in order to justify a conviction under S. 19(f)."

Possession of the key of a box containing arms in the house of the accused, must be held to be possession of arms for purposes of S. 19(f), Arms Act, as the possession of the key of the box by the accused tends to show that the accused must have knowledge of the presence of the arms in the box: Vide — Mahtabali Shah v. Emperor', AIR 1947 Sind 192 (U).

(15) Then coming to Bombay Abkari Act, construing S. 43(1)(a)(h) it was held in — 'Apparama Mali v. Emperor', AIR 1934 Bom 16 (V) as follows: The accused lived jointly with his two brothers in a clump of huts. Of the three huts that were there the middle one was occupied by accused with his family, the two adjoining huts by his two brothers and their families. At the back of the huts there were some fields jointly cultivated by the brothers. In each of three huts were found articles which suggested that the inhabitants were or had been in possession of illicit liquor and in the fields were found some bottles containing liquor and tins of jaggery-wash intended for the preparation of illicit liquor. Held, that the only reasonable inference which could be drawn from the possession of the articles would be that the accused or the accused and his brothers were manufacturing illicit liquor and that the possession of these articles which could not be explained on any other hypothesis was for the purpose required by cl. (h) of S. 43, Bombay Abkari Act. Held also the fact that the evidence of possession would tell with almost equal force against the brothers of the accused was no ground for holding that possession has not been proved against the accused himself. If the evidence as to possession is adequate in the case of the accused it does not assist him at all to say that on the same evidence other persons might have been tried and convicted along with him. But when illicit liquor was found in the room occupied for the night by the son and his wife for sleeping, it does not necessarily mean that the son was in the exclusive possession of the room. The legal possession still remains with the father,

the house-master, and there is obvious possibility that the liquor was stored there by the father. We must look to attendant circumstances to establish some element of knowledge on the part of the son and if evidence forthcoming is found insufficient, son is not guilty of possession: — 'Emperor v. Binjha', AIR 1930 Lah 884 (W); — Bimal Protiva Debi v. Emperor', AIR 1942 Cal 464 (X).

(16) Similarly, under the Opium Act, it has been held by Thadani, C. J. and Ram Labhaya, J. in — 'Bholanath Sarma v. King', AIR 1949 Assam 73 (Y) that where substantial amount of opium is found in the bedroom of the accused with weighing scales and small weights, knowledge of the presence of the opium in the house can reasonably be attributed to him under S. 10, Opium Act. The accused is then required to account satisfactorily for his possession and his failure renders him liable to a conviction under S. 9 of the Act. In — 'Wazir v. Emperor', AIR 1935 Pesh 68 (Z) it was held that the possession of the husband does not necessarily connote that the wife also was liable under S. 9. Where opium is recovered on a search of the house in which the accused lived with his wife, the husband alone is responsible for the opium discovered and it cannot be presumed that the wife was also jointly in possession with him.

(17) To sum up, in the case of a family living jointly in the same house the head of the family will be presumed to be in possession of any illicit article found in the house; but this presumption is rebuttable and the weight to be attached to it must vary according to the circumstances as laid down in — 'Emperor v. Mir Ahmed', AIR 1937 Pesh 73 (K) and — 'Weston v. Das', AIR 1914 Cal 396 (L). The strength of the presumption also varies according to the improbabilities that the article owing to its size etc., should have escaped the notice of the head of the family: — 'Harban Singh v. Emperor', AIR 1941 Nag 296 (N) or it was unlikely that such incriminating article would have been found by chance or that any of the sons could have taken possession of the article and hidden it in the house without informing the father or that such article could have escaped notice or could remain concealed in the house without his knowledge: — 'Jwala v. Emperor', AIR 1934 All 548 (ZA) or the nature of the occupation — 'Ismail v. Emperor', AIR 1929 All 705 (ZB) or the nature of the participation of the other members in the manufacture, storing and disposal of the illicit article: — 'Fernando v. Emperor', AIR 1931 Mad 490 (2) (ZC); — 'Nga Shwe Toe v. Emperor', AIR 1937 Rang 434 (ZD). Possession in order to justify a conviction under the Abkari Act need not necessarily be exclusive possession: — 'AIR 1934 Bom 16 (V)'; — 'Harsh Nath v. Emperor', AIR 1915 Cal 719 (ZE) and — 'Parmai v. Emperor', AIR 1934 All 129 (ZF). The only point that must be proved in all these cases is that the accused or all the accused persons were aware of the presence of the illicit article and had control of the same.

(18) Bearing these principles in mind when we examine the evidence in this case we find that the possession of the brandy bottles has been brought home beyond reasonable doubt to this accused. This accused is the head of the undivided family. It was he who rented that house. He was occupying an important position in life and was suffering from heart trouble and a certain amount of weakness for which a particular type of Doctors recommend brandy in small quantities both for bracing of heart as well as to prevent depression and alleviate pain also. The keys for opening the almirah and iron safe were handed over by this accused. It is quite possible as spoken to by the servant of this accused that the keys were in the actual custody of the daughter-in-law as this elderly man may not like to carry about a bunch of keys with him and might have left to his daughter-in-law the household duties of keeping the keys, etc. This would not make Jayalakshmi the culprit because the suggestion made that these brandy bottles might have been purchased by her for confinement was found to be wholly untrue and her last child was more than a year old at the time of this offence and there is no suggestion that she was carrying. On the other hand, Jayalakshmi's husband comes forward and says that neither his wife nor himself ever took brandy. Similarly, the fact that the articles of Jayalakshmi and her husband have been kept in the safe and the almirah is neither here nor there. It would not disprove the possession of this accused. One significant circumstance showing that the present suggestions are afterthoughts is the fact that this accused stoutly declined to give an explanation regarding the presence of the brandy bottles either on the 5th or on the 7th on the pretext that he was unwell though one would imagine that the fever from which he is stated to have been suffering could not have prevented him from saying in a few words as to how the brandy bottles came into the almirah and the iron safe. Therefore, putting all these circumstances together both the lower Courts rightly found that the accused was in possession of these illicit articles.

(19) The conviction is correct and the sentence of imprisonment till the rising of the Court and a fine of Rs. 200/- imposed by the Sub-Magistrate are equally correct. I am unable to understand the setting aside of this imprisonment till the rising of the Court, which had already been undergone by the accused, by the District Magistrate (Judicial) of Visakhapatnam. In fact he need not have gone to the extent of setting aside the imprisonment which he could not set aside because this imprisonment till the rising of the Court would not disentitle the accused from getting any of the benefits of gratuity etc., if otherwise he is entitled to them.

(20) There are no grounds to interfere and this Criminal Revision Case is dismissed.

B/V.S.B. Revision dismissed.

A.I.R. 1953 MADRAS 537 (Vol. 40, C. N. 202)

RAJAMANNAR C. J. AND VENKATARAMA AIYAR J.

Belegal Gundachar and another, Petitioners v. The State of Madras, represented by the Collector of Bellary and others, Respondents.

Writ Petn. No. 790 of 1951, D/- 3-9-1952.

Land Acquisition Act (1894), Ss. 4, 6 — Public purpose — Acquisition for irrigation.

Any scheme under which the Government provide for the utilisation of the available water in Government sources of supply for the extension of cultivation

will be a public purpose. The Government for this purpose has not only to construct and maintain the main sources of supply but also to provide for distribution of the water to the various pieces of land which could be irrigated with the available water by means of distributory channels. Such channels must necessarily be of two kinds, namely, the major distributory channels and the smaller distributory channels which ultimately lead the water to the several fields. An acquisition for carrying out any part of this scheme will certainly be an acquisition for a public purpose, which is also a State purpose. Case law discussed. (Para 11)
Anno: L. A. Act, S. 4 N. 1 S. 6 N. 5.

M. S. Ramachandra Rao, for Petitioners; Advocate General, for the Govt. Pleader; D. R. Krishna Rao, for Respondents.

CASES CITED:

(A) ('52) AIR 1952 SC 252: 65 Mad LW 527 (SC)
(B) (1896) 41 Law Ed 489: 164 US 403
(C) (1930) 282 US 162: 75 Law Ed 270
(D) (1896) 164 US 112: 41 Law Ed 369
(E) (1905) 198 US 361: 49 Law Ed 1085
(F) ('71-74) 7 Mad HCR 60
(G) ('05) 15 Mad LJ 32: 28 Mad 72
(H) ('52) AIR 1952 Mad 756: 1952-2 Mad LJ 298

RAJAMANNAR C. J.: The two petitioners in this petition are the joint pattadars of S. No. 406 in the village of Kamalapuram, Hospet taluk, Bellary district. The said plot of land and other plots covered by S. No. 405 etc., belonging to the petitioners are being irrigated by water taken from sluice No. 68 in the Government Roya Channel through a main distributory channel which runs over some of the lands belonging to the petitioners as well as on poromboke lands. The third respondent is the pattadar of S. No. 404 lying to the north of S. No. 406. Though it is registered as dry, it can be cultivated with wet crops if there is adequate water supply. After obtaining reports from the Revenue Officers the Collector sanctioned a proposal for the acquisition of a portion of S. No. 406 belonging to the petitioners for excavating a field distributory channel to irrigate S. No. 404 belonging to the third respondent, provided the cost of the acquisition was met by the third respondent. Accordingly a notification under S. 4(1) of the Land Acquisition Act was published in the Fort St. George Gazette of 31-1-1951 wherein it was stated that an extent of 6 cents in S. No. 406 was needed for a public purpose, to wit, for excavating a field distributory channel to irrigate S. No. 404 from sluice No. 68 of the Roya Channel. After due enquiry under S. 5(a) of the Act a notification under S. 6 was published on 24-4-1951. The petitioners challenge the validity of this acquisition on the ground that the purpose of the acquisition being solely for the benefit of a single individual, namely, the third respondent, cannot be said to be a public purpose.

It must now be taken as well established that the power of the State to acquire property compulsorily is a power to acquire it only for a public purpose. Public purpose is a content of the power itself. Mahajan J. in the recent Supreme Court decision, — 'State of Bihar v. Kameshwar Sing', AIR 1952 SC 252 (A) observed thus:

> "Public purpose is an essential ingredient in the very definition of the expression 'eminent domain' as given by Nichols and other constitutional writers ..... The exercise of the power to acquire compulsorily is conditional on the existence of a public purpose ..... Jurisdiction to acquire private property by legislation can only be exercised for a public purpose. It may be the purpose of the Union or the purpose of the State or any other public purpose. Private property cannot be acquired for a private purpose."

(2) The only question, therefore, is whether the purpose of the impugned acquisition can be said to be a public purpose. There is no definition of "public purpose" either in the Constitution or any other relevant statute. Indeed, as pointed out by the Supreme Court, the expression "public purpose" is not capable of a precise definition and has not a rigid meaning.

> "The definition of the expression is elastic and takes its colour from the statute in which it occurs, the concept varying with the time and state of society and its needs", AIR 1952 SC 252 at page 311 (A).

Mr. M. S. Ramachandra Rao, learned counsel for the petitioners contended that whatever test be applied it could never be said that when the purpose is ostensibly only to benefit one particular individual, it is a public purpose. In support of his contention he relied on two decisions of the Supreme Court of the United States. In — 'Missouri Pacific Ry. Co. v. Nebraska Ex rel, Board of Transportation', (1896) 41 Law Ed 489 (B), the validity of an order of the Nebraska State Board of Transportation requiring a railroad company to surrender a part of its land to private persons for the purpose of building and maintaining their elevator upon it was questioned. The Court held that it was illegal as it would result in the taking of private property of a person without his consent for the private use of another.

The principle of the decision is to be found in the following passage:

> "This court, confining itself to what is necessary for the decision of the case before it, is unanimously of opinion that the order in question, so far as it required the railroad corporation to surrender a part of its land to the petitioners, for the purpose of building and maintaining their elevator upon it, was in essence and effect, a taking of private property of railroad corporation, for the private use of the petitioners. The taking by a State of the private property of one person or corporation, without the owner's consent, for the private use of another, is not due process of law, and is a violation of the 14th Article of Amendment of the Constitution of the United States."

It is important to notice that the order in question in that case was not and was not claimed to be a taking of private property for a public use under the right of eminent domain. The decision therefore is not of much assistance to us.

(3) In — 'Chicago St. Paul Minneapolis & Omaha Rv. Co. v. Holmberg', (1930) 75 Law Ed 270 (C) also there was no question of the State's exercise of its powers of eminent domain. A state railroad commission had, by an order, required the construction at the expense of a railroad company and the landowner of an underpass connecting the farm

lands on both sides of the railroad tracks solely for the convenience and benefit of the landowner in the use of his own property. The Supreme Court held that it was invalid as taking property without due process of law.

(4) Learned counsel also referred us to the following passages from Willis' book on Constitutional law :

"According to the newer viewpoint there is a public use if the thing taken is useful to the public ..... Under this rule it is not necessary for the benefit to be for the whole community, but it must be for a considerable number. The fact that benefit also inures to a private individual is no objection."

After referring to instances where it had been held that there was sufficient public use, the learned text writer goes on to say :

"In these cases there is not necessarily a general use by the public, but there is a general benefit to the public. Private enterprises are thus allowed to exercise the sovereign power of eminent domain, not because they are taking the property for their own use, but because in taking the property for their use they are benefiting the public. Of course, where the taking will benefit a private person alone, there is not a public use even in this newer sense."

(5) The learned Advocate General who appeared for the State invited our attention to two other decisions of the Supreme Court of the United States. The first one is — 'Fallbrok Irrigation District v. Bradley', (1896) 41 Law Ed 369 (D). In this case an Act of California which provided for the acquisition of land whenever 50 landowners or a majority of them in a particular locality required it for construction of a water course was upheld as valid, though it was attacked on the ground that as the acquisition would only benefit particular landowners who get water from the channel and the public as such were not benefited there was no public user. The court observed :

"To irrigate and thus to bring into possible cultivation these large masses of otherwise worthless lands would seem to be a public purpose and a matter of public interest, not confined to the landowners, or even to any one section of this State. The fact that the use of the water is limited to the landowners is not therefore a fatal objection to this legislation. It is not essential that the entire community, or even any considerable portion thereof, should directly enjoy or participate in an improvement in order to constitute a public use."

(6) In — 'Clark v. Nash', (1905) 49 Law Ed 1085 (E) it was held that a statute of Utah under which an individual landowner could condemn a right of way across his neighbour's land for the enlargement of an irrigation ditch therein in order to enable him to obtain water from a stream in which he had an interest to irrigate his land which otherwise would remain absolutely valueless was valid. It is interesting to notice the reasoning of the court in arriving at its decision. Peckham J. who delivered the opinion of the court emphasised the fact that the validity of a statute permitting acquisition by an individual for the purpose of obtaining water for his land may depend upon a number of considerations relating to the situation of the State and its possibilities for land irrigation, and he observed :

"But we do not desire to be understood by this decision as approving of the broad proposition ..... that private property may be taken in all cases where the taking may promote the public interest and tend to develop the natural resources of the State. We simply say that in this particular case, and upon the facts stated in the findings of the court, and having reference to the conditions already stated, we are of opinion that the use is a public one, although the taking of the right of way is for the purpose simply of thereby obtaining the water for an individual, where it is absolutely necessary to enable him to make any use whatever of his land, and which will be valuable and fertile only if water can be obtained. Other landowners adjoining the defendant in error, if any there are, might share in the use of the water by themselves taking the same proceedings to obtain it, and we do not think it necessary, in order to hold the use to be a public one, that all should join in the same proceeding, or that a company should be formed to obtain the water which the individual landowner might then obtain his portion of from the company by paying the agreed price, or the price fixed by law."

(7) The learned Advocate General also cited to us passages from Nichols on Eminent Domain. The learned author attempts a definition of "public use" which is consistent with the weight of judicial authority. It is as follows :

"It is a public use for which property may be taken by eminent domain,

(1) To enable the United States or a State or one of its sub-divisions or agencies to carry on its governmental functions, and to preserve the safety, health and comfort of the public whether or not the individual members of the public may make use of the property so taken, provided the taking is made by a public body;

(2) To serve the public with some necessity or convenience of life which is required by the public as such and which cannot be readily furnished without the aid of some Government power, whether or not the taking is made by a public body, provided the public may enjoy such service as of right;

(3) In certain special and peculiar cases sanctioned by ancient customs or justified by the requirements of unusual local conditions, to enable individuals to cultivate their land or carry on business in a manner in which it could not otherwise be done, if their success will indirectly enhance the public welfare, even if the taking is made by a private individual and the public has no right to service from him or enjoyment of the property taken."

He points out that it is not the number of people who will participate in or benefit by the use for which the property is sought to be taken that determines whether the use is or is not public and also that merely because the whole or part of the expense is met by those benefited it should not be held that the use for which the property was taken was not public.

(8) The following passage in Rottschaefer on Constitutional Law summarises the effect of the decisions on this aspect of the law of eminent domain :

"It is frequently sufficient if the use to which the private condemnor is to put the property

is one of widespread general public benefit not involving any right on the part of the general public itself to use the property. The adoption of this general test has expanded the scope of valid public uses to include uses by private parties in purely private activities. The public benefit that has been relied upon to sustain such exercises of the power of eminent domain has usually consisted in that derived from the development of a State's important natural resources rendered possible by such exercises of that power. It is on that basis that one private person has been permitted to condemn land for the purpose of conveying water in ditches across that land in order to properly irrigate his own, and to condemn a right of way across another's land for an aerial bucket line necessary for the working of the condemnor's mine. The same considerations are frequently invoked in sustaining the condemnation of property required by drainage or irrigation districts for the accomplishment of their objectives, and the condemnation of land and water rights to be used for developing power for general public distribution."

(9) With this discussion of the material authorities on the question, let us examine the nature of the present acquisition. In the first place the extent of land acquired will vest in the State itself and will not be transferred to any private person. As mentioned in the notifications under Ss. 4 and 6 the land will be used for excavating a field distributory channel. The acquisition will not have the effect of transferring the property of one person to another person for his private use. What is acquired is acquired for the State.

(10) The next question is, why does the State acquire it? It is here that a point is made of the fact that it is acquired for the private use of the third respondent. 'Prima facie' this is so. But there are certain other facts which should also be borne in mind before we judge the real purpose of the acquisition.

(11) It is now well established that one of the most important functions of the State in India is to provide for the irrigation of lands capable of being cultivated with wet crops. With this end in view the State is bound to maintain works of irrigation already existing and also to construct new works of irrigation and expand the old works. The State has both the right and is under a duty to regulate the distribution of water in the interests of the public. The Government have the right to distribute the water from Government channels for the benefit of the public subject to the rights of landholders to continue to receive such supply as is sufficient for their accustomed requirements vide — 'Kristna Ayyan v. Venkatachalla Mudali', 7 Mad HCR 60 (F); — 'Sankaravadivelu Pillai v. Secy. of State', 28 Mad 72 at 75 (G) and Sundararaja Aiyangar's Land Tenures in the Madras Presidency, 2nd Edn., page 181. Any scheme under which the Government provide for the utilisation of the available water in Government sources of supply for the extension of cultivation will be a public purpose. The Government for this purpose has not only to construct and maintain the main sources of supply but also to provide for distribution of the water to the various pieces of land which could be irrigated with the available water by means of distributory channels. Such channels must necessarily be of two kinds, namely, the major distributory channels and the smaller distributory channels which ultimately lead the water to the several fields. All these together constitute a net work of water supply for irrigation.

An acquisition for carrying out any part of this scheme will certainly be an acquisition for a public purpose, which is also a State purpose. In the present case, it appears from the correspondence that passed between the Revenue officials before the acquisition was finally sanctioned that though immediately S. No. 404 alone would be benefited by the excavation of the small field channel in S. No. 406, in course of time the new channel would also serve to benefit other lands as well. Therefore the present acquisition must be held to be an acquisition for a public and State purpose, namely, extension of irrigation. The fact that now only one individual stands to benefit by the channel proposed to be excavated on the site acquired would not make the acquisition any the less an acquisition for a public purpose. It was observed by this Bench in a recent case that

> "it is not necessary that it (property) should be available to the public as such. It might be in favour of individuals provided they are benefited not as individuals but in furtherance of a scheme of public utility." — 'Thambiran Padayachi v. State of Madras', AIR 1952 Mad 756 (H).

The present acquisition would fall within the category indicated in that decision.

(12) As no other point was pressed upon us by learned counsel for petitioners, the application fails and is dismissed with costs. Advocate's fee Rs. 100/-.

B/D.H. Application dismissed.

A.I.R. 1953 MADRAS 540 (Vol. 40, C. N. 203)

SATYANARAYANA RAO AND KRISHNASWAMI NAYUDU JJ.

Guruperla Subbarayulu Setti and others, Appellants v. Thota Venkataramanamma and others, Respondents.

Appeal No. 640 and C. M. P. No. 6875 of 1947, D/- 18-8-1952.

Debt Laws — Madras Agriculturists' Relief Act (4 of 1938), S. 4(d) — "House Property".

"House property" in the clause means not only the house and the site on which the house stands but also the site that is appurtenant to the house, and which is necessary for its enjoyment. It includes garden, compound and yard, which are enjoyed as part of the house. AIR 1939 Mad 789; AIR 1940 Mad 54. AIR 1943 Mad 258, Foll. (Paras 3, 4, and 5)

Ch. Suryanarayana Rao and Ch. Ramakrishna Rao, for Appellants; S. Sitarama Iyer and S. Rajarama, for Respondents.

CASES CITED:
(A) ('39) AIR 1939 Mad 789: 1939-2 Mad LJ 233
(B) ('40) AIR 1940 Mad 54: 1939-2 Mad LJ 782
(C) ('43) AIR 1943 Mad 258: 1942-2 Mad LJ 487

SATYANARAYANA RAO J.: The plaintiffs are the appellants in this appeal. The suit was instituted for the recovery of a large amount of Rs. 30000 as principal and interest due under a mortgage. Ex. P. 1, dated 19-9-25 executed by one T. Seshaih, the father of

defendants 2 to 4 and the husband of the first defendant in favour of the plaintiffs. There were various defences to the action, and we are now concerned only with two questions: (1) whether the debt is liable to be scaled down under Madras Act 4 of 1938 and (2) what amount should be deducted as rent for the godown in the occupation of the plaintiffs from the amount due under the mortgage.

(2) The defendants claimed that they were agriculturists entitled to the relief under the Act. The learned Subordinate Judge found that they were agriculturists, and that they were entitled to relief under Act 4 of 1938. The attempt of the plaintiffs was to exclude the application of the Act to the present case by alleging that the case fell under S. 4(d) of the Act, which states:

"Nothing in this Act shall affect debts and liabilities of an agriculturist falling under the following heads:

....

(b) any debt contracted on the security of house property alone in a Municipality, a cantonment or a panchayat which was a Union before the 26th August 1930."

The learned trial Judge did not accept this plea; as he found that security was not created on "house property alone" within the meaning of the sub-clause. As regards the deduction from the mortgage amount, of rent which was payable by the mortgagee for the godown occupied by him he found that the original arrangement was that the mortgagee should pay rent at the rate of Rs. 2-8-0 per month for the godown, but as in 1928 D. W. 6, who occupied a portion of the godown paid a higher rent and that the defendants were entitled to claim deduction of rent at the rate of Rs. 5 per month from 1928 instead of Rs. 2-8-0 per month.

(3) The appellants in this appeal challenge these findings of the learned Subordinate Judge. As regards the contention of the plaintiffs that the Act does not apply to the mortgage in suit because security was created on house property alone, we think that the view taken by the learned Subordinate Judge is correct. Ex. P. 1, the mortgage, comprises four items of property. The first three items described in the schedule to the mortgage deed are tiled houses within specified boundaries situate at Gudur. The fourth item which is also described by boundaries is a vacant site of 30 ankanams, which, it is in evidence, is not in the same row as the houses but in the opposite row. This item is treated therefore in the mortgage as an independent unit not appurtenant to any of the three houses specified in the deed. The clause relied on was interpreted by this Court though by a single Judge, in — 'Ponnambala Chetti v. Ambalam Raman Chetti', AIR 1939 Mad 789 (A). "House property" in the clause means not only the house and the site on which the house stands but also the site that is appurtenant to the house, and which is necessary for its enjoyment. It included garden, compound and yard, which are enjoyed as part of the house. If, however, there is an independent site, which is intended for a different purpose such as for building, and is treated as a separate unit by the parties and also in the assessment registers of the Panchayat, Union or the Municipality, it should be treated as not forming part of the house property, and if such item is included in the mortgage deed along with the other house property, the clause does not apply, as the security was not created on the house property alone within the meaning of the clause. In contrast to that decision, we have the later decision in — 'Namasivaya Mudaliar v. Srinivasa Iyangar', AIR 1940 Mad 54 (B), in which the site was, unlike the site in the earlier case, in the same compound as the house and was enjoyed as appurtenant to it. The whole of the property, that is, the house and the site within the compound wall was treated as house property, and therefore the benefit of the exemption was given to the mortgagee creditor. The later decision in — 'Jikkini Bibi Sahiba v. Ranganayaki Ammal', AIR 1943 Mad 258 (C), does not throw much light except that in that case along with house property the mortgagors mortgaged a site on which there was a superstructure belonging to a third party. The superstructure was excluded from the security, as it did not belong to them. In such a case it was held that it could not be said that the security was created on house property alone, as the mortgagor included in the mortgage, apart from house property, a site on which the superstructure belonging to some other person stood.

(4) In our opinion the three decisions interpreted and applied the clause correctly, and in the light of those decisions, we have to consider the contention raised on behalf of the plaintiffs. Notwithstanding that this site was treated as a different unit in the mortgage and that it was removed from the house, it was claimed, on behalf of the plaintiffs that one Chenchamma was living as a tenant in one of the houses, and was utilising this vacant site, at least as part of it, as a latrine and also as a dung-pit. This Chenchamma, assuming the evidence adduced on behalf of the plaintiffs is acceptable, came into possession of the house only about 20 years ago, i.e., long after the mortgage. Merely because she used the site later on for the purpose of a latrine and a dung-pit, it cannot be said that that circumstance makes the site which is removed and which is far away from the house, appurtenant to the house, and therefore the whole of it constitutes house property. At the time of the mortgage, Chenchamma was not living in the house, and this site was not being used as a latrine or for a dung-pit. It is also in evidence that subsequently a portion of the site was built upon by T. Seshaih, the original mortgagor, and that indicates, in our opinion, that the site was intended for building purposes and was never treated as appurtenant to any of the three houses at or about the time of the mortgage. The material date on which the question has to be decided is the date on which security was created on the house property and not a subsequent date. In this view of the evidence and in view of the interpretation placed on the clause by the three aforesaid decisions, we think that the conclusion reached by the learned Subordinate Judge is correct. He also held that the clause did not apply for another reason, namely, that it was not established by evidence that this Panchayat of Gudur was in existence before 26-8-1930, as required by the clause. In the plaint it was alleged by the plaintiffs that the house site was within the panchayat, which was in existence before 1930, and that allegation was not denied by the defendants in the written statement. The learned Judge seems to have overlooked this aspect and failed to notice that there was really no serious dispute about this fact. It must therefore be taken as an esta-

blished fact that this union of Gudur was in existence even before 1930. In this view of the case it is unnecessary to admit additional evidence documents now tendered here, that is, the tax receipts which go to show that the union was in existence before 1930.

(5) The next question is whether the learned Judge was correct in holding that the defendants were agriculturists on the relevant dates. (His Lordship after holding upon an examination of the evidence that the lower Court was correct in concluding the defendant an agriculturist proceeded further.) It follows therefore that the learned Subordinate Judge was right in scaling down the debt, and it is not disputed before us that the correct amount after scaling down was as stated by the trial Court.

(6) The only other question that has to be considered is the amount of rent that should be deducted from the mortgage amount due to the plaintiffs. The evidence in the case discussed by the learned Judge in paragraph 19 of the judgment undoubtedly establishes that there was an arrangement from the beginning to pay rent at the rate of Rs. 2-8-0 per month. In paragraph 20, however, the learned Judge expressed the view that in or about 1928 there must have been a revised agreement by which the original rent was enhanced from Rs. 2-8-0 per month to Rs. 5. We are of opinion that there is no warrant for this inference of the learned Judge in the evidence adduced in the case. Merely because D. W. 6 paid a higher rent for a portion of the godown, it does not follow that there was an agreement to enhance the rent due by the plaintiffs in respect of the godown in their possession. We think therefore that upto the date of the suit deduction should be at the rate of Rs. 2-8-0 a month and not at Rs. 5. The suit was instituted on 28-8-46, and thereafter it is not disputed before us that the proper rent which the plaintiffs should pay to the defendants until delivery of possession is Rs. 5 per month.

(7) The decree of the learned S. J. would therefore be modified by giving credit to the plaintiffs in a sum of Rs. 545 with regard to the rent. Except for this slight variation the decree of the lower court is confirmed and the appeal is dismissed with costs. C. M. P. No. 6875 of 1947 is dismissed.

B/M.K.S. Decree modified.

A.I.R. 1953 MADRAS 542 (Vol. 40, C. N. 204)

SUBBA RAO J.

M. D. Krishnamurthy, Petitioner v. Deputy Registrar of Co-operative Societies, Chepauk, Madras and others, Respondents.

Writ Petn. No. 319 of 1952, D/- 20-8-1952.

(a) Madras Co-operative Societies Act, (6 of 1932) — Rules under Act, R. 27 (a) — By-laws of Triplicane Urban Co-operative Society — Rules 21 and 24 are inconsistent with R. 27 (a) of the Rules under Act.

Under R. 27 (a) of the rules made under the Madras Co-operative Societies Act, the Registrar shall decide when a question is raised whether a person is a near relation of the paid employee, whereas under the Rr. 21 and 24 of by-laws framed by the Triplicane Urban Co-operative Society an election of a person to the directorate can be questioned only by an election petition filed within 3 days from the date of the election and that election petition will be disposed of by a committee of 3 advocates subject to an appeal to the Board. It is, therefore, manifest that the rules in so far as it encroached upon the right of the Registrar to decide the question under R. 27 (a) is inconsistent with the rules made under the Madras Co-operative Societies Act. The Registrar may hold that a director is a near relation of the employee whereas the ad hoc committee, or on appeal, the Board may hold that he is not a near relation. There may be inconsistent decisions. It is, therefore, a clear case of inconsistency, between rule 27 (e) and the rules made by the society. If so, the by-law which is inconsistent with the provisions of the Act is bad. The Registrar is given a clear power under rule 27 (e) to decide whenever a question arises whether a person is or is not a near relation. (Para 6)

(b) Madras Co-operative Societies Act (6 of 1932) — Rules under — Rule 27 (e) — Rule does not confer arbitrary power on Registrar.

It is difficult to hold that R. 27 (e) conferred an arbitrary power upon the Registrar. The question to be decided under the rule is a simple one, namely, whether A is a near relation of B. The power to decide that question is conferred upon the Registrar who is accustomed to discharge judicial functions under the Act and who is expected to decide the question judicially. As the Registrar discharges his duty judicially and as his order is subject to revision to the Government he is expected to give his reasons for his decision. If he goes wrong the Government under S. 57 of the Act can rectify the mistake. In those circumstances the power conferred upon the Registrar cannot be held to be an arbitrary power. (Para 7)

(c) Madras Co-operative Societies Act (6 of 1932) — Rules under — Rule 27 (e) — Near relations — Persons marrying sisters.

Advisability of adding a new rule prescribing the degree of relationship which would be a disqualification under R. 27 (1) of the Rules, pointed out. (Para 7)

The families of persons who married sisters are often more attached to each other than other families. Such families would be mutually interested in the welfare of each other, and they are therefore prone to help each other. The right to inherit the property of another is not the only tests of near relationship. It cannot be said that the relationship between persons who have married sisters is not a near relationship in the ordinary sense of the term. (Para 8)

K. V. Venkatasubramania Aiyar and T. P. Gopalakrishnan, for Petitioner; Government Pleader, for Respondents.

ORDER: This is an application for issuing a writ of certiorari to quash the order of the Deputy Registrar of Co-operative Societies dated 15-4-1952.

(2) The petitioner was elected as a Director of the Triplicane Urban Co-operative Society Ltd., in February 1952. One of the paid employees of the said Society is one Rajagopalan. The petitioner and Rajagopalan have married sisters. On 26-3-1952, the Deputy Registrar of

Co-operative Societies issued a notice to the petitioner calling upon him to show cause why he should not be removed from the Board of Directors on the ground that he was a near relative of one of the paid employees of the Society. The petitioner offered his explanation by his letter dated 9-4-1952. On 15-4-1952 the Deputy Registrar made an order declaring that the petitioner would cease to be a director of the Triplicane Urban Co-operative Society. The aforesaid petition has been filed to quash that order.

(3) The learned Counsel for the petitioner raised before me three points (i) The by-laws and the rules governing the Society provided for an election petition and as no election petition was filed within the time prescribed the petitioner's election to the directorate cannot be questioned. (ii) The rule prescribing that near relationship as a disqualification is ultra vires the Constitution. (iii) The Deputy Registrar has no power to direct the removal of a person elected to the directorate.

(4) To appreciate the first contention and to provide an answer for the same the relevant provisions of the rules made under the Madras Co-operative Societies Act, the by-laws of the Triplicane Urban Co-operative Society and the rules of the Society may be extracted. Rule 65 (1) says:

"The Provincial Government may, for the whole or any part of the Presidency of Madras and for any registered Society or class of such Societies make rules to carry out all or any of the purposes of this Act."

Rule 65 (2) (i) says:

"In particular and without prejudice to the generality of the foregoing power, such rules may provide for the appointment, suspension and removal of the members of the Committee and other officers and for the procedure at meetings of the committee and for the powers to be exercised and the duties to be performed by the committee and other officers."

(5) In exercise of the said power the Provincial Government made rules. Rule XXVII (i) says:

"No person shall be eligible for appointment as a member of the Committee of any society if he is a near relation of a paid employee of the society; provided that if any question arises whether a person is or is not a near relation of a paid employee of the society, the question shall be referred to the Registrar and his decision shall be final."

Rule 2 of the Co-operative Societies Act states:

"With every application for registration. the applicants shall submit a draft of the by-laws agreed upon by them. The by-laws shall be consistent with the Act and with the rules made by the local Government thereunder and they shall deal with the matters specified in clauses (a) to (z) and may deal with such other matters incidental to the organisation of the society and the management of its business as may be deemed necessary."

(6) Rule 19 (ii) (a) of the by-laws of the Triplicane Urban Co-operative Society states:

"The Board of Directors shall have the power to draw up and enforce rules not inconsistent with the by-laws for the following among other purposes:

(v) The election to the Board of directors and to the Local Panchayats."

Rule 21 of the by-laws of the Triplicane Urban Co-operative Society states:

"No election shall be called in question except by an election petition presented by any voter or voters of the branch in which the election has taken place within 3 days after the publication of the elections at the branch concerned."

Rule 24 states:

"All election objection petitions be tried by an ad hoc committee of three independent advocates appointed by the Board of directors from among the members of the society who do not hold any honorary office and their services be purely honorary. There shall be a right of appeal from such decisions of the committee within 3 days after the communication of the decision of the Committee. The Board's decision on appeal will be final."

It will be seen from the aforesaid provisions that under R. 27 (a) of the rules made under the Madras Co-operative Societies Act the Registrar shall decide when a question is raised whether a person is a near relation of the paid employee, whereas under the rules framed by the Co-operative Society an election of a person to the directorate can be questioned only by an election petition filed within 3 days from the date of the election and that election petition will be disposed of by a committee of 3 advocates subject to an appeal to the Board. It is, therefore, manifest that the rules in so far as it encroached upon the right of the Registrar to decide the question under R. 27(a) is inconsistent with the rules made under the Madras Co-operative Societies Act. The Registrar may hold that a director is a near relation of the employee whereas the 'ad hoc' committee, or on appeal, the Board may hold that he is not a near relation. There may be inconsistent decisions. It is, therefore, a clear case of inconsistency, between R. 27 (e) and the rules made by the society. If so, the by-law which is inconsistent with the provisions of the Act is bad. The Registrar is given a clear power under R. 27 (e) to decide whenever a question arises whether a person is or is not a near relation.

(7) The learned Counsel then contended that R. 27 (e) is invalid as it confers upon the Registrar a naked arbitrary power. In appreciating this argument a distinction must be made between a rule conferring a power and an authority on whom such a power is conferred abusing that power. Taking the first aspect of the question, I find it rather difficult to hold that the rule conferred an arbitrary power upon the Registrar. The question to be decided is a simple one, namely, whether A is a near relation of B. The power to decide that question is conferred upon the Registrar who is accustomed to discharge judicial functions under the Act and who is expected to decide the question judicially. As the Registrar discharges his duty judicially and as his order is subject to revision to the Government he is expected to give his reasons for his decision. If he goes wrong the Government under S. 57 of the Act can rectify the mistake. In those circumstances the power conferred upon the Registrar cannot be held to be an arbitrary power.

It was said that under this rule the Registrar may hold that a person remotely related is a near relation. As I have said, the Registrar exercising his functions judicially is not likely to abuse his power to such a degree and if he does so a revisional tribunal is there to rectify it. At the same time to avoid such an abuse

the Government may consider the question of adding a new rule prescribing the degree of relationship which would be a disqualification under rule 27(1) of the rules.

(8) I cannot also hold on the facts that the Registrar acted arbitrarily in the present case. The families of persons who married sisters are often more attached to each other than other families. Such families would be mutually interested in the welfare of each other, and they are therefore prone to help each other. The right to inherit the property of another is not the only test of near relationship. It cannot be said that the relationship in question is not a near relationship in the ordinary sense of the term. In those circumstances when the Registrar said that they are near relations, I cannot say that he acted arbitrarily.

(9) I therefore hold that the rule is valid and the Registrar has not acted arbitrarily in exercising the power conferred on him under the rule.

(10) Even so, the learned counsel contended that there is no provision under the Act empowering the Registrar to remove the petitioner from the directorate. It is not necessary to express my opinion on the question as the Registrar did not purport to do any such thing in exercise of the power conferred on him. He decided that the petitioner is disqualified to be the director of the Society. What would be the consequence of such a declaration I need not dilate upon.

(11) In the result, I hold that no case has been made out for issuing a writ of certiorari. The petition is dismissed with costs.

B/R.G.D. Petition dismissed.

A.I.R. 1953 MADRAS 544 (Vol. 40, C. N. 205)

GOVINDA MENON AND KRISHNASWAMI NAYUDU JJ.

Gadipudi Seethamma, Appellant v. Gudipudi Annapurnamma and others, Respondents.

Appeal No. 726 of 1947, D/- 14-3-1952.

Arbitration Act (1940), Ss. 31, 32 and 33 — Questions relating to award — Allegation that consent to reference was vitiated by fraud — Separate suit — (Civil P. C. (1908), S. 9).

A suit in which the existence and validity of the reference to arbitration and the award passed in pursuance of such arbitration is agitated is not maintainable: A I R 1945 Mad 371, AIR 1946 Mad 346, AIR 1948 Mad 436 and AIR 1951 Mad 525, Rel. on. (Paras 2, 3)

Anno: Arbn. Act, S. 31 N. 3, 4; S. 32 N. 1; S. 33 N. 1; Civil P. C., S. 9 N. 50, 62.

P. Somasundaram and P. Suryanarayana, for Appellant; M. S. Ramachandra Rao and A. L. Narayana Rao, for Respondents.

CASES CITED:

(A) ('45) AIR 1945 Mad 371: 1945-2 Mad LJ 98
(B) ('46) AIR 1946 Mad 346: ILR (1946) Mad 840
(C) ('48) AIR 1948 Mad 436: ILR (1949) Mad 111
(D) ('51) AIR 1951 Mad 525: 1950-2 Mad LJ 313
(E) ('49) 53 Cal WN 410

GOVINDA MENON J: While not disagreeing with the lower court regarding its conclusion on issues 1 and 2 decided in favour of the respondents, we think that this appeal can be disposed of on a much shorter ground. The learned Subordinate Judge framed an additional issue as to whether the plaintiff was entitled to maintain the suit pleading the illegality and invalidity of the awards and decrees in O. S. No. 30 of 1942, O. S. No. 297 of 1942 and O. S. No. 701 of 1943. On that issue, the learned Judge after a consideration of Ss. 31, 32 & 33, Arbitration Act of 1940 concluded that the suit was not maintainable. In the view of the learned Judge, the plaintiff was agitating a question which she ought to have agitated by means of the procedure laid down under the provisions of the Arbitration Act. In fact, she is agitating the existence and validity of the reference to the arbitration and the award passed in pursuance of such arbitration. The lower court relied upon the decision in — 'Rashid Jamshed Sons and Co. v. Moolchand Jothajee', AIR 1945 Mad 371 (A) which has been confirmed in Letters Patent Appeal by a Bench of this Court in — 'Moolchand Jothajee v. Rashid Jamshed Sons and Co.', AIR 1946 Mad 346 (B). In delivering the judgment of the Bench the learned Chief Justice observes as follows at page 348:

> "The Act of 1940 was intended to consolidate and amend the law of India relating to arbitration matters. The scheme of the Act is to prevent the parties to an arbitration from agitating questions relating to the arbitration in any manner other than that provided by the Act. The suit which the appellants filed clearly raised the question with regard to the existence and validity of the award, and such a suit is expressly barred by S. 32."

We find other decisions of this Court also to a similar effect such as — 'Suryanarayanareddi v. Venkatareddi', AIR 1948 Mad 436 (C) and — 'Surayya v. Anandayya', AIR 1951 Mad 525 (D).

(2) But Mr. Somasundaram for the appellant contends that what the plaintiff relies upon in support of her claim is that the arbitration and the award thereto were based upon fraud, and therefore it should be deemed as if there was no award at all. In such a case the decisions of this court above referred to would not be relied upon. But we find on a reading of the plaint that the plaintiff's case was that she was induced to agree to the reference to the award of the arbitrator, Venkatarao, on the persuasion of S. Janakiramiah that the proposed arbitrator would uphold the validity of the will dated 7-3 1942 alleged to have been executed by her deceased husband, G. Janakiramiah. It was on that persuasion that she agreed to the reference to the arbitration. Such being the case, we do not think that she has alleged any fraud in the passing of the award or any act on the part of the arbitrator. Even if she was induced by fraud to agree to the award, we do not think that she has a right of suit separately apart from the provisions of the Arbitration Act. What she ought to have done was when she found that the will in her favour was not upheld and that the hopes and aspirations held out to her had not been fulfilled, to have moved the court by means of an application to set aside the award, if such an application would have lain under the provisions of the Act. That a party to reference to arbitration was induced to agree by means of fraud or by some other party is a matter which could have been and should have been taken in proceedings under the Arbitration Act. We find observations of a nature akin to this in the judgment of a single

Judge of the Calcutta High Court in — 'Chaturbhuj Mohanlal v. Bhicamchand', 53 Cal W N 410 (E).

(3) Apart from these decisions, on the facts of this case we are satisfied that what the plaintiff now alleges is with regard to existence and validity of the award. We have no doubt whatever that taking the allegations in the plaint as they are, the sole question for consideration was with regard to the existence and the validity of the award, and if that is so, the remedy is not by filing a fresh suit as she has now done, and she ought to have moved the court under the sections of the Arbitration Act. In this view we are of opinion that the decision of the lower court is right.

(4) The appeal is dismissed but in the circumstances without costs.

B/M.K.S. Appeal dismissed.

A.I.R. 1953 MADRAS 545 (Vol. 40, C. N. 206)

CHANDRA REDDI, J.

K. Tirupathi Mudali, Appellant. v. T Lakshmana Mudali and another, Respondents.

Second Appeal No. 183 of 1948, D/- 21-10-1952.

(a) T. P. Act (1882), S. 53 — Avoidance by fraudulent grantor — (Trusts Act (1882), S. 84).

So long as the contemplated fraud is not carried out or at least there has been no substantial part performance of it, the grantor although in 'pari delicto' is entitled to invoke the assistance of a Court for the recovery of the properties he has parted with irrespective of the fact whether the frustration of the fraud was the result of the 'locus penitentiae' of the transferor or due to other causes. 35 Cal 551 (PC) and AIR 1936 Mad 717 (FB), Rel. on; 29 Mad 72 Explained; (1951) 1 All E. R. 92, Not followed. (Para 11)

Anno: T. P. Act, S. 53 N 9; Trusts Act, S. 84 N 7.

(b) Specific Relief Act (1877), Ss. 42 and 39 — Setting aside transactions — (T. P. Act (1882) Ss. 54 and 53) — (Evidence Act (1872), S. 92).

A sale deed, executed with the object of defrauding creditors, whether real or sham has to be decided with reference to the document & the surrounding circumstances. The question depends on the 'animus transferendi' which parties had at the time they entered into the transaction (Para 12)

All transfers intended to defraud creditors cannot be presumed sham: Dictum of Krishnan J. in AIR. 1919 Mad 467, held too broadly stated. (Para 12)

Sale of property real — Intention to defraud cerditors — Fraud not carried out— Representatives-in-interest cannot, without setting aside sale deed, recover property upon a mere declaration of their title. (Paras 13-14)

Anno: Sp. Rel. Act. S. 42 N 13, 20; S. 39 N 5, 7; T.P. Acts S. 54 N 5; S. 53 N 5; Ev. Act. S 92 N 20, 6.

M. Natesan for Appellant. L. S. Veera Raghava Ayyar for Respondents.

REFERENCES: Courtwise/Chronological/ Paras

('08) 35 Cal 551:(35 Ind. App. 98 PC) 8, 9, 10, 11, 12
('06) 29 Mad 72: (15 Mad LJ 478) 5, 6
('16) 30 Mad LJ 565:(AIR 1917 Mad 519) 12
('19) 36 Mad LJ 180:(AIR 1919 Mad 467) 12
('20) 55 Ind. Cas. 766 (2):(AIR 1920 Mad (1)) 88 12
('36) 59 Mad 998:(AIR 1936 Mad 717 FB) 10, 11, 12
(1951) 1 All ER 92 5, 7, 11
(1884) 26 Ch. D 616:(54 LJ Ch. 68) 9
(1870) 9 Eq. 475:(39 LJ Ch 304) 9
(1876) 1 Q. B. 291:(46 L. J. Q. B. 39) 7, 9
(1890) 24 Q. B. D. 742:(59 L. J. Q. B. 288) 9

JUDGMENT: This second appeal is filed by the 1st defendant against the judgment and decree of the Subordinate Judge of Chingleput who reversed the decision of the trial Court dismissing the suit brought by the respondents for a declaration of their title to the suit property and for the recovery of possession thereof. The facts material for the purpose of this enquiry are as follows: One Damodara Mudali executed a sale deed, Ex. P. 1, in favour of the appellant conveying his divided half share in the suit house for a stated consideration of Rs. 600 on 9-6-1935 and had it registered on 3-10-1935. The vendor took the same property on lease from the vendee evidenced by the original of Ex. D. 1 dated 3-10-1935. A creditor of Damodara attached the suit house in execution of a decree which he obtained against him. The first defendant in the present suit intervened with a claim petition but his claim was disallowed on the ground that the sale was effected with a view to defraud the creditors. The defeated claimant did not bring a suit to set aside the claim order as the decree debt was satisfied out of the sale proceeds of other properties belonging to Damodara. Subsequently, the present plaintiffs instituted a suit, O. S. No. 176 of 1937 against the present 1st defendant that is the vendee under Ex. P. 1 and the widow and mother of Damodara (Damodara having died by that time) for an injunction restraining them from interfering with the plaintiff's possession on the allegations that Damodara and the plaintiffs were members of an undivided Hindu joint family and that on the death of Damodara the plaintiffs got the suit property by survivorship. This suit was ultimately dismissed as it was found that Damodara on the date of Ex. P. 1 was divided from the plaintiffs and that the plaintiffs were not in possession of the property at the time of the suit. It is not necessary for me to refer to some other litigation in respect of the same property as that has no bearing on the controversy in the present appeal. Having failed there, the plaintiffs laid this action for the reliefs mentioned above with the averments, that Ex. P. 1 was a sham and nominal document not intended to convey title and that they were entitled to the properties as the reversioners to the estate of Damodara.

(2) The suit was resisted mainly on the plea that the sale deed Ex. P. 1 was a genuine one and that the plaintiffs could not put forward any claim thereto. The trial Court dismissed the suit holding that Ex. P. 1 evidenced a real transaction and that it was not a nominal document executed in fraud of creditors. On appeal the lower appellate Court in disagreement with the trial Court found that Ex. P. 1 was executed with a view to defraud the creditors. In the result, it decreed the suit.

(3) It may be stated that the learned Subordinate Judge had not kept in view the distinction between a sham and fictitious document under which no title was intended to pass and a real

document executed with intent to defraud creditors. Having regard to this fact, I had to call for a finding when the appeal came on for hearing for the first time in September 1951 as to whether Ex. P. 1 was a mere sham document under which no title was intended to pass to the vendee and therefore a mere nullity or whether it was a document by which legal title was intended to vest in the vendee with the object of defrauding the creditors. The finding submitted by the learned Subordinate Judge is that the intention of Damodara was not to defraud his creditors but that his object was only to retain the suit property for himself and make the creditors proceed against the other properties, that consequently Ex. P. 1 was not intended to convey legal title to the first defendant and that it was merely a sham document. I will presently show that this finding is not borne out by the evidence on record and is also self-contradictory and is therefore not entitled to any weight. I propose to consider the evidence afresh and give a decision on this question on the materials before me.

(4) In support of this appeal, Mr. Natesan on behalf of the appellant contended that in view of the finding of the learned Subordinate Judge that there were no creditors at all in fraud of whom this document is said to have been executed, the only conclusion that could have been reached by the learned Subordinate Judge was that Ex. P. 1 evidenced a genuine transaction and could not be impeached on the ground that it was entered into with a view to defraud the creditors. I do not think that I can accede to this argument having regard to the fact that there is evidence to show that there were some creditors at the time of the execution of Ex. P. 1 to defeat whom the document is said to have been executed & that the finding given in all the prior litigations was that this document was executed with intent to defraud the creditors.

(5) It was next argued that the object in entering into the transaction being a fraudulent one and the reason for the non-fulfilment of the fraud being not the 'locus pacnitentiae' of the fraudulent grantor but the intervention of the Court, the transferor cannot invoke the aid of the Court to recover the property transferred by him. According to him, it is only when an illegal transaction is not carried out due to repentance on the part of the transferor and not due to the intervention of third parties that the transferor would be entitled to claim the recovery of the property through Court. In support of this proposition reliance was placed by him on — 'Muthooraman Chetti v. Krishna Pillai', 29 Mad 72 and also on the opinion expressed by Pritchard J. in — 'Bigos v. Boustead', (1951) 1-All E. R. 92.

(6) I do not think that — 'Muthuraman Chetti v. Krishna Pillai', 29 Mad 72 carried the appellant very far. All that was laid down there was that the rule that a person 'in pari delicto' cannot recover is applicable not only to cases where contemplated fraud is completely carried out but to cases where there has been substantial part performance of the same as well. Undue weight cannot be attached to the remarks at page 74 of the report which run thus:

> "Turning to the facts here, we do not find a case when a party to a fraudulent transaction relented before anything was done in pursuance of the intended fraud and the unlawful compact was in no way carried out."

These remarks should be understood only with reference to the context in which they are used.

(7) No doubt the judgment of Pritchard J. in — 'Bigos v. Boustead', (1951) 1-All E. R. 92 supports to a great extent the position taken up by Mr. Natesan. The following observations of the learned Judge at page 100 of the report are pertinent:

> "I confess that there was a time when I thought it would be right to apply to the facts of this case the reasoning of the decision in — 'Taylor v. Bowers', (1876) 1 Q. B. 291, but, having considered all the authorities, I do not take that view. I think that what is to be extracted from the authorities may be treated as follows. I think that they show, first, that there is a distinction between what may, for convenience be called the repentance cases, on the one hand, and the frustration cases, on the other hand. If a particular case may be held to fall within the category of repentance cases I think the law is that the Court will help a person who repents, provided his repentance comes before the illegal purpose has been substantially performed. If I were able in this case, to take the view that the defendant had brought himself within that sphere of the authorities, it might well be that I would have been able to help him by saying that his repentance had come before the illegal purpose had been substantially performed but I do not take that view. I think, however, that this case falls within the category of cases which I call the frustration cases."

(8) I do not think I can share this view of the learned Judge. It is not only opposed to the rule of law contained in S. 84 of the Trusts Act but to the principles enunciated in the Privy Council decision in — 'Pethaperumal Chetti v. Muniandy Servai', 35 Cal 551, which has been followed by the Full Bench of this Court in — 'Venkataramayya v. Pullayya', 59 Mad 998.

(9) In — Pethaperumal Chetti v. Muniandy Servai', 35 Cal 551 (P.C.) in order to defeat the claim of an equitable mortgagee to certain property the predecessor-in-interest of the plaintiff and another member of the joint Hindu family executed a document purporting to be a sale of the property in favour of the predecessor–in-interest of the defendant. But the equitable mortgagee succeeded in getting a declaration that his mortgage could be enforced against the property covered by the last conveyance in priority to the last mentioned conveyance as the transferee under the sale deed was aware of the existence of the equitable mortgage. The claim arising under the mortgage was subsequently satisfied. In a suit filed by the transferor for the recovery of the property purported to have been conveyed under the sale deed the defence put forward was that as the grantor was in 'pari delicto' his successor-in-interest could not recover the property although the fraud was not successfully carried out. This objection was overruled and a decree was granted. The Privy Council repelled the contention that if the plaintiff was allowed to recover the property in dispute and if the maxim in 'pari delicto potior est conditio possidentis' were not rigorously applied to such cases, much confusion would be imported into the law in the following words:

> "The answer to that is that the plaintiff, in suing to recover possession of his property is not carrying out the illegal transaction but is seeking to put every one, as far as possible, in the same position as they were in before that transaction was determined upon. It is the defendant, who is relying upon the fraud, and is seeking to make a title to the lands through and by means of it. And despite his anxiety to effect great moral ends, he cannot be permitted to do this. And, further, the purpose of the fraud having not only not been effected, but absolutely defeat-

ed, there is nothing to prevent the plaintiff from repudiating the entire transaction, revoking all authority of his confederate to carry out the fraudulent scheme, and recovering possession of his property."

The decision of the Court of Appeal in —'Taylor v. Bowers', (1876) 1 Q. B. 291, and the authorities upon which that decision is based, clearly establish this. —'Symes v. Hughes', (1870) 9 Eq. 475, and —'In re Great Berlin Steamboat Co', (1884) 26 Ch. D. 616 are to the same effect. And the authority of these decisions, as applied to a case like the present is not, in their Lordships' opinion, shaken by the observations of Fry L. J. in —'Kearley v. Thomson', (1890) 24 Q. B. 742. The statement contained in the subsequent portion of the judgment that it is only when a contemplated fraud was effected that a fraudulent transferor would forfeit the right to seek the assistance of a Court to get back the property he has parted with furnishes a complete answer to the contention put forward by Mr. Natesan. It is evident from these observations that there is no foundation for the distinction between the fraud not being carried out on account of the repentance of the grantor and the frustration of the fraud through the intervention of Courts or third parties. In my opinion, in judging whether a fraudulent grantor can recover the property he had parted with, with the aid of the Court, the test is whether the fraud has been perpetrated or whether there has been a substantial part performance of it and not whether it was due to the penitence of the fraudulent grantor or whether it fell through on account of the intervention of a Court or third parties.

(10) — 'Petheperumal Chetti v. Muniandy Servai', 35 Cal 551 (P.C.) was followed by a Full Bench of this Court in — 'Venkataramayya v. Pullayya', 59 Mad 998. What happened there was this. With a view to cheat his son a Hindu father transferred an item of joint family property in favour of his daughter. Subsequent to this he filed a suit for partition of family properties in which the property covered by the sale deed was not included. When objection was taken to it by the son in his written statement, to this exclusion, the father agreed to include this property for partition and asked for its being allotted to his share. Ultimately the matter was compromised and the property was allotted to his share and he recovered possession thereof from his son. Shortly thereafter the maternal grandson that is the transferee's son filed a suit for the recovery of the property in dispute. The defence to the suit was that the sale in favour of his daughter was a 'benami' transaction entered into for the purpose of cheating his son. The question arose whether it was open to the 1st defendant to plead his own fraud. The answer given by the Full Bench was in the affirmative. It took the view following — 'Petheperumal Chetti v. Muniandi Chetti', 35 Cal 551 (P.C.), that in order to deprive a fraudulent grantor of his right to recover the property with the assistance of a Court, the intended fraud must have been effected or at least there must have been a substantial part performance of the intention to defraud. The learned Judges expressed the opinion that a mere fraudulent intention as evidenced by the impeached document was not sufficient.

(11) I may also refer to S. 84 of the Trusts Act. The rule enacted in that section is in conformity with the principles embodied in the decisions quoted above. (His Lordship after quoting the section stated) On this statutory provision, and the principles enunciated in — 'Petheperumal Chetti v. Muniandi Servai', 35 Cal 551 (P.C.) followed in — 'Venkataramayya v. Pullayya', 59 Mad 998 (F.B.), and in other rulings to which I need not allude here, my conclusion is that so long as the contemplated fraud is not carried out or at least there has been no substantial part performance of it, the grantor although in 'pari delicto' is entitled to invoke the assistance of a Court for the recovery of the properties he has parted with irrespective of the fact whether the frustration of the fraud was the result of the 'locus paenitentiae' of the transferor or due to other causes. I therefore reject the contention based on the theory propounded by Pritchard J. in — 'Bigos v. Boustead', (1951) 1 All E. R. 92 and find that the plaintiffs can get a decree for the recovery of the property if otherwise they are entitled to do so.

(12) The next submission made by Mr. Natesan is that if the object in executing a sale deed was to defraud the creditors it must be considered to be a fraudulent transfer which has to be avoided and not a sham and colourable transaction not intended to convey title which need not be set aside. In support of this he cited to me the judgment of Krishnan J. in the —'Secy. of State v. Dadi Reddi Nagiah', 36 Mad L. J. 180. That judgment does lend support to this contention of Mr. Natesan. But the other learned Judge, Ayling J. remarked thus:

"I speak thus cautiously, because we have not had the benefit of any argument 'contra' and the words are open to the construction placed upon them by the learned District Judge."

The dictum laid down by Krishnan J. is opposed to a Bench decision of this Court in — 'Swaminatha Aiyar v. Rukmani Ammal', 55 Ind Cas 766 (2) (Mad). In — 'Palaniandi Chetti v. Appavu Chettiar', 30 Mad L. J. 565 a Bench of this Court consisting of Coutts-Trotter and Seshagiri Aiyar JJ. called for a finding whether a document executed with a view to defraud the creditors was merely a colourable one leaving the real beneficial enjoyment with him who purported to transfer it or a real one meant to effect a real transfer of the property from the transferor to the transferee. The decision in — 'Petheperumal Chetti v. Muniandi Servai', 35 Cal 551 (P.C.), also seems to be opposed to what is stated by Krishnan J. in — 'The Secy. of State v. Dadi Reddi Nagiah', 36 Mad L. J. 180. In the last mentioned case it was observed that if the transaction impeached was a 'benami' one not intended to be operative as between the grantor and the grantee the successor-in-interest of the grantor could recover the property without asking for the cancellation of the document. It looks to me that the proposition was too broadly stated by Krishnan J. in that decision. In my opinion, whether a sale deed was a sham and simulated one not intended to convey any title or whether it was real one intended to pass title to the transferee thereunder depends upon the 'animus transferendi' at the time when the parties entered into the transaction and each has to be decided with reference to the documents & the surrounding circumstances. Nor is there any substance in the contention of Mr. Veeraraghava Aiyar that in all cases of fraudulent transfers intended to defraud the creditors, they should be presumed to be mere sham and bogus transactions not intended to be operated between the grantor and the grantee.

(13-14) (His Lordship after examining the evidence and holding that Ex. P. 1 was a real document intended to be given effect to stated): The next question is that if this document was

not a mere sham and colourable transaction but a real one, could the plaintiffs ask for a mere declaration that they are entitled to the property without asking for the avoidance of that document? In my judgment, they cannot do it. The document not being void but only voidable will be valid till it is set aside and the plaintiffs without having it avoided cannot recover the property. In this case, there is no prayer for setting aside the sale deed and the reliefs asked for are the declaration mentioned above and recovery of possession of the property. Consequently they cannot recover possession of the property from the 1st defendant.

(15) It follows that the reliefs asked for cannot be granted and the suit has to be dismissed. The decision of the lower appellate Court decreeing the suit is unsustainable. Hence the appeal is allowed. In the circumstances of this case, I direct the parties to bear their own costs throughout. No leave.

B/M.K.S. Appeal allowed.

AIR 1953 MADRAS 548 (Vol. 40 C. N. 207)

RAJAMANNAR C. J. AND VENKATARAMA AYYAR J.

Penugonda Bramaramba, Appellant v. Yaditha Jagannadha Rao, Respondent.

Letters Patent Appeal Nos. 76 and 90 of 1949, D/- 11-7-1952 from judgment and order of Mack J., in A. A. O. No. 519 of 1948, D/- 6-4-1949.

Debt Laws — Madras Agriculturists Relief Act (4 of 1938), Ss. 14 and 19 — Mortgage decree for sale — Scaling down on application by agriculturist judgment-debtor — Relief under S. 14 can be claimed for first time in execution though not claimed in application under S. 19 — (Civil P. C. (1908), S. 11). AIR 1951 Mad 107 (FB), Rel. on. (Para 3)

Anno: C.P.C., S. 11 N. 23.

P. Satyanarayana Raju, for Appellant; Y. Suryanarayana, for Respondent.

CASE CITED:

(A) ('51) AIR 1951 Mad 107: 1951-1 Mad LJ 153 (FB)

RAJAMANNAR C. J.: These two appeals are against the judgment of Mack J. disposing of a Civil Miscellaneous Appeal No. 519 of 1948 preferred against an order passed by the Principal Subordinate Judge of Visakhapatnam in E. P. 26 of 1948. The transferee decree-holder of the decree in O. S. 14 of 1935 on the file of the Subordinate Judge, Visakhapatnam, is the appellant in L. P. Appeal No. 76 of 1949 and the second judgment-debtor who is the contesting respondent therein is the appellant in the connected appeal No. 90 of 1949.

(2) There is no dispute about the material facts. A preliminary mortgage decree was passed against two brothers for a sum of about Rs. 15,373 on 27-2-1937 and final decree was passed on 29-10-1937. The Second judgment-debtor filed an application (E. A. 618 of 1938) to scale down the decree debt under the provisions of Madras Act 4 of 1938. This application was allowed and the debt so far as he was concerned was scaled down to Rs. 4,000 for principal and interest at 6 per cent from 1-10-1937 till realisation and costs with interest from the same date at the same rate. The order scaling down the decree was passed on 31-1-41. Subsequent to this order the decree was transferred to the appellant in L. P. A. 76 of 1949 and he appears to have filed an application to have the transfer recognised (E. P. 64 of 1942). There was also a prior petition for execution (E. P. 32 of 1942) but our attention was not drawn to any order passed by the Court as against the second judgment debtor in either of these applications.

Eventually the transferee decree holder filed E. P. 26 of 1948 on 26-2-1948 claiming Rs. 4,000 for principal and subsequent interest from 1-10-37 and the full amount of costs and interest thereon from the same date. He prayed for a sale of the hypotheca belonging to the second defendant's share for Rs. 9,031-5-10. The second judgment debtor raised an objection on the ground that under S. 14 of Madras Act 4 of 1938 he would be liable to pay only half the amount of Rs. 4,000 and interest thereon. He also pleaded that he had already paid Rs. 4,071-4-6 which would cover his liability and therefore the execution petition should be dismissed. The learned Subordinate Judge made an order that the second judgment debtor was liable to pay half the costs of the suit and the full interest on Rs. 4,000/- from 1-10-37 till date of payment and he directed execution to proceed after deducting Rs. 4071-4-6 already paid. Against this order the second judgment-debtor preferred C. M. A. 519 of 1948. Mack J. was unable to understand on what basis the learned Subordinate Judge had passed his order. He thought a muddle had resulted from the failure of the scaling down court to amend the original mortgage decree in accordance with the provisions of S. 14 of the Act. He therefore thought that the only way in which justice could be done was by permitting the second judgment-debtor to rectify this error. He apparently considered that it was necessary for the judgment-debtor to file an amendment application under S. 152, C. P. C. to apply the provisions of S. 14 of the Act. With these directions he allowed the appeal.

(3) Mr. Somasundaram appearing for the transferee decree holder in L. P. A. 76 raised a plea of res judicata. He contended that it was too late in the day to rely upon the provisions of S. 14 of the Act. If the judgment debtor wanted to rely upon those provisions he ought to have availed himself of the opportunity in the application filed under S. 19 of the Act for scaling down the decree. Not having done so, he cannot now urge the objection in execution. We see no substance in this contention. In our opinion, it was not necessary for the judgment-debtor to have invoked the provisions of S. 14 of the Act in his application under S. 19 of the Act to scale down the decree. Section 14 is a special provision which applies when there is a debt payable by members of a family some of whom are agriculturists and some are not. That section declares that in such cases the creditor could recover only their proportionate shares from the agriculturist and non agriculturist members respectively. It was not therefore incumbent on the judgment debtor to have included a prayer for the application of S. 14 of the Act in his scaling down petition under S. 19. We are supported in this view by the decision of a Bench of this Court in — 'Rayalu Iyer Nagaswami Iyer & Co. v. Shanmugham', AIR 1951 Mad 107 (A). The learned Judges dealing with a similar plea of res judicata observed thus:

"The cause of action for filing an application under S. 8 of the Madras Agriculturists Relief

Act and the relief claimed therein are different from that claimable in an application under S. 14 of the Madras Agriculturists Relief Act.....As the scope of the applications and the reliefs obtainable thereunder are different the order, Ex. D 1, cannot operate as res judicata."

While we agree with these observations we do not think the learned Judges meant to lay down that a substantive application is necessary for the judgment debtor to obtain the benefit of S. 14 of the Act. When the creditor proceeds to recover what is alleged to be due to him, the judgment debtor can rely upon this provision. That is what the judgment debtor has done in this case. We therefore see no reason why he should be driven to file another application for an amendment either under S. 152, C. P. C. or under any other provision of law. He has raised the objection based upon the section in his counter affidavit in the execution petition and his objection must be upheld.

(4) In the result the appeal filed by the transferee decree holder must be dismissed and the appeal filed by the second judgment debtor must be allowed. The order of the learned Subordinate Judge on E. P. 26 of 1948 must be set aside and he is directed to take up that application on file and proceed to dispose of it as against the second defendant in the light of this judgment. Mr. Y. Suryanarayana, learned counsel for the second judgment debtor represented to us that he has actually made a payment in excess of his liability when S. 14 of the Act is applied. That is a matter which may be taken into consideration by the learned Subordinate Judge in passing final orders on the execution petition. The appellant will pay the costs of the respondent in L. P. A. 76 of 1949. No order as to costs in L. P. A. 90 of 1949.

B/K.S. Order accordingly.

AIR 1953 MADRAS 549 (Vol. 40 C. N. 208)

RAMASWAMI J.

Krishnappa Chettiar, Petitioner v. Sivagami Achi, Respondent.

Criminal Revn. Cases Nos. 585 and 580 of 1951, D/- 4-9-1952.

Criminal P.C. (1898), S. 488(4) — Compromise between parties — Application of wife for enhancement of maintenance does not lie. 2 Wier 629; (1888) Pun Re 42 Cr.; (1905) Pun Re 39 Cr., Rel. on. (Para 6)

Anno: Cr. P. C., S. 488 N. 23 Pts. 7 and 8.

T. R. Arunachalam, for Petitioner; Public Prosecutor, for the State.

CASES CITED:

(A) 2 Weir 629
(B) ('88) 1888 Pun Re 42 Cr
(C) ('05) 2 Cri LJ 690: 1905 Pun Re Cr 39
(D) ('03) Cri R C No 489 of 1903 (Mad)

ORDER: This is a criminal revision case, which has been preferred against the judgment of the Additional First Class Magistrate, Devakottai, in M. C. No. 4 of 1951.

(2) The short facts are: Sivakami Achi, the respondent before us, is the lawfully wedded wife of Krishnappa Chettiar. Krishnappa Chettiar and Sivakami Achi could not carry on their married life by 1948. This Chettiar, as is common in these parts, was keeping a concubine and wanted to take a second wife also. Therefore, the husband and wife entered into an arrangement, which has been marked as Ex. D. 1, and it is nobody's case that this arrangement was not entered into or that the husband is going behind Ex. D. 1.

(3) The relevant passage in Ex. D. 1 is as follows:

"As the party No. 1 among us is about to marry a second wife and as the party No. 2 above could not hereafter live amicably with party No. 1 and in view of the above factors, accounts were looked into with the help of mediators and it was settled that party No. 1 should pay and has accordingly paid party No. 2 a sum of Rs. 5500. As party No. 2 desires hereafter to live separately and has asked party No. 1 to make provision for her maintenance till her life-time and party No. 1 has agreed to the same and should accordingly pay party No. 2 a sum of Rs. 100 per annum on or before the 10th of the month (of) Thai every year till her lifetime in default party No. 2 could take steps to recover the same. Out of the sum of Rs. 5500, there is a balance of Rs. 4500 after reducing Rs. 1000 paid in cash for which sum the party No. 1 has executed a mortgage deed in favour of party No. 2. Till this entire principal and interest is paid, the party No. 1 shall be bound to pay without any plea of limitation the seethanam money of Rs. 1362-4-0 in respect of which a hundi has been executed to this effect both of us have agreed and executed this written deed."

There was a receipt executed by Sivakami Achi, which has been marked as Ex. D. 2 and which can be considered to be the counter-part of Ex. D. 1. It runs as follows:

"According to the agreement entered into between us, you have to pay me Rs. 100 as and for my maintenance till the 10th day of Thai this year. I have this day received from you cash for which I have executed this receipt."

(4) Subsequently the affairs of this Chettiar seem to have got into a fair amount of muddle and he seems to have lost his income from the Federated Malay States and other places and, what is more, his affairs in Ramanathapuram district itself seem to be not in flourishing circumstances and, therefore, the Chettiar says that he has taken that refuge which is open to persons of that description, viz., a religious life. The wife has now come forward with a petition under S. 488 Cr. P. C., asking for maintenance of Rs. 100 per month instead of Rs. 100 per annum, which has been secured for her in Ex. D. 1.

(5) The learned Additional First Class Magistrate gave a complete go-by to Ex. D. 1 and came to a conclusion of his own that the wife should be given Rs. 25 per month and hence this criminal revision case. The short point taken is that when the parties have amicably settled the maintenance to be granted to the wife and when the husband and wife have been living apart by mutual consent, there was no jurisdiction for the Magistrate to entertain this application under S. 488(4), Cr. P. C.

(6) There can be no doubt that a Magistrate purporting to act under this section, cannot assume the functions of a civil Court and give judgment in accordance with a bond evidencing a compromise entered into between a husband and a wife. Where a claim for maintenance is amicably settled by the parties, the Magistrate should simply dismiss the petition if pending before him. — Lingadu v. Labbakka', 2 Weir 629 (A); — 'Mt. Rahim Bibi v. Khair

Din', (1888) Pun Re 42 Cr (B); 'Raham Ali v. Fateh Bibi', (1905) Pun Re 39 Cr. (C). In Madras High Court Cri R C No 489 of 1903, a husband and wife came to a settlement outside the Court, whereby the husband consented to maintain the wife. It was held by the High Court that the Magistrate had no longer any power to make an order under this section as it could no longer be said that the husband was refusing to maintain the wife.

(7) In this case, if the wife was dissatisfied with the miserable pittance secured for her under Ex. D. 1, there are courses open to her like filing a civil suit for denouncing Ex. D. 1 or she can ask for enhanced maintenance on account of the rise in the cost of living or she can file a suit on the ground that Ex. D 1 was executed by her without fully understanding its import and that it is an invalid document. It is not for us to advise this respondent as to the many courses open to her for getting enhanced maintenance if she deserves it.

(8) This petition is allowed and the order of the lower Court is set aside and the respondent is left to her own reliefs in the civil Court, if so advised.

B/V.S.B. Petition allowed.

A.I.R. 1953 MADRAS 550 (Vol. 40, C. N. 209)

GOVINDA MENON AND KRISHNASWAMI NAYUDU JJ.

Arunachala Mooppanar, Appellant v. Arumugha Mooppanar and others, Respondents.

S. A. No. 989 of 1948, D/- 6-3-1952.

Hindu Law — Widow — Alienation — Gift by widow of part of estate — Subsequent surrender of entire estate in favour of reversioner — Reversioner has right to recover possession from donee. AIR 1917 Mad 473, Foll. 40 Cal 721 and AIR 1935 Cal 689, Ref.

(Paras 3 and 4)

K. V. Venkatasubramaniam and T. P. Gopalakrishnan, for Appellant; S. Ramachandra Iyer, for Respondents.

CASES CITED:

(A) ('17) AIR 1917 Mad 473: 39 Mad 1035
(B) ('03) 12 Mad LJ 197: 26 Mad 143
(C) ('18) AIR 1918 Mad 469: 41 Mad 75 (FB)
(D) ('21) AIR 1921 Mad 332: 41 Mad LJ 208
(E) ('25) AIR 1925 Mad 1267: 48 Mad 933
(F) ('27) AIR 1927 Mad 530: 52 Mad LJ 634
(G) ('27) AIR 1927 Mad 429: 52 Mad LJ 195
(H) ('37) AIR 1937 Mad 146: ILR (1937) Mad 248
(I) ('32) AIR 1932 Mad 120: 62 Mad L J 131
(J) ('51) AIR 1951 Mad 753: 1951-2 Mad LJ 39
(K) ('13) 19 Ind Cas 273: 40 Cal 721
(L) ('35) AIR 1935 Cal 689: 40 Cal WN 208

GOVINDA MENON J.: The property in dispute in this litigation formed part of the estate of one Pattakarathi Moopanar on whose death his widow Esakki Ammal succeeded to a widow's estate. By a gift deed Ex. D. 1 dated 12-12-1936 she gifted away the suit and other properties in favour of her brother, defendant 1. Nearly ten years later, by Ex. P. 5 dated 10-2-1946, she surrendered her estate in favour of the nearest reversioner of her husband, the plaintiff. By Ex. D. 6 dated 29-4-1946 father of defendants 4 to 7 purchased for consideration 32 cents of land which are in dispute in this suit from defendant 1, the donee under Ex. D. 1. The suit out of which this second appeal arises was filed by the plaintiff for recovery of possession of the 32 cents of land on the strength of the surrender deed, Ex. P. 5, executed in his favour by the widow Esakki Ammal. Both the lower Courts have upheld the contention put forward by the alienees that it is not open to a reversioner, to whom the widow has surrendered the estate after alienating a part of the property to recover possession of the alienated property on the strength of the surrender deed until the death of the widow.

(2) In this case it is admitted that the widow Esakki Ammal is still alive and that if the contention of the alienees who claim under defendant 1 is accepted, then the suit has to be dismissed.

(3) By a long course of judicial decisions this Court has held that when a widow, in possession of her husband's estate, alienates part of that estate and then makes an unconditional surrender of the entire estate in favour of the nearest reversioner, it is not open to the reversioner-surrenderee to recover possession and dispossess an alienee from the widow until the widow dies. The earliest of these is in — 'Subbamma v. Subrahmanyam', AIR 1917 Mad 473 (A) which is based upon a dictum in — 'Sreeramulu v. Kristamma', 26 Mad 143 (B). 'AIR 1917 Mad 473' (A) has been followed in this Court in quite a large number of subsequent cases. Though the judgment in — 26 Mad 143' (B) on which the learned Judges based their judgment in — 'AIR 1917 Mad 473' (A) had been overruled by the Full Bench in — 'Vaidyanatha Sastri v. Savithri Ammal', A I R 1918 Mad 469 (FB) (C), still the Full Bench itself has stated that so far as the surrender by the widow is concerned, an ante-surrender alienee cannot be dispossessed by the reversioner until the widow dies. We need only refer to the judgment of Kumaraswami Sastriar J. at page 480 of the Full Bench judgment where the learned Judge observes as follows:

> "Reference has been made to cases where it has been held that a reversioner to whom the widow surrenders the estate (and thereby accelerates the succession) cannot sue to set aside the alienation made by her till she dies. These cases have, in my opinion, no bearing or application to cases of adoption by the widow. The whole doctrine of surrender and consequent acceleration of the estate, of the reversioner has no basis in Hindu Smritis but has been evolved by Courts of justice on general principles of jurisprudence. An anticipation of interest involved by the theory of relinquishment or the defeasance of an ulterior interest by the intermediate acts on the part of the widow are hardly contemplated by the Hindu law-givers. It is clear that the surrender by the widow and the acceptance of the estate by the reversioner are purely matters of contract."

Therefore it has to be taken that so far as the Full Bench is concerned, the learned Judges have not chosen to doubt the correctness of the decision in — 'AIR 1917 Mad 473' (A). Subsequent course of judicial opinion in this Court is more or less on the same lines as is exemplified by — 'Venkata Rajagopala Suryarao v. Venkata Suryanarayana Jagapathi', AIR 1921 Mad 332 (D), — 'Sundarasiva Rao v. Viyyamma', A I R 1925 Mad 1267 (E), — 'Ramayya v. Narayya', AIR 1927 Mad 530 (F), — 'Karuppa Pillai v. Irulayee', AIR 1927 Mad 429 (G), — 'Ramayya v. Bapanamma', AIR 1937 Mad 146 (H) and —

'Vijayaraghava Pillai v. Ponnammal', A I R 1932 Mad 120 (I).

A much more recent case of this Court is contained in the decision of Satyanarayana Rao J. in — 'Tripursundara Rao v. R. Kotayya', AIR 1951 Mad 753 at p. 754 (J), where the learned Judge takes the view that the law has been settled so far as this Court is concerned. In fact, in delivering the judgment of the Bench in — 'AIR 1932 Mad 120' (I) Reilly and Ananthakrishna Aiyar JJ. adverted to that fact and expressed the opinion that the law is well settled that a widow cannot alienate her interest in her husband's estate and then defeat the alienation by surrendering her interest in that estate to the nearest reversioner.

(4) But Mr. K. V. Venkatasubramaniam for the appellant contends that the instant case is not one of alienation for consideration by the widow but is one where the widow has voluntarily made a gift of a portion of her husband's estate in favour of a donee. Such being the case the learned counsel contends that the principle enunciated in the cases abovementioned cannot be applied to this case. But we find that in — 'AIR 1927 Mad 429' (G) Curgenven J. had to consider a similar case and the learned Judge says that what is applicable to alienees for consideration must apply with equal force to gifts and donations. Mr. Venkatasubramaniam wants to question the very foundation of the decision in — 'AIR 1917 Mad 473' (A) on the footing of the expressions of opinion by Mookerjee J. in — 'Debi Prosad v. Golap Bhagat', 40 Cal 721 (K), followed and adumbrated in the judgment of D. N. Mitter J. and B. N. Rao J. in — Ramakrishna v. S. M. Kausalya Mani', AIR 1935 Cal 689 (L). The learned Judges of the Calcutta High Court were of opinion that the basic principle of the surrender by a Hindu widow of her husband's estate is not founded on judicial decisions at all but can be traced to the Hindu law-giver Katyayana and, therefore, when the Madras Judges held that the whole doctrine is based upon Judge-made law they have made a fundamental error in the approach to the question.

But so far as our High Court is concerned, in view of these catena of cases, it is futile, at least for the purpose of this case, to explore into the antiquities of texts and verses and try to find out whether all these cases have been based upon a wrong doctrine. In any event we do not think that at this late stage we should try to unsettle the settled law in this state which has been in force for such a long time. We are, therefore, of opinion that — 'AIR 1917 Mad 473', (A) followed as it is in a long series of subsequent decisions and by Curgenven J. in — 'AIR 1927 Mad 530' (F) is correct. The second appeal, therefore, fails and is dismissed but in the circumstances without costs.

B/V.R.B. Appeal dismissed.

A.I.R. 1953 MADRAS 551 (Vol. 40, C. N. 210)

MACK AND KRISHNASWAMI NAYUDU JJ.

Chukkapalli Venkateswarlu, Appellant v. Kanyadhara Challaiya and others, Respondents.

Appeal No. 300 of 1948, D/- 14-10-1952.

Hindu Law — Widow — Surrender — Provision for maintenance and gift to her relations.

A surrender by the widow of her entire interest in her husband's property in favour of the nearest reversioners does not become invalid by reason of the reversioners making a provision at the time of the surrender or subsequently of a portion of the property to the kindred of the widow's father and mother to satisfy her wishes. Reservation of a small portion of the property as provision for her maintenance out of the estate is 'a fortiori' permissible. Case law discussed. (Paras 7, 9, 14)

K. Krishnaswami Iyengar and N. C. Raghavachariar, for Appellant; K. Kotayya and Y. G. Krishnamurthy, for Respondents.

CASES CITED:

(A) ('18) AIR 1918 PC 196: 42 Mad 523 (PC)
(B) ('21) AIR 1921 PC 107: 39 Mad LJ 161: 48 Cal 100 (PC)
(C) ('08) 31 Mad 446
(D) ('34) AIR 1934 Mad 535: 68 Mad LJ 179
(E) ('44) AIR 1944 Mad 439: 1944-1 Mad LJ 443
(F) ('50) AIR 1950 Mad 617: 1950-1 Mad LJ 750
(G) ('18) AIR 1918 Mad 469: 41 Mad 75 (FB)
(H) ('35) AIR 1935 Cal 689: 40 Cal WN 208
(I) ('53) AIR 1953 Mad 550: 1952-2 Mad LJ 280
(J) ('13) 19 Ind Cas 273: 40 Cal 721
(K) ('98) 8 Mad LJ 69: 21 Mad 128
(L) ('08) 18 Mad LJ 309: 31 Mad 366 (FB)

KRISHNASWAMI NAYUDU J.: The plaintiff, who is the appellant, sued in forma pauperis to recover the suit properties, which consisted of 23 items of lands and two houses belonging to one Chukkapalli Pichayya as his adopted son having been adopted by his widow defendant 20 (Achamma). Chukkapalli Pichayya died about 60 years prior to the suit leaving defendant 20 a childless widow. Defendants 1 and 2 are the sister's sons of Pichayya. The widow, defendant 20, purported to adopt P. W. 5, but that adoption was subsequently set aside by Court. On 25-2-1940 she obtained an authorisation from two of the reversioners to adopt a son to her husband. But before any actual adoption took place, the widow surrendered her husband's estate in favour of defendants 1 and 2, the nearest reversioners. On 28-2-1940 under Ex. A. 2 the widow and Pichamma, the sister of the deceased Pichayya and mother of defendants 1 and 2 jointly executed a deed of surrender in favour of defendants 1 and 2 conveying all the properties of Pichayya and the document mentions a payment of Rs. 2000 to the widow for her maintenance for her lifetime and for spiritual benefit to her husband and for offering Gaya pindams etc. Prior to this document it may be stated that by a deed of gift (Ex. B. 1) dated 26-2-1940 she had already made a gift of 2 acres of land to a temple. Immediately after the execution of Ex. A. 2, the surrender deed, defendants 1 & 2 and the other reversioners entered into a deed of settlement, Ex. A. 3, whereunder the properties of Chukkapalli Pichayya which were surrendered by the widow were divided as between defendants 1 and 2 and the other reversioners in certain proportions, the plaintiff's grandfather, who was one of the reversioners, also getting a share.

It is found that there was a sale deed by defendants 1 & 2 on the same date, namely 2-3-1940, Ex. B. 2 of the 3 acres and 6 cents of land to D. W. 1 for a sum of Rs. 3000 out of which Rs. 2000 is mentioned as having been received by defendants 1 & 2 to enable them to pay the widow the maintenance as provided under Ex. A. 2, the balance being the amount due under a prior transaction between defendants 1 & 2 and D. W. 1. More than three years thereafter on 30-9-1943, by Ex. B. 20, D. W. 1 sold the 3 acres and 6 cents of land, which he purchased under Ex. B. 2, to defendant 15 for the

same price of Rs. 3000. Defendant 15 is the brother's son of the widow. From a reading of Ex. B. 20, it is seen that the sum of Rs. 2000, which was paid by D. W. 1, as part of the sale consideration of Ex. B. 2 for payment of the sum provided under Ex. A. 2 to the widow, was in fact borrowed by D. W. 1 from defendant 15 even on the date of Ex. B. 2 and that there was an arrangement between D. W. 1 and defendant 15 that if the amount is not repaid he should execute a conveyance of the property which he purchased under Ex. B. 2 to defendant 15. The recitals in Ex. B. 20 show that defendant 15 was the person who in fact paid the sum of Rs. 2000 which enabled defendants 1 and 2 to pay the widow as and for her maintenance.

(2) It may also be mentioned that the properties were subject to a usufructuary mortgage in favour of P. W. 5, and defendants 1 and 2 and others instituted O. S. No. 292 of 1941 on the file of the District Munsif's Court, of Tenali, for redemption and P. W. 5 in turn instituted O. S. No. 32 of 1942 on the file of the Subordinate Judge's Court of Tenali for a declaration that the surrender deed and the settlement were fictitious transactions not binding on him. There was a compromise, which was recorded in O. S. No. 292 of 1941, Ex. B. 7, on 2-8-1943, whereby the mortgagee was given about 3 acres in satisfaction of his mortgage. The widow was a party to the compromise and all the parties including the widow Achamma declared under the compromise that the surrender deed and the settlement deed were true and valid. Achamma was nearly 75 years at the time of the deed of surrender, and 5 years thereafter on 17-2-1945 she executed a deed of adoption, Ex. A. 1 in favour of the plaintiff evidencing the adoption of the plaintiff.

(3) The plaintiff instituted the suit claiming to be entitled to the suit properties and alleging that the surrender deed executed by the widow in favour of defendants 1 and 2 was not valid. It is also alleged that it was the result of a conspiracy between the widow, defendants 1 and 2 the sister's sons and the nearest reversioners, and the other reversioners, that the surrender, settlement and the sale deeds, Exs. A. 2, A. 3, B 2 and B 20, though of different dates were the result of an arrangement between the parties to benefit defendant 15, who is the brother's son of the widow, with a portion of the property and also to benefit the other reversioners, though none of them were the nearest reversioners, and that being the result of such an arrangement, the surrender was not valid nor being bona fide.

(4) The factum of the adoption was not disputed; but it was contended that the adoption was not valid as the widow had no authority from the husband and she had not even the consent of the nearest sapindas, and further that in any event the widow having surrendered her interest in her husband's estate in favour of defendants 1 and 2, the plaintiff, even though validly adopted, was not entitled to recover the suit properties. The trial Court held against the plaintiff on both these questions, found that the adoption was not valid and upheld the surrender.

(5) That two questions that arise, therefore, for determination in this appeal are (1) whether the surrender is invalid for the reasons stated by the plaintiff and (2) whether the adoption is true and valid. Learned counsel addressed arguments on the first of these questions, since if the finding of the lower Court is upheld by us, it would be unnecessary to decide as to the validity of the adoption since the suit being one for possession has to fail. Though there are certain features that can be gathered from the documentary and the oral evidence which would throw suspicion as to whether the transactions were not the result of an arrangement between the widow and the reversioners as to the best way of disposing of the properties, we feel unable to agree with the appellant's contention that Exs. B. 2 and B. 20 are fictitious transactions brought into existence with a view to benefit defendant 15 by the widow setting apart a portion of her husband's property in favour of her brother's son. The reference in Ex. B. 20 to an agreement between defendant 15 and D. W. 1 the vendee under Ex. B. 2 as to the conveyance of this property in his favour, the circumstance that Ex. B. 20 was executed after the compromise in O. S. No. 292 of 1941 and the relationship of the parties are certain of the circumstances which are urged in support of the plaintiff's contention. But since a sum of Rs. 2000 had to be paid to the widow under the surrender deed and the major portion of the consideration of Ex. B. 2 being the said sum of Rs. 2000 was borrowed for the purpose and the person from whom it was borrowed now transpiring to be defendant 15 and not D. W. 1, neither Ex. B. 2 nor Ex. B. 20 can be held to be not supported by consideration. It is not suggested that defendants 1 and 2 secured the sum from other sources and paid the widow. We are unable, therefore, to hold that Ex. B. 2 and B. 20 are nominal transactions intended to benefit defendant 15. If the surrender is otherwise valid, the fact of the surrenderees disposing of the properties obtained by them under the deed of surrender in favour of third parties would not affect in any manner the validity of the surrender.

(6) It is, however, further urged that the settlement deed between defendants 1 and 2 who are the nearest reversioners, and the other reversioners was the result of an arrangement entered into between them to which the widow was a party, which settlement was contemplated prior to the execution of the surrender deed. No doubt mention is made in Ex. A. 3 the settlement deed, as to the gift of 2 acres of wet land to the temple two days earlier than the date of the surrender deed and to an objection having been raised by the other reversioners as to the validity of the surrender. It is stated that as it was intended by the widow to adopt defendant 13 in pursuance of a deed of consent obtained by her on 25-2-1940 to make an adoption and as there were these disputes, there was a mediation and the mediators settled, that the surrender deed was executed bona fide and as per the advice of the mediators defendants 1 and 2 and the other reversioners divided the property. It is, therefore, urged that the surrender is not bona fide being the result of an arrangement whereby the property was divided as between the nearest reversioners and the other prospective reversioners as also defendant 15, the brother's son of the widow.

(7) The Privy Council held in — 'Rangasami Gounden v. Nachiappa Gounden', AIR 1918 P C 193 (A), that an alienation by a widow of her deceased husband's estate held by her may be validated if it can be shown to be a surrender of her whole interest in the whole estate in favour of the nearest reversioner or rversioners at the time of the alienation and that in such circumstances the question of necessity does not fall to be considered, but the surrender must be a bona fide surrender and not a device to divide the estate with the reversioner. Excepting getting a sum of Rs. 2000 for maintenance no portion of the property of her husband had been retained

by her and it has been consistently held that a reasonable provision by way of maintenance reserved to the widow does not affect the validity of the surrender, if it is in other respects unobjectionable. The fact, therefore, of a payment of Rs. 2000 from and out of the estate would not affect its validity in this case. The surrender should not be a device to divide the estate with the reversioner. The division that is prohibited is a division of the estate between the widow and the surrenderee, not any division of the property surrendered as between the surrenderee and others. It may be said in this case in view of the proximity of time between the surrender and the settlement, the settlement and the sale, namely, Exs. A. 2, A. 3 & B. 2, that in fact there has been a division of the estate between the nearest reversioners and the prospective reversioners. In the view we have taken of the effect of Exs. B. 2 and B. 20, we cannot say that it amounts to a division of the estate with defendant 15 also. Such a division of the estate between the nearest and the prospective reversioners of the husband is not what is contemplated by Lord Dunedin, who delivered the judgment of the Board in AIR 1918 PC 196 (A).

This is made clear by the same Law Lord in a later decision of the Judicial Committee in —'Sureshwar Misser v. Mt. Maheshrani Misrain', AIR 1921 PC 107 (PC) (B) where the dictum in AIR 1918 PC 196 (A) is repeated namely that the surrender must be a bona fide surrender not a device to divide the estate with the reversioners and it was held that a bona fide arrangement whereby a Hindu widow surrendered all right of succession to the immoveable property in favour of the nearest reversioner who in turn made over half the property to daughters cannot be stigmatised as a device to divide the estate between the surrendering lady and the nearest reversioner and cannot be taken exception to. The surrender would cease to be bona fide if such a device is adopted whereby the widow would secure a division of the property for her individual benefit.

(8) It is not suggested in the present case that by the transfer of 3 acres and 6 cents of lands by defendants 1 and 2 in favour of the widow's brother's son the widow was personally benefited or she intended to retain any benefit in the sense that the sale of lands was a benami or colourable transaction brought about for the ultimate benefit of the widow, defendant 15 being only a benamidar. It is, therefore, a case where there has been a transfer of the widow's whole interest in her husband's estate in favour of the nearest reversioners, the widow retaining nothing out of it. If that be the case could it be said that there has not been such self-effacement or renunciation by the widow as to constitute the giving up of her entire interest in her husband's properties? There can be no doubt that there has been such a renunciation. Could an arrangement entered into between the nearest reversioners and other reversioners and even a relation of the widow whereby the properties are divided among them to which the widow might be a consenting party invalidate the surrender where the widow herself does not retain any interest? That a surrender should be not only of her whole interest in favour of the nearest reversioner or reversioners but must also be bona fide, it appears to us, was for the first time laid down by Lord Dunedin in AIR 1918 PC 196 (A). By "bona fide" it must be understood that the transaction is a real transaction, not a colourable one, whereby there is not a complete renunciation or the relinquishment of the widow's interest. What impels a widow to surrender is not of any consequence.

(9) In — 'Challa Subbiah Sastri v. Palury Pattabhiramayya', 31 Mad 446 (C), it was held that where a widow conveys the whole of her limited estate to the next reversioner in consideration of an undertaking by such reversioner that he would reconvey a portion of such property to a person named by the widow, the conveyance is valid and is not vitiated by such agreement and the title of such reversioner and that of the person to whom the property is reconveyed in pursuance of such agreement cannot be impeached by other reversioners. Sankaran Nair J. observed:

"It is difficult to see how the validity of a surrender by a widow which stands on a higher footing can therefore be affected by her motives or by any such conditions that may be imposed by her as referred to above. Further, there is nothing in the reason of the law to support this contention. Supposing this succession is accelerated by the widow becoming a sanyasi or remarrying, can it be contended that the actual reversioner at the time of her death is entitled to claim the property on the ground that her renunciation of the world or remarriage was made in order to vest the property in a favourite presumptive reversioner, or that it was made under arrangement by which he was to convey a portion of the property to another? On her renunciation of the world, or remarriage, the Hindu law vests the property in the reversioners and it is not the less his property because he has promised the widow to give a portion of that property to some stranger who himself could not enforce that agreement."

The motives of a widow in renouncing and transferring her husband's estate in favour of the nearest reversioner, whatever they may be, should not be taken into account in determining the validity of the surrender. What has to be looked into is only her capacity to renounce and a complete effacement of her interest in favour of the nearest reversioner.

(10) This principle as to motive being immaterial in judging whether a transaction of surrender is valid or not is still good law. In — 'Subbalakshmiammal v. Narayana Aiyar', AIR 1934 Mad 535 (D), Venkatasubba Rao J. expresses his agreement with the dictum of Sankaran Nair J. in the above referred case that the validity of a surrender does not depend upon the motive of the widow, though the learned Judge is of the opinion that the actual point decided upon in that case must be treated to have been overruled in view of the subsequent Privy Council decision in AIR 1918 PC 196 (A). In the course of the judgment while referring to that decision the learned Judge observed as follows:

"Their Lordships of the Judicial Committee in AIR 1918 PC 196 (A) and AIR 1921 PC 107 (B) explain clearly what is meant by the expression 'bona fide' used in this connection. The transaction must be bona fide in the sense that the widow retains no benefit either directly or indirectly, i.e, there must be a complete relinquishment; if in the guise of a surrender, the widow enlarges her own estate in regard to a part, the so-called surrender will not be upheld. I do not think there is any warrant for importing a third and further condition, namely, that the motives operating on the mind of the widow must be of a religious or spiritual character. In regard to adoptions by widows accord-

ing to the Bombay Courts the motive is irrelevant, but the law, as administered in this presidency, makes the motive material. There being no authority declaring that the motive of the surrendering widow has any bearing, I should, for my part, be disinclined to introduce an uncertain and puzzling element, making it incumbent upon the Courts to embark upon an enquiry, often difficult and fruitless, as regards the motive for the transaction."

What is, therefore, understood by "bona fide" is that the surrender must not be a ruse to secure for the widow an interest in her husband's property which she is not entitled in law, that is retaining any benefit under it after purporting to renounce it in favour of the nearest reversioner. The surrender must be complete and effective and not colourable and nominal. If the transaction of surrender is a relinquishment of her entire interest in her husband's property and if such relinquishment is in favour of the nearest reversioner and so long as it is not in any way indicated that the arrangement evidenced by the surrender between the widow and the reversioners allows a benefit to accrue to the widow excepting a provision for maintenance, it must be held that that should be sufficient to stand the test of a valid surrender. It is difficult to say what generally influences or impels a widow to relinquish her property in favour of her husband's next of kin, that is, the nearest reversioners.

It is in exceptional cases that such a renouncement arises out of a conviction on the part of the widow to renounce not only her husband's estate but also the world and become a sanyasin. But apart from it, cases have occurred where Hindu widows have relinquished their interests for various reasons; mainly if the widow is of a retiring disposition, being a woman she would like to be relieved of the management of the estate and to hand over the estate to the nearest reversioner being content with a suitable provision for maintenance. There are cases where along with a suitable provision for maintenance she may desire that a near relation of hers may also be provided for. These are considerations which generally weigh with a Hindu widow to renounce her estate. The fact that not only she desires to be free from the trouble of administering the estate but also desires to provide for a relation for whom she might have some affection, and where the reversioner who will be entitled to the estate accedes to her request in deference to her wishes to make such a provision, cannot characterise the surrender as not a bona fide one.

(11) Learned counsel referred to the decision of Lakshmana Rao and Happell JJ. in —'Krishnamurthi v. Seshayya', AIR 1944 Mad 439(E), cited with approval by Raghava Rao J. in —'Akkamma v. Brahmadu', AIR 1950 Mad 617(F), in support of his contention. In 'AIR 1944 Mad 439(E)', it was held that the surrender deed, the retention of some of the properties covered by it by the surrenderee and the alienation of the rest by him benami for the brother's son of the widow, all formed part of the same transaction; that in the circumstances, the surrender was not a bona fide transaction and the whole arrangement was only a device to divide the estate so as to give a part of the estate to the widow's brother's son in order that the sister's son might get the remainder in praesenti, and that accordingly the surrender was not binding on the reversion. The finding in those decisions is that the transactions which they were considering were benami transactions in the sense that the transfer by the reversioners in favour of a near relation of the widow was really for her benefit and the effect of it was a retention of a portion of the property in the widow by adopting the transfer in favour of the relation as a device to divide the estate. Those decisions might be supported on the particular facts of those cases. But it is necessary to point out that Raghava Rao J. observed that the dictum in 31 Mad 446(C), was accepted in Mayne as good law, namely, that the widow's motive in making a surrender is immaterial and that therefore a surrender by her cannot be called in question on the ground of improper motive.

(12) The doctrine of surrender has been understood in some decisions to have been evolved out of judicial decisions and to have no foundation in the original texts. That was the view taken by Kumaraswami Sastriar J. in —'Vaidyanatha Sastri v. Savithri Ammal', AIR 1918 Mad 469(G) (F.B.), where the learned Judge observed that

"the whole doctrine of surrender and consequent acceleration of the estate of the reversioner has no basis in Hindu Smritis, but has been evolved by Courts of justice on general principles of jurisprudence."

With respect to the learned Judge that statement cannot be said to be quite accurate. Though the surrender by a widow in favour of the nearest reversioners is not specifically mentioned in the texts, such of the Hindu law texts that pertain to the widow's right of inheritance to her husband's property and the extent and scope of such rights are certainly derived from the texts and the right of the widow to surrender is one of the incidents of the right to succeed to her husband's property and to enjoy it. This was pointed out by Mitter J. in —'Ramkrishna v. Sm. Kousalya Mani', AIR 1935 Cal 689(H). In —'Arunachala Moopanar v. Arumugha Moopanar', AIR 1953 Mad 550 (I), a decision of Govinda Menon J. & myself, our attention was drawn to the view of Kumarswami Sastriar J. In that case the question arose as to the right of the reversioner-surrenderee to recover possession and dispossess the alienee from the widow before the lifetime of the widow as a logical consequence of the surrender. We, however, did not think it then necessary to examine the original texts and preferred to follow the rulings on the subject. But now it appears to me it may be necessary in view of the textual law on the subject to reconsider the rulings on which we relied in coming to a decision in that case.

(13) Mookerjee J. in —'Debi Prosad v. Golap Bhagat', 40 Cal 721(J), has referred to some of these texts. The main text is that of Katyayana as explained by Jimutavahana in the Dayabhaga Chapter XI, S. 1, para 56, which says :

"Let the childless widow, preserving unsullied the bed of her lord, and abiding with her venerable protector, enjoy with moderation the property until her death. After her let the heirs take it".

In para 64 he refers to the text of Narada which says :

"When the husband is deceased, his kin are the guardians of his childless widow. In the disposal of the property, and care of herself, as well as in her maintenance, they have full power. But, if the husband's family be extinct or contain no male, or be helpless, the kin of her own father are the guardians of the widow, if there be no relations of her husband within the degree of a sapinda."

With reference to this text of Narada, his commentary is that

"in the disposal of property by gift or otherwise, she is subject to the control of her husband's family, after his decease, and in default of sons",

and with their consent she may bestow gifts on the kindred of her own father and mother. Deya-Krama-Sangraha, a commentary on the Dayabhaga of Sri Krishna Tarkalankara, Chap. 1, s. 2 refers to Katyayana and Narada's texts and commenting upon them states in para 7 :

". . . . On these (Sapindas, daughter's sons, sister's sons, maternal uncles of her husband) and on the others should she bestow presents, and not on the members of the family of her own father, while these persons are living, for then the specification of 'paternal uncles' and the rest would be superfluous. With their consent, however, she may make gifts to the kindred of her own father and mother, as declared by Narada. . . . In the disposal of property that is by gift, etc., the wife is liable to the control of the family of her husband, after the death of her husband and on failure of sons; so it is declared in the Dayabhaga."

Emphasis is laid in the texts on the parental position occupied by the nearest reversioners, who are considered to be the guardians of the widow and are expected to protect her interests and guide and direct her in dealing with the properties of her husband.

(14) The rights of the widow to inheritance of her husband's estate and power to dispose of her husband's property owe their origin to the Dayabhaga and the commentaries thereon; and that the principles as derived from the texts are applicable to the Madras Presidency do not admit of any doubt, since the Bengal rulings based on the Dayabhaga on these matters have been applied and followed in the decisions of our Court. Subramania Aiyar J. in —'Marudamuthu Nadan v. Srinivasa Pillai', 21 Mad 128 at p. 133 (K) (F.B.) observed :

"I think it unnecessary to go into the question, whether the Hindu law according to the texts or the commentaries lends support to the doctrine that a female holding a qualified estate can validly surrender such an estate, so as to entitle the then immediate reversioner to enter upon the inheritance and to hold it absolutely as if the succession had opened by the natural or civil death of the qualified owner. Though there has been no course of decisions on the point in this Presidency as in Bengal, yet instances have occurred which show that parties have acted upon the view that such surrenders are valid in these parts as well. This appears even from some of the cases which have come before the Courts. Since, there is nothing in the doctrine itself which makes it less suited to the community in this Presidency than to the community in Bengal, it is not surprising that the Calcutta rulings have in practice been followed in this Presidency also."

So long as the widow does nothing to contravene the injunctions of the nearest reversioners such acts of the widow could be said to be permitted. This is also evident from the commentary of Dayabhaga in Dayakarma-Sangraha that in the disposal of property the wife is liable to the control of the family of her husband, after the death of her husband and on failure of sons, and with their consent, she may make gifts to the kindred of her own father and mother. The reason behind the principle laid down in the texts is that the husband's relations, that is, the nearest reversioners being the persons that are ultimately interested in the properties are themselves persuaded to part with a portion of the properties at the request of the widow, they must be deemed to have done for proper and justifiable reasons since they are the guardians and advisers of the widow. When the widow expresses a desire to surrender her interest and also wishes that a gift of a portion of the property may be made to the kindred of her own father & mother, the reversioners are entitled to give effect to it and nothing prevents them from doing so. The nearest reversioners are not bound to secure the property without any dismemberment or disposal for the benefit of any other kin or reversioner, since the reversioners, even the presumptive much less the prospective reversioner, have any vested right in the widow's husband's property. Such disposal of property at the time of the surrender would not be against the injunctions laid down in the texts. The principle of relinquishment or surrender as observed by Mookerjee J. in 40 Cal 721(J), is contemplated in the texts.

The learned Judge states at page 771 as follows; "As a matter of fact, the theory of relinquishment is foreshadowed in the Dayabhaga, Chap. XI S. 1, para 59, where Jimuthavahana lays down that the persons who would be the next heirs on failure of prior claimants, succeed to the residue of the estate remaining after her use of it, upon the demise of the widow in whom the succession had vested, in the same manner as they would have succeeded if the widow's right had never been taken effect. The words used by Jimuthavahana "पत्न्या अधिकार प्रध्वंसेवि योगात शिष्ट धनं गृह्णयु:" ("if her right ceases or never takes effect") are comprehensive enough to include not merely the case of the death of the widow, but all cases where her right ceases; in other words, the reversioners take the estate not merely when the widow dies, but also when her title is extinguished, for instance by renunciation, remarriage or the like."

Though the term surrender is not expressly mentioned in the texts, the circumstances and conditions under which a widow could dispose of her husband's property as laid down in the texts will with equal force apply to the case of a disposal by the widow as and by way of surrender in favour of the nearest reversioners and thus accelerate the reversion. Even from the point of view taken in the texts and as explained by the commentators, we are of the opinion that a surrender by the widow of her entire interest in her husband's property in favour of the nearest reversioners does not become invalid by reason of the reversioners making a provision at the time of the surrender or subsequently of a portion of the property to the kindred of the widow's father and mother to satisfy her wishes. Reservation of a small portion of the property as provision for maintenance out of the estate is 'a fortiori' permissible and has been so held in a number of decisions of the several High Courts. We are, therefore, of the view that even if the transfer of 3 acres and 6 cents in favour of defendant 15, who is a kindred of the widow's parents, being her brother's son, out of an extent of 25 acres and other properties is a gift, it is a permissible disposal of the property which does not vitiate the validity of the surrender.

We, however, hold in this case that it is not a gift, but a transfer for consideration to D. W. 1, who in turn sold it to defendant 15. In view of our holding that the surrender is valid, it is

unnecessary to examine the finding of the lower Court that the adoption is invalid since the adoption would not divest the properties from the possession of defendants 1 and 2, who hold the same under a valid surrender.

(15) In the result, the appeal is dismissed with costs of the contesting respondents. Appellant will pay the court-fee payable to Government.

(16) MACK J.: I have perused with great interest and advantage the judgment of my learned brother, with which I am in complete agreement. I am greatly indebted to him for his research into ancient Hindu texts, which appear to me to set at rest all doubts attaching to the surrender of a widow's life estate. It is indeed refreshing, nor is it in any way surprising, to find that the ancient texts give direct support to a commonsense and reasonable position that a childless widow can, with the consent of her husband's kins, make a valid surrender to the nearest reversioners after making gifts with their consent to any of her own relations. It is also settled law, so far as case law on any subject in the domain of Hindu law can be regarded as settled, as both the learned Counsel agree and as my learned brother has pointed out, that a Hindu widow can, with the consent of the reversioners, make a valid surrender at the same time reserving for herself a portion of property for her maintenance over which she will have absolute powers of alienation.

(17) The ancient texts themselves, as analysed by my learned brother, throw considerable light on the obscurity of a series of decisions, some progressive and some, which, with great respect, may be called reactionary, the general effect of which have imposed on the conveyancer of the necessary documents in connection with a widow's surrender and gift with the consent of the reversioners or sapindas an extremely difficult problem. Some decisions have treated the widow's power of acceleration and the reversioner's power of validation as distinct and independent powers. Wallis J. in -- 'Rangappa Naik v. Kamti Naik', 31 Mad 366 (L), observed that the Bombay High Court had consistently refused to treat the reversioner's power to validate as derived from the widow's power to accelerate, as, though the former had the authority of the Hindu texts, the latter was regarded as being based upon the application of the English doctrine of merger. The widow herself has no power of acceleration as such without the consent of the reversioners, except in the very rare case of a widow making a complete renunciation of her whole husband's estate without reserve to the reversioners leaving to herself absolutely nothing at all. In all other cases of surrender, the widow's power of acceleration and the reversioners' power of consent or validation are mutually inter-dependent and one cannot operate without the other.

(18) I have never been able to appreciate the many legal impediments which have been sought to be placed in the way of a childless widow with the consent and approval of the reversioners disposing of the estate in order to free herself from the botheration of its management. The widow of course has an unfettered right to the enjoyment of the income of the entire estate till her death if she so desires. Similarly the reversioners are entitled to refuse to agree to any surrender by the widow, which involves the retention of any portion of the corpus by the widow even for her maintenance. I have never been able to see what spiritual benefit any one dead or living can derive from obstacles various decisions have placed in the way of a childless widow in the domain of surrender. The limited estate provided by Hindu law for a childless widow is something peculiar to Hindu law, and any endeavour to apply the principles attaching to other forms of limited interest to this kind of estate can only be frought with much involved complication. The one condition necessary for a surrender by a childless widow to be valid is, as my learned brother has pointed out, that it should be bona fide. It must not be a division of the estate between the widow and a reversioner in order that each should have premature and absolute powers of alienation over a portion. To cite an extreme case, if a young widow and an elderly reversioner without children should agree between themselves to divide the estate and this agreement is embodied in the form of a surrender deed with reservation for maintenance, it would clearly be a mala fide transaction with the object of defeating the other reversioners. I am unable to see any impediment in the early Hindu texts referred to by my learned brother in the way of the widow executing a valid surrender in favour of reversioners and with their consent making contemporaneously small gifts to her own relations and also reserving a portion of the property to be enjoyed by her absolutely for her maintenance.

(19) It is becoming increasingly necessary that the law on these difficult branches of Hindu law, which have been made extremely complicated by much developed case law in the past should be expressed in as clear and simple terms as possible for the guidance of those on whom the heavy burden of conveyancing rests. In this case we have perused with much appreciation the ability, care and thoroughness with which the widow's surrender deed Ex. A. 2, a contemporaneous gift deed Ex. B. 1 gifting some land to a temple and other related documents have been prepared by unrecognised, unlicensed and unqualified de facto solicitors, who appear to have the carriage of all litigation in areas from which the suit arises. In striking contrast with these documents prepared in 1940 with a sense of responsibility, we have no hesitation in describing as a thoroughly irresponsible document, the adoption deed Ex. A, by which this widow adopts this plaintiff on 17-2-1945 without any reference whatsoever to the surrender to the reversioners she had previously made in 1940. It is on the basis of this document that a first class pauper litigation has been evolved in which no less than 23 defendants have been impleaded. The fact that the plaintiff's grand-father was admittedly a consenting reversioner to the widow's surrender and received a share of land is in itself sufficient ground for dismissing the suit. His grandson has been put forward as a pauper plaintiff in another wholly untenable legal capacity, in the circumstances, as a son adopted by the widow after this perfectly valid surrender.

B/D.H. Appeal dismissed.

A.I.R. 1953 MADRAS 556 (Vol. 40, C.N. 211)

RAJAMANNAR C. J. AND VENKATARAMA AIYAR J.

S. V. Ganapathy and others, Appellants v. Tiffin's Barytes, Asbestos and Paints Ltd. and others, Respondents.

Original Side Appeal No. 66 of 1952, D/- 16-10-1952.

Specific Relief Act (1877), S. 45 — Other specific remedy open — (Constitution of India, Art. 226).

A petition for mandamus by the duly elected directors of a company for an order directing the respondents to deliver to them all the records, documents, vouchers and other properties of the Company in their possession is not maintainable when the question in controversy between the parties is whether the respondents have been validly removed from their office as managing agents of the Company. The proper remedy in such a case is by way of an independent suit. 9 Bom HCR 438, disting.; 32 Bom 466 (PC) Ref. (Paras 3, 4)
Anno: Sp. Rel. Act, S. 45 N. 5, 8, 11.

G. Vasantha Pai, for Appellants; K. Rajah Iyer, O. Radhakrishna and P. C. Parthasarathy Iyengar, for Respondents.

CASES CITED:

(A) ('72) 9 Bom HCR 438
(B) ('08) 35 Ind App 130: 32 Bom 466 (PC)

VENKATARAMA AIYAR J.: This appeal arises out of an application for mandamus, Appln. No. 1471 of 1951 filed by the appellants under S. 45, Specific Relief Act. The first respondent is a company called "The Tiffin's Barytes Asbestos and Paints Ltd."

(2) The third respondents company are the managing agents and the second respondent is the manager of the third respondent and ex-officio director of the first respondent company. At an annual meeting of the company held on 26-2-1951 the appellants were duly elected directors. This application, Appln. No. 1471 of 1951, was filed by them as such directors for an order directing the respondents to deliver to them all the records, documents, vouchers and other properties of the company in their possession. The respondent contested the application on the ground that the managing agents (respondents three) appointed under the articles of association had not been validly removed from their office and that, therefore, they were the persons entitled to be in possession of the documents and of the properties of the company. It was also contended that S. 45, Specific Relief Act, would be inapplicable as the rights sought to be enforced in the application were not of a public character. Mr. Krishnaswami Nayudu J. upheld these contentions and dismissed the application and this appeal is directed against that order.

(3) We agree with Mr. Krishnaswami Nayudu J. that the application for mandamus was misconceived and that the proper remedy of the appellants was by way of a suit. Section 45, Specific Relief Act, in so far as it is material for this case, is as follows:

"Any of the High Courts of Judicature at (Calcutta, Madras and Bombay) may make an order requiring any specific act to be done or forborne within the local limits of its ordinary original civil jurisdiction, by any person holding a public office whether of a permanent or a temporary nature, or by any corporation or inferior Court of judicature provided:

(b) that such doing or forbearing is, under any law for the time being in force, clearly incumbent on such person or Court in his or its public character or on such corporation in its corporate character; and

(d) that the applicant has no other specific and adequate legal remedy."

The question whether the third respondent company have been validly removed from their office as managing agents is in controversy between the parties. If they have been validly removed, as is contended by the appellants, then their possession of the documents and all the properties of the company would be without any title and all the properties of the company would be without any title and unlawful. There can then be no question of their being directed to do or forbear from doing anything in their public character. The appropriate remedy of the appellants would in that case be to institute a suit against them as trespassers to recover possession of the properties. An application for mandamus would be barred both under provisos (b) and (d) to S. 45, Specific Relief Act. In the alternative if the third respondents company are validly in office then Art. 71 which vests the management of the company in them, entitled them to maintain the possession of the documents and of the properties and the only right which the directors possess is under Art. 77 to have inspection of them at all times. The articles do not provide for the directors themselves maintaining accounts, at least when there are managing agents. The application for mandamus should in this alternative fail on the merits.

(4) The learned advocate for the appellants referred us to the decision — 'In re the Albert Mills Co. Ltd., Nasarvanji v. Shivji Manikbhai', 9 Bom HCR 438 (A). There it was observed that when the directors of a joint stock company who are duly elected are prevented from exercising their rights or prevented from exercising their functions by the company acting through its other directors then a mandamus can be issued against the company as there was no other remedy. But in this case though the first respondent is the company, effective relief is prayed against respondents 2 and 3 in their individual character and it is also indisputable that there is another remedy open to the appellants for the enforcement of their rights. Reliance was also placed on the decision in — 'Bank of Bombay v. Suleman Somji', 32 Bom 466 (PC) (B) where in an action by a shareholder claiming a right to inspect the register of shareholders and make extracts therefrom, the Privy Council observed that the principles applicable would be those regulating an application for a writ of mandamus and that it was incumbent on the applicant to show clearly that he has "a specific legal right to enforce which he asks for interference of the Court." We do not see how this decision advances the case of the appellants. If the third respondent company are treated as still validly in office then the only specific right which the applicants can enforce is under Art. 77 for inspection of the documents if that is refused. That, however, is not what the applicants want and indeed the respondents have offered to give inspection of the documents. We do not find any valid ground for interfering with the order of Krishnaswami Nayudu J. The remedy of the appellants is by way of an independent suit. We do not express any opinion on the merits of the points in dispute. This appeal is accordingly dismissed but in the circumstances without costs.

B/K.S.

Appeal dismissed.

AIR 1953 MADRAS 557 (Vol. 40 C. N. 212)

SUBBA RAO J.

Gandavani Lakshama Naidu, Appellant v. Maddini Kannayya Naidu, Respondent.

A. A. A. O. No. 154 of 1951, D/- 13-8-1952.

Debt Laws — Madras Agriculturists Relief Act (4 of 1938), S. 9A(7)(ii) — Applicability.

Sale of property which is subject to usufructuary mortgage in 1941 — Vendor to discharge usufructuary mortgage out of sale consideration and then to give possession to vendee — S. 9A (7) (ii) (a) applies and vendor is not entitled to scale down mortgage debt — Fact that portion of consideration was kept with vendor or that he agreed to put vendee in possession after the amount was paid to mortgagee would not confer on him any interest in the immovable property. AIR 1925 Mad 778, Ref. (Para 1)

S. A. Seshadri Iyengar, for Appellant; M. Natesan, for Respondent.

CASE CITED:

(A) ('25) AIR 1925 Mad 778: 48 Mad LJ 213

JUDGMENT: This civil miscellaneous second appeal arises out of an application filed by the appellant under S. 19, Madras Agriculturists Relief Act to scale down the decree debt. The appellant is defendant 3 in the suit. He along with other executed a usufructuary mortgage deed in favour of the respondent for a sum of Rs. 400. On 15-5-1941 he sold the property, the subject matter of the usufructuary mortgage, in favour of Yengamma for a consideration of Rs. 600. A petition for amendment of the decree was filed on the basis of S. 9A, Madras Agriculturists' Relief Act. The relevant sub-section, viz., S. 9-A(7) reads as follows:

"(7) Nothing contained in this section except sub-sec. (1) shall apply to any usufructuary mortgage.

(i) .. .. ..

(ii) in respect of property situated in any other area, in the cases mentioned below:

(a) Where during the period after 30-9-1937 and before 30-1-1948, the equity of redemption in the property subject to the usufructuary mortgage has devolved either wholly or in part on a person by or through 'inter vivos' either from the original mortgagor or from a person deriving title from or through such mortgagor otherwise than by a transfer 'inter vivos', then to the whole or such part, as the case may be."

Section 9A will not therefore apply to a case where the equity of redemption was transferred between 30-9-1937 and 30-1-1948. Exhibit A. 2 whereunder the petitioner sold the property in favour of Yengamma is dated 15-5-1941. 'Prima facie', therefore, S. 9-A(7)(ii)(a) will apply and the appellant is not entitled to have his debt scaled down. But the learned counsel for the appellant argued that though the appellant sold the property in favour of Yengamma for a consideration of Rs. 600 as Rs. 400 out of that amount was kept with him to enable him to pay the same to the usufructuary mortgagee and as he agreed to give possession only after the said amount was paid to the mortgagee, it must be held that notwithstanding the transfer he continued to possess an interest in the equity of redemption. Under Ex. A. 2 the appellant sold the property in the Yengamma for consideration. No interest in the property sold was reserved. The fact that a portion of the consideration was kept with the vendor or the circumstance that he agreed to put the vendee in possession after the amount was paid to the mortgagee would not confer on him any interest in the immoveable property. Under the sale the entire property devolved on Yengamma within the meaning of S. 9-A(7)(ii)(a) of the Act.

The decision of Ramesam J. in — 'Ratnam Pillai v. Kamalambal Ammal', AIR 1925 Mad 778 (A), relied upon by the learned Counsel, in my view, will not support him. There the question was whether the mortgagor who had sold the property but agreed with the vendee to redeem the mortgage was entitled to redeem the mortgage. It is unnecessary to express any view on the correctness of the decision; but the learned Judge did not say that by reason of such an arrangement the vendor continued to have any interest in the immoveable property conveyed absolutely by him to another. In the instant case, in order to get the benefit of the provisions of the Madras Agriculturists' Relief Act, the appellant must establish that the property had not devolved by transfer 'inter vivos' on the vendee under Ex. A. 2. As I have already said, under the sale deed the entire property was sold and there was no reservation of any interest in the vendor. S. 9-A (7)(ii)(a) of the Act directly applies and the court below rightly dismissed the application.

(2) The appeal fails and is dismissed with costs. No leave.

B/K.S. Appeal dismissed.

A.I.R. 1953 MADRAS 558 (Vol. 40, C. N. 213)

RAMASWAMI J.

B. N. Viswanathan, Petitioner v. The Assistant Registrar of Joint Stock Companies, Madras, Complainant.

Criminal Revn. Case No. 263 and Cri. Revn. Petn. No. 246 of 1952, D/- 3-9-1952.

(a) Companies Act (1913), Ss. 76 and 131 — Failure to hold general meeting if good defence for offence under S. 131.

In a prosecution under Ss. 76 and 131 it is not open to the accused Director to plead his own default by saying that as the general body meeting could not be held no question of placing the balance sheet arose and therefore no offence under S. 131 was committed. AIR 1952 Mad 800, Rel. on. (Para 6)

Anno: Companies Act, S. 76 N. 1; S. 131 N. 1.

(b) Companies Act (1913), Ss. 76 and 133 — Distinct offences — (Penal Code (1860), S. 71).

Sections 76 and 133 create two distinct offences viz., one for not holding general body meeting and another for not laying the balance sheet before the general meeting. The former offence may give rise to the latter offence or even independently of it. Hence, there is no case of the accused being prosecuted twice for the same offence and put in double jeopardy. (Para 7)

Anno: Comp. Act, S. 76 N. 1; S. 133 N. 1; Penal Code, S. 71 N. 1.

J. R. Gundappa Rao, for Petitioner; The State Prosecutor, for the State.

CASES CITED:

(A) ('52) AIR 1952 Mad 800: 1952 Mad WN Cr. 66: 1953 Cri LJ 19

(B) ('17) AIR 1917 Cal 1: 45 Cal 486: 18 Cri L J 787

(C) (1911) 80 LJKB 396: (1911) 1 KB 588

(D) ('48) AIR 1948 Cal 42: 48 Cri LJ 236

ORDER: This is a criminal revision case which has been filed against the conviction and sentence of the Fourth Presidency Magistrate, G. T. Madras, in C. C. No. 4903 of 1951.

(2) The facts are: The petitioner before us, B. N. Viswanathan, who was the fourth accused in

the lower Court was one of the Directors of the Madras Electrical Industries Ltd., by its Managing Agents, the Indian Trades and Investments Ltd. This fourth accused appears to have had the controlling interest in the Managing Agency because out of the ten shares of the Managing Agency concern, nine belongs to his wife, for whom he acts, and one belongs to this accused as pointed out by Mack J. in his order in O. P. No. 1028 of 1951. This accused has also given his address as 310-311 Lingi Chetti Street to the Assistant Registrar of Joint Stock Companies and this is the address of the Managing Agency concern, the Indian Trades and Investments Ltd., also.

(3) In these circumstances on account of the internecine quarrels which seem to have dogged the footpath of this firm from the beginning the company laid its last balance-sheet and profit and loss account before the General Body meeting held on 31-3-1949. No balance-sheet and profit and loss account had been laid before a General Body meeting of the company before 30-6-1950 as should have been done under the provisions of S. 131(1), Companies Act. Therefore, this petitioner and three others were charged for an offence under S. 131(1), Companies Act. This accused was convicted and he was sentenced to pay a fine of Rs. 50.

(4) It is also seen that this petitioner has also been put up along with other Directors for not holding a General Body meeting under S. 76, Companies Act. It is undisputed that all these directors got convicted under S. 76 and fines were imposed on them and this Court refused to interfere in revision.

(5) The case for this petitioner now as set out by him in paras 9 and 10 of the Memorandum of revision is as follows:

"The learned Magistrate failed to appreciate the provisions of Ss. 76, 131 and 133, Companies Act, that it is mandatory under S. 76 of the said Act to hold an annual meeting within a calendar year and it is only discretionary to hold other general meeting and that the balance sheet of a company should also be presented only at an annual meeting and not in other meetings and erred in giving double punishment, once for not holding a meeting and again for not laying the balance sheet before a meeting which was not held. The learned Magistrate should have held on a construction of Ss. 76 and 131 that they have reference that the mandatory nature of the sections referred to the annual balance-sheet and annual meeting. The learned Magistrate ignored the constitution of the company as embodied in the Articles of Association of the company with supplementary provisions under the Indian Companies Act, wherever the Act was permissive and erred in holding that two different meetings were contemplated under Ss. 76 and 135, Companies Act."

(6) This contention, that no offence has been made out inasmuch as no General Body meeting was held within the period prescribed and therefore no question of placing balance-sheet arose and that the charge against him as it stands is misconceived and that no offence has been committed by him on that footing has been examined by me in a parallel case in 'G. Appayya In re', AIR 1952 Mad 800(A). I followed the Bench decision of the Calcutta High Court in — 'Debendranath v. Registrar Joint Stock Co. Ltd.', AIR 1917 Cal 1 (B) and the English decision in — 'Park v. Lawton', (1911) 1-K. B. 588(C), and held that the Director could not be allowed to rely upon his own default for arranging to hold a General Body meeting in order to establish his innocence. Then I cited with approval — 'Bhagirath v. Emperor', AIR 1948 Cal 42 (D) and pointed out that the argument drawn from misery by the Director that he was helpless and circumstances forced him from pressing on and getting a meeting held, could not be accepted. The same reasoning applies here with necessary changes and the plea put forward by this accused that because a General Body meeting could not be held the balance sheet could not be presented is without any substance.

(7) Then we shall examine the allegation of double punishment. Section 76, Companies Act, lays down that a General meeting of every company will be held within eighteen months from the date of its incorporation & thereafter once at least in every calendar year and not more than fifteen months after the holding of the last preceding general meeting and that on failure to do so every director or manager of the company who is knowingly and wilfully a party to the default shall be liable to a fine not exceeding five hundred rupees. Then S. 131(1) regulates the laying of a balance sheet. This balance-sheet, it is stated, should be laid before the company in a general meeting. Section 133 lays down that if any default is made in laying before the company or in issuing a balance-sheet and profit and loss account ..... as required by S. 131 or if any balance-sheet and profit and loss account is issued ..... which does not comply with the requirements laid down by and under S. 131, S. 132, S. 132-A ..... the company and every officer of the company who is knowingly and wilfully a party to the default shall be punishable with fine which may extend to five hundred rupees. Thus, two distinct offences are created, viz., a distinct offence for not holding a general body meeting and another offence for not laying the balance-sheet before the company in the general meeting.

It is possible to have a general body meeting under S. 76 without laying the balance sheet and a balance sheet can be laid before a general meeting which need not be one convened under S. 76. Therefore, there is no case of the accused being prosecuted twice and punished twice for the same offence and put in double jeopardy. On the other hand, the same transaction may give rise to several distinct offences and the instant case is one such instance.

(8) Therefore the point taken fails and there are no other grounds to interfere in revision except to reduce the fine to Rs. 10. The excess fine amount if collected will be refunded to petitioner.

B/K.S. Sentence reduced.

A.I.R. 1953 MADRAS 559 (Vol. 40, C. N. 214)

MACK J.

Mundlamudi Penchalamma, Petitioner v. Kopparthi Subbaramiah and others, Respondents.

Civil Revn. Petn. No. 513 of 1951, D/- 5-12-52.

Provincial Small Cause Courts Act (1887), Sch. II, Art. 15 — Suit by vendor to recover balance of purchase money.

Generally speaking a suit by a vendor to recover the purchase money or any balance alleged to be due on a sale of immoveable property falls within the category of a suit for specific performance. Where, therefore, a suit is not even one to recover a specific unpaid amount but raises generally the question of how a specific contract of sale

has been performed it is one which is not of a small cause nature & the decree passed by the Small Cause Court is accordingly without jurisdiction. AIR 1943 Mad 761 (FB), Rel. on; 1 Ind Cas 552 (Mad), Disting. (Para 2)

Anno: Pro. S.C.C. Act, Sch. II, Art. 15 N. 1.

R. Venkatasubba Rao, for Petitioner; K. Subbaramiah, V. Sreeramulu and K. Subramaniam, for Respondents.

CASES CITED:

(A) ('09) 1 Ind Cas 552: 19 Mad LJ 220
(B) ('43) AIR 1943 Mad 761: 1943-2 Mad LJ 424 (F B)

JUDGMENT: The petitioner is defendant 1 who bought some lands from the plaintiff in 1947 for a sum of Rs. 2,000. The plaintiff's case was that Rs. 100 still remained unpaid by defendant 1 and he sued to recover the balance alleged to be due. This was not a straightforward claim for the money due. There was an agreement that defendant 1 should discharge all the plaintiff's debts which included a decree in a Munsif's Court suit. Though defendant 1 paid up the debts of the plaintiff this decree was not satisfied but was transferred in the name of defendant 2. The learned Small Cause Judge rejected the plea taken that he had no jurisdiction to try this suit, went into the merits and gave the plaintiff a decree against defendant 1 only. The decision in — 'Veerasalingam v. Sathapally Sathirasu', 19 Mad LJ 220 (A) was placed before him but he did not think that in point. That was a suit for recovery of a sum of money due to the plaintiff under a contract for the transfer of some pattahs for Rs. 60. The plaintiff sued to recover Rs. 60. It was held that the suit was for specific performance of contract between the plaintiff and the defendant and, therefore, the Small Cause Court had no jurisdiction to entertain it. The present suit is not on all fours in the sense that it is not so clearly a suit for specific performance of a contract.

(2) The learned advocate for the petitioner, respondents being unrepresented and making no appearance, invoked the support of the decision in — 'Subramanian Chettiar v. Arunachalam Chettiar', AIR 1943 Mad 761 (B), a Full Bench decision of our High Court which held that a suit by the vendor for the recovery of the purchase consideration is a suit for specific performance within the meaning of Chap. 2, Specific Relief Act. Though that was not a suit which decided any question of jurisdiction of the Small Cause Court to entertain such a suit, it is clearly authority for the position that generally speaking a suit by a vendor to recover the purchase money or any balance alleged to be due on a sale of immoveable property falls within the category of a suit for specific performance. The nature of the present suit is also such that it is not even one to recover a specific unpaid amount but raises generally the question of how a specific contract of sale has been performed. I am clearly of opinion that this suit is one which is not of a small cause nature and that the decree passed was accordingly without jurisdiction. It is set aside. The plaint will be returned for presentation to the proper Court for disposal. Costs of this petition will abide the result and be provided for by the trial Court.

Revision allowed.

B/D.R.R.

A.I.R. 1953 MADRAS 560 (Vol. 40, C. N. 215)

RAJAMANNAR C. J. AND VENKATARAMA AIYAR J.

Kalidindi Ramakrishna Raju, Appellant v. K. Someswara Rao and others, Respondents.

Letters Patent Appeal No. 352 of 1952, D/- 17-12-1952, from judgment and order of Chandra Reddi J., in W. P. No. 408 of 1952, D/- 21-11-1952.

Madras Village Panchayats Act (10 of 1950), Ss. 19 (1), 131; Sch. 3, R. 4(1) — Jurisdiction to entertain petition under S. 19 (1) — (Madras Local Boards Act (14 of 1920), S. 57).

If a dispute is raised that a member of a Panchayat had ceased to hold office at a time when the Madras Local Boards Act of 1920 applied to panchayats, then that dispute must be referred to the District Court in accordance with the provisions of S. 57 of that Act. (Para 2)

A District Munsif has no jurisdiction in such a case to entertain a petition under S. 19 (1), Madras Village Panchayats Act as that section applies only to disqualifications arising after the commencement of the Act. S. 131 read with Sch. 3, R. 4 (1) can have no application to a member who must be deemed to have ceased to hold office prior to commencement of Madras Village Panchayats Act by reason of any disqualification. (Para 2)

E. Venkatesam, V. V. Raghavan and M. Ramachandra Raju, for Appellant.

RAJAMANNAR C. J.: The appellant before us, filed a petition under S. 19 (1) of Madras Act 10 of 1950 before the District Munsif of Tanuku alleging that respondent 1 had ceased to be a member of the Panchayat Board of Polamuru by reason of non-attendance of three consecutive meetings of the board. An objection was raised on behalf of respondent 1 that the District Munsif had no jurisdiction to entertain the petition. But the Munsif overruled the objection and decided on the merits that the respondent had ceased to be a member. The respondent thereupon applied to this Court for the issue of a writ of certiorari to quash the order of the District Munsif. That application came on before Chandra Reddi J. The learned Judge held that the District Munsif had no jurisdiction to entertain the petition and quashed his order. Hence this appeal.

(2) On the allegations made by the appellant, we are of opinion that the learned Judge was right in holding that the petition under S. 19 (1) of the new Act of 1950 was not maintainable. That section obviously applies to cases of disqualification arising after the commencement of the Act. Section 19 (1) of the Act refers to disqualifications under Ss. 13, 15, 16 and 17. Section 17 speaks 'in futuro'. It says "a member shall cease to hold office as such", in certain contingencies. It is not alleged that respondent 1 assumed office under the Act and thereafter ceased to hold office. Reliance was placed on S. 131 which provides for transitory provisions in regard to the first reconstitution in accordance with the provisions of the new Act of Panchayats in existence at the commencement thereof and to R. 4 (1) of Sch. 3 which contains such transitional provisions. Rule 4 (1) provides that

"the members of a panchayat holding office at the commencement of this Act shall be deemed to be the elected members of the

Panchayat under this Act and such members shall continue to hold office under this Act upto such date as the Government may, by notification, fix in this behalf, and in case no such date is fixed, upto the date on which their term of office would have expired if this Act had not come into force."

It is clear that the case of the appellant is that respondent 1 was not holding office at the commencement of this Act. Because he must be deemed to have ceased to hold office even before that date on account of his default in attending the meetings of the board. It follows that if the contention of the appellant is accepted R. 4 (1) will not apply to respondent 1. Then who is to decide the question whether respondent 1 has ceased to hold office before the commencement of the new Act of 1950? Surely the District Munsif who is the tribunal prescribed under the new Act could not decide that question. The Madras Local Boards Act of 1920 which applied to panchayats as well before the new Act, specifically provides that a dispute as to disqualification of any member of the panchayats shall be referred to and decided by the District Court. But for Madras Act 10 of 1950 there can be no doubt whatever that the dispute now raised by the appellant would and should have been referred to the District Court. Now, has the passing of the new Act made any difference? Whatever might have been said if the new Act purported to repeal the Madras Local Boards Act in its entirety or in parts, we find actually no such repeal and new Act of 1950 contains only amendments of some of the provisions of the Madras Local Boards Act, 1920. Schedule 4 contains such amendments which include a complete omission of some of the provisions of the Local Boards Act. Section 57 of that Act, however, is not one of the sections either omitted or modified in any way. It appears to be fairly clear that if a dispute is raised that a member of a Panchayat had ceased to hold office at a time when the Madras Local Boards Act of 1920 applied to panchayats, then that dispute must be referred to the District Court in accordance with the provisions of S. 57 of that Act.

(3) The petition filed before the District Munsif was, therefore, incompetent and the order of the learned District Munsif who had no jurisdiction to entertain the petition was rightly quashed by Chandra Reddi J.

(4) The appeal is, therefore, dismissed.

B/K.S. Appeal dismissed.

A.I.R. 1953 MADRAS 561 (Vol. 40, C. N. 216)

RAJAMANNAR C. J. AND VENKATARAMA AIYAR J.

H. Chandanmull and Co., Appellant v. Mohambal M. Mehta and others, Respondents.

O. S. Appeal No. 122 of 1951, D/- 27-10-52.

Arbitration Act (1940), Ss. 30 and 37 (1) — Application to set aside award is not proceedings before arbitrator within meaning of S. 37 (1) — S. 5, Limitation Act does not apply — (Limitation Act (1908), S. 5 and Art. 158). AIR 1929 PC 103, Disting. (Para 4)

Anno: Arbitration Act, S. 30 N. 8; Limitation Act, S. 5 N. 4; Art. 158 N. 5.

K. C. Doraiswami, for Appellant; T. T. Srinivasan and A. N. Rangaswami, for Respondents.

CASES CITED:

(A) ('13) 17 Ind Cas 7: 18 Cal LJ 35
(B) ('27) AIR 1927 Lah 273: 8 Lah 274
(C) ('29) AIR 1929 PC 103: 56 Cal 1048 (PC)
(D) (1899) 80 LT 116: 68 LJQB 252
(E) (1927) 95 LJKB 1054: (1927) 1 KB 269

VENKATARAMA AIYAR J.: The question that is raised in this appeal is whether S. 5, Limitation Act, is applicable to an application filed under the Arbitration Act, to set aside an award. In certain arbitration proceedings to which the appellant was a party an award was pronounced and it was filed on the Original Side of this Court in O. P. No. 66 of 1951. Notice of this petition was served on the appellant on 27-3-1951. Art. 158, Limitation Act, provides that an application to set aside an award should be filed within 30 days from the date of service of the notice of filing of the award. The appellant did not file any application to set aside the award within the time limited by Art. 158. The High Court was closed for summer recess on 28-4-1951 and on the day of reopening the appellant filed Appln. No. 2355 of 1951 under S. 5, Limitation Act, for excusing the delay in filing the application to set aside the award. That application was dismissed by Krishnaswami Nayudu J. on the ground that S. 5, Limitation Act, was inapplicable, and this appeal has been brought against that order of dismissal.

(2) S. 5, Limitation Act, runs as follows:

"Any appeal or application for a review of judgment or for leave to appeal or any other application to which this section may be applicable by or under any enactment for the time being in force may be admitted after the period of limitation prescribed therefor, when the appellant or applicant satisfied the Court that he had sufficient cause for not preferring the appeal or making the application within such period."

(3) As we are concerned in these proceedings with an application to set aside as award, the only question to be determined is whether there is any enactment which had made S. 5 applicable to such proceedings.

(4) Before the Arbitration Act of 1940 the law was well settled that the Court had no power under S. 5, Limitation Act, to extend the time prescribed by Art. 158 for filing an application to set aside an award. That was held by Mookerjee and Holmwood JJ. in — 'Suryanarain v. Banwarijha', 18 Cal L. J. 35 (A) and that view was followed by the Lahore High Court in — 'Devi Ditta v. Baburam', AIR 1927 Lah 273 (B). The learned advocate for the appellant does not dispute the correctness of the law as laid down in those decisions. What he contends is that the law has been changed by the Arbitration Act, and under S. 37(1) of the Act properly construed, S. 5, Limitation Act, would be applicable to an application to set aside an award. S. 37(1) runs as follows:

"All the provisions of the Limitation Act, 1908, shall apply to arbitrations as they apply to proceedings in Court."

The question is, what is the precise meaning of the word "arbitration" in this section? The contention of the appellant is that arbitration proceedings mentioned in the section include not only proceedings before the arbitrators, but also applications taken out for filing the awards in Court or for setting them aside. He contends that they are also arbitration proceedings and that by virtue of S. 37(1) the provisions of the Limitation Act, including S. 5 will apply.

He relied upon certain observations of the Privy Council occurring in — 'Ramdutt Ramkissen v. E. D. Sasoon & Co.', AIR 1929 P. C. 103 (C), as supporting this position. The facts in that case were these. There were certain arbitration proceedings which resulted in an award. But that award was set aside. Subsequently the applicant commenced fresh arbitration proceedings with reference to the same subject-matter. The opposite party pleaded that at the time of the new proceedings an action by the applicant would be barred and that therefore no relief should be granted to him in arbitration proceedings. The applicant pleaded that he was entitled to the benefit of S. 14, Limitation Act, and to deduction of the time taken in the prior arbitration proceedings. It was this question that came up for consideration before the Privy Council. Lord Salvesan held that the applicant was entitled to the benefit of S. 14, Limitation Act. His Lordship observed that the Limitation Act was in its own terms inapplicable to proceedings before the arbitrators and that if the opposite party was entitled to rely on a plea of limitation based on the Limitation Act, the applicant would likewise be entitled to rely on S. 14 of that Act. Then occur the observations on which the advocate for the appellant relies:

> "Arbitrations under the Arbitration Act are not prosecuted by filing suits and preferring appeals from the decrees in such suits but by procuring awards and filing them in Court and resisting applications to set them aside".

It is contended on the strength of these observations that proceedings taken in Court for setting aside awards must also be considered to be arbitration proceedings.

We are unable to agree that that was what was intended in those observations. The Privy Council was dealing with the question as to whether the provisions of the Limitation Act were applicable to proceedings before the arbitrator. They were not concerned with an application before the Court arising out of arbitration proceedings, and taken in their context the observations do not amount to a decision that an application to set aside an award must be taken to be an arbitration proceeding.

The matter has to be decided on an interpretation of the language of S. 37 (1). Whatever force there might have been in the contention of the appellant if S. 37 (1) had stopped with the words "apply to the arbitrations", it is wholly untenable in view of the words that follow, namely, "as they apply to proceedings in Court". The section makes a sharp distinction between arbitrations and proceedings in Court. Whatever justification there might be for considering an application to set aside an award in a Court as an arbitration proceeding, there can be none for holding it to be not a proceeding in Court. In the context, therefore, the word "arbitration" should be limited to proceedings before the arbitrations; and an application to set aside an award being a proceeding in Court, cannot be held to be an arbitration proceeding. Moreover, S. 37 (1) is intended to apply to proceedings in arbitration the provisions of the Limitation Act which would otherwise be inapplicable. But even apart from S. 37 (1), Art. 158 in terms applies to an application to set aside an award. On the construction of the section, therefore we are of opinion that "arbitration " referred to in S. 37 (1) cannot include a proceeding taken in Court for setting aside the award.

That this is the correct conclusion will be clear if regard is had to the history of the legislation on the subject. S. 37 (1) is a reproduction of S. 16 (1), English Arbitration Act of 1934. Before that Act the statutory law in England relating to arbitration contained no provision similar to S. 16 (1). In the absence of such a provision the question was raised whether a party could plead limitation in proceedings before the arbitrators. In the decision in 'In re Astley and Tyldesley Coal Co', (1899) 68 L. J. Q. B. 252 (D), a Bench of the Divisional Court in England had held that it was open to the defendant to plead limitation in proceedings before the arbitrator. That the law laid down in that case was not accepted without question would be clear from the observations of the Court of appeal in the case reported in — 'Cayzer Irvine & Co. v. Board of Trade', (1927) 1 K. B. 269 (E), where Scrutton L. J. in particular expressed doubts as to the correctness of the decision in (1899) 68 L. J. Q. B. 252 (D). When that case was taken in appeal to the House of Lords, Viscount Cave L. C. observed that it was not necessary in that case to express an opinion as to whether is (1899) 68 L. J. Q. B. 252 (D) correctly decided. It was only in 1929 that the Privy Council held in the case reported in 'AIR 1929 P.C. 103 (C)' that the law as laid down in '(1927) 1 K. B. 269 (E)' was correct. As late as 1931 in Halsbury's Laws of England, Vol. 1, p. 653, para. 1104, the law on the subject is stated in these terms:

> "In mercantile references it is an implied term of the contract that the arbitrator must decide the dispute according to the existing law of contract and every defence which would have been open in a Court of law can be legally raised for the arbitrator's decision unless the parties have agreed to exclude the defence",

and the statute of Limitation is mentioned as one of the law in accordance with which the arbitrators should pronounce their decision. It was in this state of the law that the Arbitration Act of 1934 was enacted and S. 16 (1) provided that the rules of limitation applicable to proceedings in civil Court should also be applicable to proceedings before the arbitrators. It was this provision that has been enacted in S. 37 (1), Indian Arbitration Act. The true scope of this provision is therefore that when proceedings are taken before the arbitrator the parties are entitled to plead limitation exactly as if the proceedings had been taken in a civil Court. That being the scope of S. 37 (1), its operation should be limited to proceedings before the arbitrator and not to proceedings taken in a Court, though they might arise out of arbitration proceedings. In this view we are of opinion that S. 37 (1) does not have the effect of making S. 5, Limitation Act, applicable to an application to set aside the award.

(5) We agree with Krishnaswami Nayudu J. that there is no power in the Court to extend the time prescribed by Art. 158, Limitation Act. This appeal is accordingly dismissed. The parties will bear their own costs in the appeal.

B/R.G.D. Appeal dismissed.

A.I.R. 1953 MADRAS 562 (Vol. 40, C. N. 217)

RAJAMANNAR C. J. AND
VENKATARAMA AYYAR J.

Sri Dantuluri Butchi Ramayya, Petitioner v. Gundu Ramanna and others, Respondents.

Civil Revn. Petn. No. 1632 of 1948, D/- 28-2-1952.

Tenancy Laws — Madras Estates Land Act (1 of 1908), S. 3 — "Landholder" — Lands situated in zeroyati village forming part of permanently settled estate obtained in ex-

change for lands in pre-settlement minor inam — Lands form part of post settlement inam — Suit for ejectment does not lie in Civil Court. AIR 1915 Mad 685, AIR 1924 Mad 589, AIR 1922 Mad 373 (FB). AIR 1939 PC 244, Rel. on. **(Paras 5, 6)**

D. Narasaraju and K. B. Krishnamurthy, for Petitioner; P. Somasundaram and P. Suryanarayana, for Respondents.

CASES CITED:

(A) ('18) AIR 1918 PC 148: 42 Mad 355 (PC)
(B) ('15) AIR 1915 Mad 685: 27 Mad LJ 490
(C) ('24) AIR 1924 Mad 589: 19 Mad LW 671
(D) ('22) AIR 1922 Mad 373: 45 Mad 716 (FB)
(E) ('39) AIR 1939 PC 244: ILR (1940) Mad 1 (PC)

RAJAMANNAR C. J.: This revision petition originally came on before Balakrishna Aiyar J. but has been referred to a Bench because the learned Judge thought that the questions raised in it were of considerable importance and the matter was barren of direct authority.

(2) The petitioner filed a suit in the District Munsif's Court of Vizianagaram to eject the contesting respondents from the lands in suit and to recover past and subsequent profits from them. It was 'inter alia' pleaded by the defendants that the Civil Court had no jurisdiction to entertain the suit as the provisions of the Madras Estates Land Act would govern the case. Both the learned District Munsif and the learned District Judge have upheld this plea of the defendants and directed the plaint to be returned for presentation to the Revenue Court.

(3) The origin of the title of the plaintiff to the suit lands is not in dispute. It appears from the Inam statement and the proceedings of the Inam Commissioner as recorded in the Inam fair register that the then Rajah of Vizianagaram one Sri Raja Pusapati Viziaramaraju granted in mark to Poosapati Ramachandraraju lands in two villages, viz., Korukonda and Nerellavalasa, yielding an income of Rs. 750 sometime in 1791. Subsequently at a partition among the sons of the original grantee, the lands in these two villages fell to the share of three of his sons. In or about 1813 the Raja of Vizianagaram took these lands and in exchange granted to the Inamdars portions of zeroyati lands in the village of Kanimeraka yielding an income of Rs. 750. These are the suit lands. It is common ground that the village of Kanimeraka was part of the permanently settled estate of Vizianagaram. These lands were the subject of enfranchisement proceedings at the time of the inam settlement in 1863. It was evidently brought to the notice of the Inam Commissioner that the lands being enjoyed at the time by the Inamdars were lands which their predecessors had obtained in exchange for the pre-settlement grants in favour of the original grantee. The enfranchisement was made presumably in the belief that the lands obtained by exchange were held under the same tenure as the lands given in exchange. The question for decision in this revision petition is whether the petitioner can be deemed to be a landholder within the meaning of the Madras Estates Land Act. If the suit lands are treated as forming part of a pre-settlement minor inam validly enfranchised by the Government in 1863, then obviously the Madras Estates Land Act would have no application to the case.

(4) Admittedly the village of Kanimeraka was a zeroyati village which was included within the Vizianagaram zamindari. Did these lands which are situated in that village cease, for any reason, to be part of the permanently settled estate because of the exchange in 1813? In our opinion, the nature of the lands did not change because of the exchange. The principle which should govern a case like this has been authoritatively enunciated by the Judicial Committee in — 'Apparao v. Satyanarayana Varaprasada Rao', AIR 1918 P C 148 (A). In that case, part of a permanently settled estate was acquired by the Government under the Land Acquisition Act. The proprietor was entitled to compensation which might have been paid in cash, or if he consented, there could have been a reduction of the peishkush on the estate. But the proprietor requested — and his request was complied with — that he might be given some Government lands in another district. By order of the Collector, the new lands were transferred to the proprietor and they were even entered in the register as zamindari lands instead of Government lands as formerly. The question which fell for decision was whether these lands formed part of a permanently settled estate. Their Lordships held that even after they were transferred to the proprietor, they did not become part of the permanently settled estate. Their Lordships pointed out that unless there was a formally effected settlement with some recorded evidence of it under which these lands may be said to have been separately settled, the land would continue to be what they were before they were transferred to the proprietor. What has happened in the present case is the converse of what happened in — 'AIR 1918 PC 148' (A).

There are two decisions of this Court which deal with facts more or less similar to those in the present case. The first is in — 'Appaya v. Ramachandraraju', AIR 1915 Mad 685 (B). Certain lands in the village of Mallavaram which was part of a permanently settled estate, viz., Uratala estate were given to one Subadrayya in exchange for certain inam lands of his situated elsewhere. The question arose whether a suit for ejectment relating to these lands could be maintained in a civil Court. It was held by Wallis C. J. and Seshagiri Aiyar J. that the civil Court had no jurisdiction. As admittedly the lands were originally ryoti lands in a permanently settled estate, the fact that the lands for which they were exchanged were inams did not have any bearing on the question. That had to be decided upon their own character and not upon that of the property for which they were substituted.

The other case is — 'Lakshminarasimham v. Veerabhadra', AIR 1924 Mad 589 (C). Certain lands in a Chathurabhagam mokhasa which originally formed part of the Nuzvid zamindari were the subject matter of that case. These lands had been exchanged for patta lands held under Government. In a suit for ejectment, it was pleaded by the defendants that the civil Court had no jurisdiction to entertain the suit as the lands formed part of an estate within the meaning of the Estates Land Act. It was held that though these lands were obtained in exchange for Government lands, they did not cease to be lands in a permanently settled estate. The learned Judges said:

"As regards the exchange alleged by the plaintiffs, we do not think it would, even if true,

change the character of the plaint lands. It has been shown that the consent of the Zamindar had been obtained. The question is concluded by the decision of their Lordships of the Privy Council in — 'AIR 1918 PC 148' (A)."

(5) The above authorities directly apply to the present case. It must be decided, following them, that the character of the lands in suit which were situated in a zeryoati village forming part of a permanently settled estate, did not cease to be such even though they were obtained by the petitioner's predecessors in exchange for lands in a pre-settlement minor inam.

(6) As these lands were given to the plaintiff's predecessor free of rent, it may be said that the lands formed part of a post settlement or Dharmila Inam. Now it is well established that a post settlement grantee, even of both the warams, would be a landholder within the meaning of that term as used in the Madras Estates Land Act and the persons in occupation of the holdings would be ryots (see the Full Bench ruling of this Court in — 'J. Brahmayya v. C. Achiraju', AIR 1922 Mad 373 (D) approved by the Privy Council in — 'Narayanaraju v. Suryanarayudu', AIR 1939 PC 244 (E). The Courts below were, therefore, right in holding that the civil Court had no jurisdiction to entertain the suit. The civil revision petition is, therefore, dismissed with costs.

B/R.G.D. Revision dismissed.

A.I.R. 1953 MADRAS 564 (Vol. 40, C. N. 218)

GOVINDA MENON AND BASHEER AHMED SAYEED JJ.

In re Sainambu, Appellant.

Criminal Appeal No. 416 of 1952, D/- 12-12-52.

(a) **Madras Criminal Rules of Practice, R. 85 — Rule has not force of statute but is promulgated for regulating procedure in criminal Courts — Rule amplifies provisions of S. 164, Criminal P. C.—(Criminal P. C. (1898), S. 164).** **(Para 3)**

Anno: Cr.P.C., S. 164 N. 2.

(b) **Madras Criminal Rules of Practice, R. 85 — Duty of Magistrate.**

Where there are more than one person charged with a crime and one of such persons wants to make a confession statement, it is the duty of the Magistrate to specifically warn the person making the confession that it was not intended to take him or her as an approver. (Para 3)

(c) **Penal Code (1860), S. 300 — Ornaments worn by deceased recovered as result of statement made by accused under S. 27, Evidence Act — Production of ornaments would not by itself be sufficient to charge accused with crime of murder — (Evidence Act (1872), S. 27).** **(Para 4)**

Anno: Penal Code, S. 300 N. 42; Evidence Act, S. 27 N. 13.

B. Prasada Rao, amicus curiae, for Appellant; M. A. Mandanna and Asst. Public Prosecutor, for the State.

CASES CITED:

(A) ('37) AIR 1937 Mad 321: 1937 Mad W N 178: 38 Cri LJ 753

(B) ('51) AIR 1951 Mad 331: 1950 Mad W N (Cr.) 300: 1952 Cri LJ 867

(C) ('52) AIR 1952 Mad 411: 1951 Mad W N (Cr.) 277: 1952 Cri LJ 853

GOVINDA MENON J.: The appellant has been found guilty of an offence under S. 302, Penal Code, for having murdered, on 6-8-1951, a girl by name Umal Regina, aged 7 years, by cutting her with an 'aruval', and sentenced to transportation for life by the learned Sessions Judge of Ramanathapuram division. The prosecution case is briefly as follows:

(2) The girl left her house after taking her midday meal for attending her classes in the school. At about 4 or 4-30 p. m. she and two other school children by name Mahariba and Ibrahim were seen going to the house of the accused and a little later Mahariba and Ibrahim returned, but the deceased girl did not return. At the time of sunset that evening, the girl was seen in the house of the accused. That night she did not return and persons who went in search of her could not trace her. The next day her dead body was seen in a channel with cut injuries. Her earrings had been removed. At about 12-15 p. m. on 7-8-1951 a complaint was given to the police at Tiruvadanai by P. W. 1, a relation of the deceased. The Sub-Inspector P. W. 13 reached the village at 4 p. m. and took up the investigation. He also examined witnesses. The body was sent for post mortem examination and the medical evidence shows that she had as many as twelve wounds on her person which were very serious in character and the doctor was of opinion that death was due to shock and haemorrhage.

On 18-8-1951, P. W. 13 arrested the appellant at about 9 a. m. and examined her. Then she dug out and produced a pair of earrings M.Os. 1 and 1 (a) from near a fence adjacent to her house. On 19-8-1951 she was produced before the Sub Magistrate, P. W. 6 for the purpose of recording her confession. It might also be mentioned that after the appellant was arrested, another woman by name Amina Bivi was also arrested by P. W. 13, but this woman was not sent to the Sub Magistrate at all. A confession was recorded by P. W. 6 which is marked in the case as Ex. P. 5. P. W. 6 deposes that he warned the accused that she was not bound to make a confession and that if she made one it would be used as evidence against her. Then she was given time to reflect till the next day and was kept out of the influence of the police.

The questions put to the accused and the answers given by her before the confession was recovered are contained in Ex. P. 5 from which it is seen that she was not informed that it was not intended to take her as an approver. In her confession statement, the accused admitted having assisted Amina Bivi in murdering the child and according to the statements contained in the confession it was Amina Bivi who cut the deceased. The earrings M. Os. 1 and 1(a) were identified by P. W. 2, the mother of the deceased as having been worn by the deceased when she left her house for school. The learned Sessions Judge found that the evidence against the accused was sufficient for finding her guilty of the offence of murder. No proceedings were taken against Amina Bivi at all, as according to the police officer, the evidence against her was insufficient. Both before the committing Magistrate and the learned Sessions Judge, the appellant retracted the confession and stated that she was induced by the Sub Inspector, P. W. 13, and by P. W. 1 to make the confession on the promise that she would be taken as an approver.

(3) It is argued in this Court by the learned advocate for the appellant that the confession should not have been admitted in evidence because the necessary requirement under R. 85

of the Criminal Rules of Practice to the effect that the Magistrate, before recording the confession, should tell the person making the confession that it is not intended to take him or her as an approver, has not been complied with in this case, and hence the confession is invalid and illegal. Two decisions of this Court have been cited in support of this argument. In — 'Govindu Subbaramayya v. Emperor', AIR 1937 Mad 321 (A) Pandrang Row J. took the view that a confession which does not strictly conform to the procedure laid down by R. 85 of the Criminal Rules of Practice was not admissible in evidence even as against the maker. The learned Judge has considered the historical reasons for the promulgation of rule 85 and was clearly of opinion that if the Magistrate did not warn the accused that it was not intended to take him as an approver, the necessary prerequisites for the validity and legality of the confession have not been complied with.

This decision was followed by a Bench of this Court in — 'Venkatareddi v. State', AIR 1951 Mad 331 (B) which is to the effect that the omission to warn the accused who was about to make a confession that it was not intended to take him as an approver is fatal to the admissibility of the confession, as it causes grave doubt on the voluntary nature of the confession. The learned Judges point out that especially in cases where there are more than one accused, there will be reasonable grounds for supposing that confessions might have been made on the assumption that the person confessing will be taken as an approver and would escape punishment. In a more recent case in — 'Ramaswami v. State', AIR 1952 Mad 411 (C), a Bench of this court, consisting of Mack and Krishnaswami Nayudu JJ. was not prepared to go to the extent to which the previous decisions went but was of opinion that failure to warn the accused that it was not intended to take him as an approver would not render the confession inadmissible.

There is, therefore, some difference of opinion in this Court regarding the admissibility of a confession which did not conform strictly with the requirements of R. 85 of the Criminal Rules of Practice. It may be mentioned that R. 85 is not a rule which has the force of a statute but is one promulgated by the Government under the powers conferred on them under the Criminal Procedure Code for the purpose of regulating the procedure in Criminal Courts. Rule 85 amplifies the provisions of S. 164, Criminal P. C. and lays down what the Magistrate should do when recording statements and confessions under S. 164, Criminal P. C. All these decisions do not seem to have taken note of S. 533, Criminal P. C. which lays down that if any of the provisions of S. 164 or S. 364, Criminal P. C. with regard to the recording of a confession have not been complied with by the Magistrate recording the statement, evidence has to be taken that such person has duly made the statement recorded and that such statement shall be admitted in evidence if the error has not injured the accused as to his defence on the merits.

It may be a matter of decision on the facts of the particular case whether the failure to strictly comply with the provisions is a matter which has caused prejudice to the accused. In the present case we feel that since the police had arrested another person in connection with this crime at the very beginning, it is possible that the complicity of that person also should have been properly investigated. On the facts of the present case we feel that it was the duty of the Magistrate to have warned the accused that it was not intended to take her as an approver. As a general rule of practice we wish to point out that where there are more than one person charged with a crime & one of such persons wants to make a confession statement, it is the duty of the Magistrate to specifically warn the person making the confession that it was not intended to take him or her as an approver.

But where it is quite clear from the circumstances that only one person is involved in the crime and such a person wants to confess, the failure to warn the person regarding the fact that it was not intended to take him as an approver would not amount to a serious irregularity. The distinction arises only when there is a plurality of accused and not in cases of single delinquents. Therefore it seems to-us that a hard and fast rule cannot be laid down regarding the compulsory nature of the warning to be given. Considering the facts of the present case, we feel that the Magistrate should have told the accused that it was not intended to take her as an approver. Her statement throughout has been that P. Ws. 1 and 13 had told her that she would be taken as an approver and pardoned. If true, this was an inducement and the confession cannot be considered to be a voluntary one. In such circumstances we rule out the confession from the record.

(4) The question then arises whether the other evidence in the case is sufficient to convict the accused. M. Os. 1 and 1(a), the pair of earrings worn by the deceased girl when she left the house have been produced by the accused after having dug out the same from a place near the fence of her house. These were recovered as a result of a statement made by her under S. 27, Evidence Act. It seems to us that the production of these material objects would not by itself be sufficient to charge the accused with the crime of murder. The evidence of P. Ws. 3, 5, 9 and 10 is not sufficient to show that it was due to the act of the accused that the deceased came by her death. We are, therefore, of opinion that the offence of murder has not been brought home to the appellant. We, therefore, set aside the conviction and sentence under S. 302, Penal Code.

But in our opinion the appellant has to be convicted under S. 404, Penal Code for having dishonestly misappropriated property knowing that such property was in the possession of the deceased person at the time of that person's death, and that it has not since been in the possession of any person legally entitled to it. If we believe the evidence of P. W. 2 that the deceased was wearing M. Os. 1 and 1(a) at the time she went out of the house to school and if we believe the other evidence that the deceased and other girls had gone to the house of the accused, the inference is irresistible that at the time she came by her death, these jewels were on her person. Moreover, the fact that when the dead body was seen, the earlobes were found cut, is sufficient for us to infer that whoever removed the jewels, must have done so at the time when death took place or immediately thereafter. The materials on record are ample, in the absence of any satisfactory explanation on the part of the

accused to find her guilty of an offence under S. 404, Penal Code. We, therefore, convict the appellant of an offence under S. 404, Penal Code and sentence her to rigorous imprisonment for three years.

B/V.R.B. Accused convicted.

A.I.R. 1953 MADRAS 566 (Vol. 40, C. N. 219)

CHANDRA REDDI J.

Poomalai Ammal (died) and others, Appellants v. Subbammal (Minor) and others, Respondents.

Second Appeal No. 40 of 1949, D/- 24-7-52.

(a) **Deed — Construction — Settlement deed in favour of Hindu female — Intention of settlor — Circumstances leading to settlement deed — Deed held conveyed absolute title (Family settlement)—(T. P. Act (1882), S. 8).**

In a suit challenging the subsequent alienations made by a settlee held on construction of the deed that the settlor intended to bestow an absolute estate and the recitals regarding the devolution of property after the settlee's death being a defeasance clause did not operate to curtail the absolute estate.

That even assuming that the settlor intended to make an independent gift to the male issues, this would not take effect as it was repugnant to the absolute estate given to the settlee in the earlier portion of the document, and was in the nature of a defeasance clause. Such a defeasance clause could not be operative so as to curtail the absolute estate given to the settlee in the earlier portion of the document. (Para 28)

Thus, M took an absolute estate under the settlement deed and the alienations made by her were valid. Even granting that the settlement deed did not convey an absolute interest, having regard to the subsequent family arrangement in which her absolute title was recognised and affirmed, it did not lie with the plaintiffs to challenge the validity of the alienations. (Para 29)

Anno: Evi. Act, S. 115 N. 18.

(b) **Deed — Construction — (T. P. Act (1882), S. 8).**

The construction of documents depends upon the words used therein and it is futile to attempt to construe a document in the light of authorities interpreting the terms of documents in other cases. Those decisions may serve as a useful guide if they contain general rules of construction. (Para 12)

Anno: T. P. Act, S. 8 N. 20 Pts. 1, 7 and 34.

(c) **Deed — Settlement deed — Intention of settlor how to ascertain — (T. P. Act (1882), S. 8).**

The intention of the settlor has to be ascertained by a reading of the document as a whole and if there is any ambiguity, Court can look to the circumstances under which the document came to be executed and also, if necessary to the subsequent conduct of the parties which might throw some light on the intention of the settlor. (Para 13)

Anno: T. P. Act, S. 8 N. 20.

(d) **Civil P. C. (1908), O. 41, R. 33 — Applicability and scope.**

Provision of O. 41, R. 33 is not meant to be exercised in favour of a party who did not choose to file an appeal against the judgment of the trial Court and allowed it to become final. (Para 30)

Anno: Civil P. C., O. 41, R. 33 N. 1 and 6.

S. Thyagaraja Iyer and K. R. Rama Iyer, for Appellants; D. Ramaswami Iyengar, C. S. Rajappa and K. Desikachari, for Respondents.

CASES CITED:

(A) ('50) 63 Mad LW 1018: 1950-2 Mad LJ 239
(B) ('13) 40 Ind App 105: 35 All 211 (PC)
(C) ('51) AIR 1951 SC 139: 64 Mad LW 547 (SC)
(D) ('86) 12 Ind App 159: 8 All 39 (PC)
(E) ('01) 28 Ind App 65: 23 All 324 (PC)
(F) ('28) AIR 1928 Pat 348: 108 Ind Cas 323: 7 Pat 396
(G) ('50) 1950-2 Mad LJ 496: 63 Mad LW 963

JUDGMENT: This second appeal is brought from the judgment of the Subordinate Judge of Tuticorin setting aside the decree of the trial Court giving the relief to the plaintiffs as prayed for. The material facts of the case are these:

(2) One Sankaralinga had two sons, Ramaswami and Arunachala, and three daughters, the plaintiffs in the present suit. His two sons were demented. He was anxious that his sons should get married in spite of their being insane. Arunachala was first married to one Pulamadi and as she died Sankaralinga wanted to get Arunachala married a second time. For that purpose, he approached the parents of one Sivanananji. The latter was not willing to give Sivanananji in marriage to Arunachala unless some properties were settled upon the girl before marriage. Accordingly Sankaralinga executed a settlement deed conveying the suit properties to Sivanananji. It is this document that falls to be considered in this second appeal.

(3) Sankaralinga died early in 1930. During his lifetime he made a gift of several items of property to his daughters, the present plaintiffs, and after his death, Ramaswami by his wife as his guardian, instituted a suit for partition of the family properties ignoring the gifts in favour of the present plaintiffs. In that suit the present suit properties were not included. Ultimately the suit ended in a compromise and under the terms of the compromise the title of the plaintiffs to the suit properties was recognised and affirmed.

(4) Neither Ramaswami nor Arunachala had any issue. Ramaswami died in the year 1931 and Arunachala in 1935. Subsequent to the death of Arunachala, Sivanananji alienated the properties in favour of the various defendants in the suit. The present suit is filed challenging the alienations on the ground that Sivanananji was given only a life estate under the settlement deed Ex. B. 11 of her father-in-law and therefore these alienations are void beyond the lifetime of Sivanananji who died in January 1945.

(5) The main defence to the suit was that Sivanananji was given an absolute estate under Ex. B. 11 and that in any event since the absolute right of their predecessors-in-interest to the suit properties was recognised by way of family arrangement in the earlier suit by these plaintiffs, it is not open to the plaintiffs to question the validity of the sales in their favour.

(6) The trial Court decreed the suit holding that under the settlement deed in question Sivanananji got only a life estate with the result the defendants did not acquire any right to these properties by virtue of the sales in their favour. It was also of opinion that the compromise decree in the earlier suit did not recognise the absolute title of Sivanananji to the suit properties.

(7) On appeal, the Subordinate Judge took a different view of the nature of the estate conferred upon Sivanananji by her father-in-law and dismissed the suit, while agreeing with the District Munsif on the question of the family arrangement. The plaintiffs aggrieved by this decision have preferred this second appeal.

(8) Mr. Rama Aiyar in support of the appeal urged that the view of the Subordinate Judge that an absolute estate was conferred upon Sivanananji is unsound and opposed to the tenor of the document. The question for decision in this second appeal depends upon the construction to be placed on Ex. B. 11. It therefore becomes necessary to set out in extenso Ex. B. 11:

"Whereas Pulamadi Ammal alias Sudalai Muthu Ammal had already been married to my junior son Arunachalam Pillai, a person of unsound mind as his first wife, whereas she is dead, whereas I requested these five individuals viz., your mother Pechiammal Ammal and your brothers Sankaralingam Pillai, Kanthimathinatha Pillai, Thangiah Pillai and Subbiah Pillai to give you in marriage to my said son Arunachalam Pillai of unsound mind as his second wife; whereas they agreed to the same and whereas I have on this day in accordance with their request conveyed to you under this settlement the properties of the value of Rs. 1000 mentioned in the schedule herein, you yourself shall for ever and ever from now onwards hold and enjoy the same with rights under the settlement. Should there be male heirs to you, the said male heirs shall take the said properties after your lifetime; should there be no male heirs to you but only female heirs, your female heirs shall take the said properties after your lifetime."

The other relevant portion of the document is to the effect:

"You alone will enjoy the abovementioned properties for all times."

(9) Mr. Rama Aiyar invites me to construe this document as giving Sivanananji Ammal only a life estate. His reasons are that while there is nothing suggestive of an absolute estate conferred on the donee in the documents, the provisions regarding the devolution of the property on the death of the settlee indicate an intention to bestow only a life estate. What he urges is that if really the intention of the settlor was to convey an absolute estate to the settlee under the document, he would not have directed the male heirs of the settlee to inherit the properties in preference to the female heirs, who would succeed to her stridhana property. According to learned counsel this is a clear indication that the settlor intended to give only a life estate to the settlee. He proceeds to argue that if an absolute estate was meant to be given, the settlor would not have tried to alter the course of the devolution.

(10) In support of the plea that this clause denotes that only a life estate was contemplated by the settlor so far as the settlee is concerned he relies on a recent decision of a Bench of this Court in — 'Radhakrishnayya v. Sakuntala', 1950-2 Mad LJ 239 (A). There the terms of a settlement that were considered by the learned Judges was in the following words:

"It is settled that you, three individuals (daughters) shall take the property, subject to the terms mentioned below, with equal rights in three shares and shall pass on hereditarily from your sons to grandsons and so on i.e., unlike Stridhanam (property), if you should each separately have male issue and female issue, the share of each of you shall pass to her sons or if there should be no male children to her daughters."

This clause was construed by the learned Judges as denoting the intention of the settlor to bestow only a limited estate in favour of his daughters and that the ultimate destination of the estate was to the male grandchildren in preference to his grand-daughters. I do not think this decision is of any material assistance to the appellants. The dispositive words of that settlement deed can leave no doubt that the settlor intended to bestow only a life estate. Under that document the settlees were given the properties subject to the terms mentioned therein, viz., that on the death of any one of them the property should pass on to her sons to the exclusion of the female issue. So that case cannot be a guide in ascertaining the intention of the settlor from the words of the document before me.

(11) Mr. Rama Aiyar next relied on — 'Skinner v. Naunihal Singh', 35 All 211 (PC) (B). The material clause of the will which was considered to confer only a life estate upon the son of the testator is in the following terms:

"In the event of my eldest son Thomas Brown Skinner dying without lawful male children, the abovementioned private zamindari etc., shall descend to my next male heir, and should all my sons die without lawful male children, the zamindari etc., shall descend to my female children, or, in the event of their death, to the female children born in wedlock of my sons in succession."

Reading the will as a whole, their Lordships came to the conclusion that his son Thomas Brown Skinner was given only a life estate. The observations of their Lordships at page 224 are pertinent:

"So looking at this settlement, their Lordships do not find themselves able to affirm that Thomas Skinner meant his son Thomas Brown Skinner to have an absolute ownership of these villages. So to conclude would be to affirm that the former a month before his death set forth an elaborate scheme of destinations over, while all the time he was really meaning that the boy of fourteen was to take the absolute ownership if he survived him. If the son was to be a tenant for life merely, then the detailed regulations for successive enjoyment and descent were entirely in place; they were natural and necessary."

Their Lordships then pointed out that the various provisions in the Will showed that the testator meant to regulate the succession after the death of his son. I fail to see how this case can afford any assistance in ascertaining the intention of the settlor in this case.

(12) Reliance was placed on a number of decisions in which it was held that only a life estate was conferred on the persons named in the documents construed in those cases. It looks to me that no assistance can be got from these decisions as the construction of those documents depended upon the words used therein and it is futile to attempt to construe a document in the light of authorities interpreting the terms of the documents in other cases. Those decisions may serve as a useful guide if they contain general rules of construction. I do not therefore propose to refer to them. The construction of a document depends upon the language employed therein and so one has to turn to the terms of the document to gather its import.

(13) The intention of the settlor has to be ascertained by a reading of the document as a whole and if there is any ambiguity we can look to the circumstances under which the document came to be executed and also, if necessary, to the subsequent conduct of the parties which might throw some light on the intention of the settlor.

(14) Now going back to the clauses relating to devolution of property on the death of the settlee I do not think they show that the settlor intended to bestow on the settlee only a life estate. On the other hand the indications in the earlier and the concluding portions of the document are that the settlor intended to give her an absolute estate. The document recites that the settlor was conveying the properties to the settlee by way of settlement for the reasons mentioned therein and that she should enjoy the properties for ever and ever. The other clause which is relevant in the context is that the settlee should enjoy the property described in the schedule exclusively and for all times.

(15) Then Mr. Rama Aiyar contended that having regard to the notions of Hindu society, any gift to a woman should not be regarded as an absolute one unless there are clear indications that the settlor or the testator conveyed the whole interest in the property. I do not think there is any basis for this view. There does not seem to be any justification for departing from the general principles recognised in S. 8, Transfer of Property Act. In my opinion a gift or bequest in favour of a woman should be construed in the same spirit as a gift in favour of a male. In fact, the proposition as stated by Mr. Rama Aiyar was rejected by the Supreme Court in — 'Ramgopal v. Nandalal', AIR 1951 SC 139 (C). At p. 141 of the report the following observations are made:

> "It may be taken to be quite settled that there is no warrant for the proposition of law that when a grant of an immoveable property is made to a Hindu female, she does not get an absolute or alienable interest in such property, unless such power is expressly conferred upon her."

(16) This passage is sufficient to answer the contention of Mr. Rama Aiyar.

(17) Mr. Rama Aiyar maintains that the terms of the documents are not suggestive of the conferment of an absolute estate on the settlee. He urges that the use of the words "for ever and ever" does not show that an absolute estate was conveyed to the settlee, and that these expressions are consistent with a life estate being given to the settlee and if this view is accepted the recitals regarding the devolution of property help his contention that only a life estate was given to the settlee. As substantiating his argument, he relied on decisions of the Privy Council in — 'Muhamad Abdul Majid v. Mt. Fatima Bibi', 8 All 39 (P. C.) (D) and — 'Azizunnissa v. Tasaduq Hussain', 23 All 324 (PC) (E). Neither of these cases carries the appellant very far. No doubt their Lordships observed in the former case that the expression "always" and "for ever" do not per se extend the interest beyond the life of the person who is named. But those observations must be understood in the context of that case. There the management of certain properties was directed to rest always and for ever in the hands of one of the parties and the Privy Council remarked that these expressions did not show that the management was intended to be heritable. But in the present case the expression "for ever and ever" is with reference to immoveable property and the considerations that govern the vesting of management of property are not applicable to a case like the present.

(18) Similarly, the latter case is distinguishable. There, under an award which came up to the Court one of the parties was to pay always to the other a sum of money mentioned therein, the expression used being "hamesha". Their Lordships adhering to the views expressed in — '8 All 39 (PC) (D)', stated that the use of this expression was consistent with limiting the interest given to the life of the grantee.

(19) The situation is different when immoveable properties are conveyed to a person. In such a case unless there are any words of limitation or restriction, the transferee gets the whole interest therein. In my opinion, those decisions do not govern the similar expression in a document conveying immoveable property. In this context, a reference to S. 8 of the Transfer of Property Act is useful:

> "Unless a different intention is expressed or necessarily implied, a transfer of property passes forthwith to the transferee all the interest which the transferor is then capable of passing to the property, and in the legal incidents thereof."

It is manifest from this section that the settlee gets an absolute estate in the property unless there is an intention express or implied of the settlor to limit this interest. On a reading of the document as a whole, bearing in mind the above provisions, it appears to my mind that the settlor intended to bestow an absolute estate on the settlee.

(20) No doubt words conferring powers of alienation are not employed in the document but in my opinion that does not make any difference as there are words of sufficient amplitude to confer an absolute estate on the settlee.

(21) This reading of the document gains a support from the surrounding circumstances. The circumstances in which the settlement came to be executed are of some assistance in gathering the import of the document. The settlor approached the parents of Sivanananji for giving her in marriage to his son who was insane and the parents were not willing to do so unless some properties were settled upon her. It is only in pursuance of the desire of the parents that this settlement deed was executed.

Another circumstance to be considered in this context is that the property conveyed to the settlee bears a very small proportion to the properties owned at that time by the family of Sankaralinga, and it is not unlikely that he would have conveyed an absolute estate to the settlee. Nor is it likely that the parents would have agreed to give their daughter in marriage to an insane person merely in consideration of a life esate in small properties on their daughter.

(22) Furthermore, the compromise in the earlier suit puts beyond doubt what the intention of the settlor in executing Ex. B. 11 was. This throws light on the nature of the estate given to Savanananji. It is categorically stated in that document that the settlor conveyed property by way of gift to the settlee at the time of the latter's marriage and that the present plaintiffs had absolutely nothing to do with the property thereby meaning that absolute title to the property inhered in the settlee. The various considerations set out above together with the employment of language that the settlee should enjoy the property exclusively for ever and for all time leave no doubt in my mind that the settlor desired to confer upon the settlee an absolute estate.

(23) The next question is whether the recitals in the settlement deed that on Sivananaji's death the property should pass to her male issue if she has any male issue and should there be no male issue the property should pass to her female issue, would in any way suggest that the settlor was giving a life estate to the settlee and gift over to her male issue. In my opinion they do not show that the settlor contemplated that the ultimate destination of the property should be to the male issues of the settlee. I think that the provision for devolution was not meant in any way to limit the character of the estate. It is more an indication that the settlor intended to impress upon the property a descendable quality.

(24) A Bench of the Patna High Court in — 'Nand Kishore Lal v. Pasupati Nath Sahu', AIR 1928 Pat 348 (F) had to construe a similar provision in a will to the following effect:

> "After the death of me, the executant, my grand daughter shall be the absolute proprietor like me of all the properties moveable and immoveable, now in my possession and those which will be acquired by me in future and shall remain as such.....After the death of my grand daughter, male issue born of her womb shall be the absolute owners and shall enjoy the income thereof."

(25) Dealing with the last clause providing for the devolution it was observed that the testator intended to assure still further the devolution of the property through the grand daughter.

(26) In a case reported in — 'Ratnasami Pillai v. Kathia Bivi Ammal', 63 Mad L W 963 (G) Somasundaram J. held that the recital that "my daughter Kathiya shall get these properties after my lifetime with absolute rights and that after her lifetime her grandson Ratnaswami shall get the properties" was not meant to cut down the estate conferred upon the daughter but at the best could only be a provision for devolution of property after the death of the daughter.

(27) In my judgment these recitals are not suggestive of the intention of the settlor to limit the estate given to the settlee and to make a gift over to the male issues of the settlee. When it was recited that the property should pass on to the male heirs after the death of the settlee only the settlor was evidently mentioning the heirs of the settlee in a wrong order. Unless it is shown that he had knowledge of the devolution of stridhanam property, the recital that the male issues should inherit the property on her death does not in any way disclose the intention of the settlor that he meant to make an independent gift to the male issue.

(28) Even assuming that the settlor intended to make an independent gift to the male issues, this would not take effect as it is repugnant to the absolute estate given to the settlee in the earlier portion of the document, and is in the nature of a defeasance clause. Such a defeasance clause cannot be operative so as to curtail the absolute estate given to the settlee in the earlier portion of the document.

(29) In these circumstances I hold that Sivanandaji Ammal took an absolute estate under the settlement of her father-in-law Ex. B. 11 and the alienations in favour of the defendants are valid and cannot be questioned by the plaintiffs. Even granting that Ex. B. 11 did not convey an absolute interest in the property to Sivananji, the predecessor in interest of the defendants, having regard to the fact that in a subsequent family arrangement amongst the members of the family in which the absolute title of Sivanananji to the properties in dispute was recognised and affirmed it does not lie with the plaintiffs who were parties to that arrangement to challenge the validity of the alienations. It follows that Sivanananji acquired a saleable interest in the properties in dispute under the settlement deed Ex. B. 11 dated 2-2-1925 and the alienations in favour of the defendants cannot be questioned in the suit. Hence the decision of the lower appellate court is correct and should be confirmed. In the result the second appeal is dismissed with costs of respondents 3 to 7.

(30) A Memorandum of cross objections has been filed by the first defendant who did not file an appeal against the judgment of the trial court decreeing the suit against her. For the first time she has filed a memorandum of cross objections here which, in effect, is only an appeal against the decree of the trial court invoking O. 41, R. 33, Civil P. C. I do not think that provision is meant to be exercised in favour of a party who did not choose to file an appeal against the judgment of the trial court and allowed it to become final. Therefore O. 41, R. 33, Civil P. C. does not avail him. Even otherwise this is not a case in which this court would exercise its discretion under O. 41, R. 33, Civil P. C. In the result the memorandum of cross objections is dismissed with costs.

(31) Leave to appeal is refused.

B/H.G.P. Appeal dismissed.

A.I.R. 1953 MADRAS 569 (Vol. 40, C. N. 220)

RAMASWAMI J.

Mamidi Harihararayulu and others, Petitioners v. Annavarapu Bangarayya, Respondent.

Civil Misc. Petns. Nos. 4149 and 7331 of 1952, D/- 29-8-1952.

Criminal P. C. (1898), Ss. 476-B, 195(1)(a), (b) and (c), 195(5) and 476 — No appeal lies

in respect of offences mentioned in S. 195(1) (a) — There is only right of revision under S. 195(5) — Rule 37 of Criminal Rules of Practice (Mad.) has no reference to such a case — (Madras High Court Criminal Rules of Practice, Rule 37). (Paras 5 and 6)

Anno: Crl. P. C., S. 476-B, N. 1; S. 195 N. 26, 27; S. 476 N. 24.

Narayanachar and K. R. Sharma, for Petitioner and Respondent (in Nos. 4149 and 7331 respectively); A. Subramanian and N. Subramanian, for Respondent and Petitioner (in Nos. 4149 and 7331 respectively).

CASES CITED:

(A) ('34) AIR 1934 Oudh 344(2): 35 Cri LJ 824
(B) ('35) AIR 1935 Mad 673: 36 Cri LJ 895
(C) ('39) AIR 1939 Mad 336: 40 Cri LJ 568
(D) ('37) AIR 1937 Pat 31: 38 Cri LJ 292
(E) ('27) AIR 1927 All 828: 28 Cri LJ 547
(F) ('28) AIR 1928 Rang 296: 29 Cri LJ 912
(G) ('23) AIR 1923 Mad 473: 24 Cri LJ 424
(H) ('27) AIR 1927 All 571(2): 28 Cri LJ 668
(I) ('27) AIR 1927 Pat 111: 28 Cri LJ 353
(J) ('34) AIR 1934 Mad 473: 35 Cri LJ 1134
(K) ('42) AIR 1942 Cal 307: 43 Cri LJ 636
(L) ('24) AIR 1924 Oudh 402: 25 Cri LJ 1127
(M) ('42) AIR 1942 Cal 434: 43 Cri LJ 410
(N) ('45) AIR 1945 Mad 58: 46 Cri LJ 421
(O) ('39) AIR 1939 Mad 472: ILR 1939 Mad 439: 41 Cri LJ 705
(P) ('34) AIR 1934 Mad 52: 57 Mad 177: 35 Cri LJ 392 (FB)

ORDER: This civil miscellaneous appeal has been placed on the list, subject to the question of the maintainability of the same being decided.

(2) The facts are: Annavarapu Bangarayya, the decree-holder in O. S. No. 115 of 1937, on the file of the District Munsif's Court, Masulipatam, filed an application dated 21-2-1951 under Ss. 476 and 195, Criminal P.C. in the Court of the District Judge of Krishna praying that the Court may be pleased to sanction and launch prosecution proceedings against the respondents Mamidi Hari Hararayulu, Dora Krishnarao and Kosaraju Venkateswara Rao, who had obstructed the amin of the District Court while he was discharging his duties in effecting attachment of certain movables of the judgment-debtor Mamidi Hari Hararayulu in E. P. No. 316 of 1949 in O. S. No. 115 of 1937. The District Judge had before him the report of the amin and the connected papers. Notice was given to the respondents and the learned Judge heard arguments of the vakils for the petitioner and the arguments of the three advocates for the three respondents.

Then he passed the following order:

"In view of the amin's report dated 14-12-1950 which discloses offences under Ss. 183 and 186, Penal Code among others, the Central Nazir of this Court is directed to make a complaint against the respondents in respect of the said offences before a Magistrate. I make no order as to costs."

This order was passed on 1-11-1951.

(3) Thereupon the learned advocate for the defeated respondents in the lower Court purported to file a proceeding, which has originally been typed as a memorandum of criminal appeal and which has been subsequently corrected into a civil miscellaneous appeal falling under S. 476-B, Criminal P. C. The High Court office returned the memorandum on the following ground:

"S. 476 applies only to offences under S. 195 (b). Sections 183 and 186 fall under S. 195 (a). Hence the proceedings in the lower Court could not have been taken under S. 476. It may be stated how C. M. A. lies under S. 476-B."

Thereupon the learned advocate re-presented it with the following endorsement:

"The C. M. A. is filed as civil miscellaneous appeal under R. 37, Criminal Rules of Practice, and S. 476-B, Criminal P. C., which applies to orders passed by the lower Court under S. 476, Criminal P. C. and S. 195, Criminal P. C."

(4) There can be no doubt that this endorsement of the learned advocate is based on a profound misreading and, if I may say without meaning any offence, non-reading of Ss. 476 and 476-B, Criminal P. C. and R. 37, Criminal Rules of Practice.

(5) Section 476-B, Criminal P. C. gives a right of appeal against the orders passed under Ss. 476 and 476-A directing the filing of a complaint or refusing to make a complaint: see — 'Wajid Ali v. Emperor', AIR 1934 Oudh 344 at p. 347 (A); — 'Mahabaleswarappa v. Gopalaswami Mudaliar', AIR 1935 Mad 673 at p. 679 (B). The right of appeal is restricted to complaints in respect of offences mentioned in cls. (b) and (c) of S. 195 (1) of the Code and no appeal lies in respect of offences mentioned in cl. (a) of that sub-section: see — 'Maruda Pillai v. Narayanaswami Pillai', AIR 1939 Mad 336 (C); — 'Bajrang v. Durga Prasad', AIR 1937 Pat 31 at p. 33 (D); — 'Brijendranath v. Emperor', AIR 1927 All 828 (E) and — 'P. J. Money v. Emperor', AIR 1928 Rang 296 (F). Before the amendment of 1923 it was held that where a public servant acted judicially as a Court and passed an order sanctioning prosecution for an offence referred to in cl. (a) of S. 195, he must, for the purpose of appeal be taken to have acted as a Court, the forum of appeal being governed by the provisions of sub-sec. (7), (now sub-sec. (3)), but that if he should be taken to have acted not as a Court, but in his executive capacity, the forum of appeal was not governed by sub-sec. (7): see — 'Nataraja Pillai v. Rangaswami Pillai', AIR 1923 Mad 473 at p. 474 (G). Since the amendment of the Code in 1923, an appeal lies only against a complaint preferred by a Court under S. 476, in respect of offences falling within cl. (b) and cl. (c) of S. 195; vide — 'Rameshwarlal v. Emperor', AIR 1927 All 571 (H). Where a public servant, whether he is a Court or not, files a complaint in respect of an offence falling under cl. (a) of S. 195 there is no appeal: vide AIR 1927 All 828 (G). But sub-sec. (5) newly added enables the authority to which such public servant is subordinate, to withdraw the complaint.

Thus, it has been held that a Sub-Divisional Magistrate acting under cl. (a) of sub-s. (1) is subordinate to the District Magistrate, the authority to which he is subordinate under S. 17, Criminal P. C., and an application for withdrawal of complaint should be made to him and not to the Court of Session to which appeals ordinarily lie from his decisions as a Court or to the High Court; see — 'Maini Misser v. Emperor', AIR 1927 Pat 111 (I); — 'Naguservai v. Emperor', AIR 1934 Mad 473 (J) and — 'Emperor v. Ramjanam', AIR 1942 Cal 307 (K). It has further been held that the High Court as being the authority to which a

District Judge or an Additional Sessions Judge is subordinate within the meaning of this sub-section, is competent to withdraw a complaint filed by the latter as a public servant; vide AIR 1927 All 828 (E) and — 'Chedilal v. Emperor', AIR 1924 Oudh 402 (L). In other words, there is no appeal in this case but there can only be a resort to sub-s. (5) to S. 195 newly added and this can only be by way of revision. Thus, where a Subordinate Judge declined to make a complaint under sub-s. (1) cl. (a) of S. 195 in respect of an offence under S. 186, Penal Code alleged to have been committed against the peon of the Court while executing a process of the Court, the High Court interfered in revision and set aside the order of the Subordinate Judge directing him to dispose of the matter after taking into consideration the observations of the High Court; vide — 'Rajshahi Banking and Trading Corporation Ltd. v. Surendranath', AIR 1942 Cal 434 (M).

It is unnecessary to consider here whether a revision lies against the withdrawal of a complaint under sub-s. (5) and the High Courts of Allahabad and Patna and the Judicial Commissioner's Court of Peshawar have held that a withdrawal of a complaint under sub-s. (5) is an administrative or executive act and hence not open to revision by the High Court. On the other hand, the High Court of Madras has held in a case where a District Magistrate summarily rejected an application under this sub-section for the withdrawal of a complaint preferred by the joint Magistrate without giving notice or hearing the applicant, that the application was by way of a judicial revision, and the order was open to revision under S. 439, Criminal P. C.: vide AIR 1934 Mad 473 (J). It has also been held by the same High Court that where a joint Magistrate has passed an order withdrawing a complaint, the order of the District Magistrate in revision setting aside that order is passed as a Court and is open to revision by the High Court: — 'Vijayaranga Reddiar v. Muthuswami Reddiar', AIR 1945 Mad 58 (N). The order of the joint Magistrate directing the withdrawal of the complaint is not, however, an order of discharge and consequently it will not be open to the District Magistrate under S. 436 to himself set it aside (ibid). Therefore, this proceeding can be filed under the newly added sub-s. (5) only as a revision and not as a civil miscellaneous appeal.

(6) The reference to R. 37, Criminal Rules of Practice is meaningless in this connection. That rule merely states:

"Every application made to a Criminal Court under the provisions of Ss. 476, 476-A or 485, Criminal P. C., and every appeal filed against an order made under the above sections, or filed in a Court of Session against an order of a Court of Small Causes in the mofussil under S. 486, Criminal P. C. shall be registered as a criminal miscellaneous petition and a criminal appeal respectively. Such applications and appeals when filed in a civil Court will be registered as civil miscellaneous petitions and civil miscellaneous appeals.

This rule applies to revision petitions also."

That this rule which prescribes a different procedure in case of appeals filed under S. 476-B, Criminal P. C. is not in consonance with procedure has been indicated in — 'Raja Gupta In re', AIR 1939 Mad 472 (O). See also — 'Janardhan Rao v. Lakshminarasamma', AIR 1934 Mad 52 (P).

(7) Therefore, even assuming that this is a revision petition, the final point to be decided is whether stay should be granted and for doing so there is not the slightest warrant because when our interference is by way of revision, the limitations incidental to interference in revisions automatically apply. The facts of this case show that when the amin of the civil Court was executing the warrant of attachment in execution of a decree, he had been resisted and assaulted by the judgment-debtors and therefore there is a good 'prima facie' case for making the complaint. The procedure followed is correct, viz., the District Judge has been moved in his capacity as a public servant to whom the amin is subordinate to make a complaint. The learned District Judge has given an opportunity to both sides and examined the matter and arrived at his conclusion. Therefore, there are no grounds to hold that a case has been made out for granting stay.

(8) The petition for stay is dismissed and the petition for vacating the order of stay is allowed and, in both cases, without costs because it has been held by Lakshmana Rao J. that in application of quasi-criminal character costs should not be allowed.

B/R.G.D. Petition dismissed.

A.I.R. 1953 MADRAS 571 (Vol. 40, C. N. 221)

RAJAMANNAR C. J. AND VENKATARAMA AIYAR J.

Vennamuddala Venkata Challamma alias Venkata Lakshmamma, Appellant v. Cheekati alias Gaddam Subbarao and others, Respondents.

Letters Patent Appeal No. 122 of 1950, D/- 7-11-1952, against decree and judgment of Panchapagesa Sastri J., in S. A. No. 1501 of 1947, D/- 23-8-50.

(a) Hindu Law — Adoption — Dancing girl.

An adoption of a daughter by a dancing girl when it is not for the purpose of prostitution is valid by custom and such adoption confers on the person adopted the status of an adopted daughter with all the civil rights flowing therefrom like inheritance to the adoptive mother's properties. 11 Mad 393, 12 Mad 214 and AIR 1936 Mad 639, Rel. on. (Para 4)

(b) Hindu Law — Adoption — Dancing girl.

Held in the absence of any judicial authority when a dancing girl was adopted by another dancing girl her ties with her natural family were broken. (Para 4)

(c) Hindu Law — Dancing girl — Law applicable.

Members of the dancing girl community who adopt the Hindu faith and Hindu customs and manners must be treated as persons governed by the ordinary Hindu law; but on account of the special kind of life led by them which is in important respects inconsistent with Hindu Dharma they are governed largely by custom and usage often not in consonance with Hindu law. Where there is no proof of a custom directly applicable to any particular case of disputed succession the general rules of Hindu law may be applied by analogy as

rules of justice and equity. Case law discussed. (Para 8)

(d) Hindu Law — Adoption — Dancing girl — Succession.

When a dancing girl was adopted by another she became entitled to inherit to the latter. Equally, the latter would have had the right to inherit to former. But in the absence of a custom, it cannot be said that a girl adopted by a woman of a dancing girl community becomes entitled to all rights of collateral succession unless there is a custom pleaded and proved to that effect. Case law discussed. (Para 11)

(e) Hindu Law — Custom — Scope.

A custom cannot be enlarged by parity of reasoning. AIR 1930 Mad 109 and AIR 1939 Mad 564, Rel. on. (Para 12)

M. S. Ramchandra Rao and Ch. Ramakrishna Rao, for Appellant; J. V. Srinivasa Rao, for Respondents.

CASES CITED:

(A) ('88) 11 Mad 393
(B) ('89) 12 Mad 214
(C) ('36) AIR 1936 Mad 639: 71 Mad LJ 53
(D) ('83) 6 Mad 267
(E) ('89) 12 Mad 442
(F) ('30) AIR 1930 Mad 883: 54 Mad 27
(G) ('18) AIR 1918 Mad 642: 33 Mad LJ 207
(H) ('18) AIR 1918 Mad 1346: 41 Mad 44 (FB)
(I) ('26) AIR 1926 Mad 289: 48 Mad 944
(J) ('35) AIR 1935 Mad 58: 67 Mad LJ 861
(K) ('36) AIR 1936 Mad 958: ILR (1937) Mad 257
(L) ('48) AIR 1948 Mad 10: 1947-1 Mad LJ 301
(M) ('39) AIR 1939 Mad 139: ILR (1938) Mad 789
(N) ('35) AIR 1935 Mad 3(2): 67 Mad LJ 706
(O) ('30) AIR 1930 Mad 109: 57 Mad LJ 817
(P) ('39) AIR 1939 Mad 564: 49 Mad LW 581

RAJAMANNAR C. J.: In this appeal filed under the Letters Patent against the judgment of Panchapagesa Sastri J. in S. A. No. 1501 of 1947, the question relates to the succession to the properties of a dancing girl.

(2) One Pullamma brought a suit for partition and possession of her half share of certain properties conveyed to her and her brother's daughter jointly in gift by a third person. When the suit was pending Pullamma died. Thereupon, the first respondent sought to come on record as her legal representative and continue the action. He claimed to be the grandson of the brother of one Nandamma who was alleged to have adopted Pullamma as her daughter. The brother's daughter who was the contesting defendant claimed to succeed to the properties of Pullamma as her nearest heir.

(3) It was common ground that both Nandamma and Pullamma belonged to the dancing girl caste and that Nandamma had adopted Pullamma as her daughter. It was further found that the first respondent was the brother's grandson of Nandamma. The trial Court decreed the suit. But, on appeal, the learned Subordinate Judge took the view that the first respondent was not the heir and that the appellant, the brother's daughter, was herself the heir. He therefore dismissed the suit. The first respondent filed the second appeal which was disposed of by Panchapagesa Sastri J. The learned Judge held that when Pullamma was adopted to Nandamma her connection with her natural family came to an end and therefore the appellant who was the natural brother's daughter could not inherit. He also held that the first respondent succeeded to the properties of Pullamma as her bandhu, being her adoptive mother's brother's grandson. He therefore allowed the second appeal and restored the decree of the trial Court. The brother's daughter now appeals.

(4) It must be now taken as well established that so far as Madras is concerned, an adoption of a daughter by a dancing girl when it is not for the purpose of prostitution is valid by custom and such adoption confers on the person adopted the status of an adopted daughter with all the civil rights flowing therefrom like inheritance to the adoptive mother's properties. — 'Venku v. Mahalinga', 11 Mad 393 (A), — 'Muttukannu v. Paramasami', 12 Mad 214 (B) and — 'Veeranna v. Sarasiratnam', AIR 1936 Mad 639 (C). Mr. Ramachandra Rao, learned counsel for the appellant did not therefore question the validity of the adoption of Pullamma by Nandamma. He however argued that the adoption does not sever all ties between the adopted daughter and her natural family. He relied on the analogy of illatom son-in-law and the decision in which it was held that an illatom son-in-law does not lose all his rights in the natural family. Vide — 'Balarami v. Pera', 6 Mad 267 (D) and — 'Ramakristna v. Subbakka', 12 Mad 442 (E) and — 'Subbarao v. Mahalakshmma', AIR 1930 Mad 883 at p. 894 (F). We do not think that this contention can be dealt with as a pure question of law. Hindu law as such does not recognise the adoption of a daughter. Such adoption is entirely the creation of custom. We must therefore find out whether it is one of the incidents of the custom which permits the adoption of a daughter by a dancing girl that such adopted daughter loses or retains her rights in her natural family. Learned counsel for the plaintiff-respondent referred us to the oral evidence in the cases which appears to support the conclusion that according to the custom of the community the adopted girl does not inherit in her natural family. There is no evidence contra. On the facts of this case it must therefore be held in the absence of any judicial authority on the point that when Pullamma was adopted by Nandamma her ties with her natural family were broken. The appellant as her natural brother's daughter would not therefore be her heir.

(5) This finding however does not dispose of the case. The first respondent must succeed on the strength of his own title. It therefore becomes necessary to consider whether he is entitled to inherit to Pullamma. The answer to this question depends upon the rule of succession which applies to the property of a dancing girl. Panchapagesa Sastri J. was of the opinion that the law of succession to a dancing girl's property must ordinarily be the Hindu law relating to 'stridhanam' property of a woman or principles analogous to the same. We shall now refer to some of the decided cases dealing with the point to see if this rule is well established.

(6) In — '12 Mad 214 (B)', the learned Judges (Muthuswami and Parker JJ.) observed as follows:

"We consider therefore that as a matter of private law it must be taken the class of dancing woman being recognised by Hindu

law as a separate class having a legal status, that the usage of that class, in the absence of positive legislation to the contrary, regulates rights of status and of inheritance, adoption and survivorship."

In — 'Subbaratnam Mudali v. Balakrishnaswami Naidu', AIR 1918 Mad 642 (G), the rival claimants to the property of a deceased dancing girl were the mother's mother's father's brother's daughter and the mother's mother's father's brother's daughter's son. It was held that the former was the preferable heir. The learned Judges, after pointing out that the ordinary Hindu law of inheritance which is based on a system of legal marriage and consequential relationship, cannot be applied at all or at least without any considerable modifications to the property of a woman of the dancing girl caste who, except her own children can ordinarily have relations only through females, said,

"The rules as to stridhanam obviously do not apply to such property and there is no other rule of succession laid down in the Smritis or by the Commentators prescribing the devolution of the property of women of this caste except it be the general rule 'that to the nearest sapinda the inheritance next belongs."

The Full Bench case in — 'Subramania Iyer v. Ratnavelu Chetti', AIR 1918 Mad 1346 (FB) (H), no doubt concerned the right of a putative father to succeed as heir to his illegitimate son. But Kumaraswami Sastri J. made some observations in passing on the law of succession applicable to dancing girls and prostitutes on the basis of earlier decisions of this Court, namely, that in the absence of a positive rule of law to the contrary the custom of the caste and the analogies of Hindu law should be applied.

In — 'Viswanatha Mudali v. Doraiswami Mudali', AIR 1926 Mad 289 (I), it was held that the legitimate descendants of two sons of a Hindu dancing woman are entitled to succeed to each other. There is a long discussion of case law by Devadoss J. who delivered the leading judgment of the Bench. The learned Judge was of the opinion that the ordinary Hindu law would govern dancing girls who followed the Hindu faith and Hindu customs and manners. Wallace J. approached the case from a slightly different aspect. He started by saying

"The law first of all to be applied is then the law founded on usage which governs inheritance to woman of the dancing girl caste, the paternity of whose children is unknown, and is not a fact of consideration at all."

But he held that the general principles of Hindu law can be applied unless such application would violate equity and good conscience and so long as a special custom to the contrary is not proved. The learned Judge said,

"I cannot see that such an analogous application of Hindu law to persons living as Hindus and following Hindu customs and usages can in any way offend the general principles of equity and good conscience."

In — 'Shanmugatammal v. Gomathiammal', AIR 1935 Mad 58 (J), the plaintiff, a member of the Dasi community, claimed to succeed to her deceased maternal aunt in preference to the three surviving sisters of the deceased on the ground that one of them had been adopted by another dancing girl and the other two had become married women. The material issue related to the custom set up by the plaintiff that among dancing women married women were excluded by a woman who continued to be a dasi. It was held by the learned Judge, differing from the lower Court, that the custom was established; King J. who delivered the judgment of the Division Bench starts the discussion of the evidence with the following prefatory remarks:

"It is unnecessary, we think, to discuss in detail the various rulings of the Madras High Court which have been cited before us..... One proposition however is uniformly laid down in every decision which deals with the Dasi caste and that is that its members are not governed by the ordinary Hindu law in matters of succession but by caste, custom and usage."

(7) In—'Balasundaram v. Kamakshi Ammal', AIR 1936 Mad 958 (K), Wadsworth J. observed:

"There is remarkably little authority in the reported cases regarding the devolution of property through females of the dancing girl caste. It is of course quite settled that when a dancing girl practising the calling of her caste acquires property thereby, it devolves more or less after the fashion of stridhanam, females taking in preference to males."

In — 'Veeranna v. Satyam', AIR 1948 Mad 10 (L), the facts were: A person belonging to dancing girl community died leaving his widow and two daughters by her. Both these daughters lived the life of prostitutes and had children whose paternity was unknown. On the death of the widow and the two daughters a daughter's son claimed to be entitled to succeed to his maternal grandfather as against the daughter's daughters. It was held by Horwill J. that his claim was unsustainable because an illegitimate son of a daughter could not be considered under the Hindu law as a daughter's son and would not be entitled to rights and privileges as such. In a community in which marriage is only casual and neither common nor customary, it appears anomalous to insist on legitimacy as a condition of the right to succeed. But the learned Judge was obviously faced with this difficulty, namely, that in the absence of custom he had to apply the general rules of Hindu law. Under the Hindu law 'sapinda' relationship and propinquity were based on the legitimacy of the offspring.

(8) The result of the authorities above cited appears to be this: that members of the dancing girl community who adopt the Hindu faith and Hindu customs & manners must be treated as persons governed by the ordinary Hindu law, but on account of the special kind of life led by them which is in important respects inconsistent with Hindu dharma on which ultimately Hindu law is based, they are governed largely by custom and usage often not in consonance with Hindu law. Where there is no proof of a custom directly applicable to any particular case of disputed succession the general rules of Hindu law may be applied by analogy as rules of justice and equity.

(9) In the present case it is obvious that the plaintiff could have no right whatever under the general law to inherit to the deceased Puliamma. He is not related to her in any way; the basis of his claim is ultimately the adoption of Pullamma by Nandamma. Such an adoption is not contemplated by Hindu law. The validity of such adoption is therefore entirely dependent on custom and usage. The rights and status of a daughter adopted in accordance with the custom prevailing among the community must

be determined by a clear proof of the incidents attaching to such adoption by custom. The evidence in the case carries us only so far, namely, that in this community a woman can take a girl in adoption as her daughter and in such case the adopted mother's property is inherited by the adopted girl and 'vice versa'. The decided cases also do not carry further vide the latest case on the point AIR 1936 Mad 639 (C).

(10) In —'Gangamma v. Kuppammal', AIR 1939 Mad 139 (M) Wadsworth J. discussed the scope of the custom of adoption of girls among the Devadasi community. In that case the adopted daughter sued her adoptive mother for partition of the latter's properties on the ground that she and her mother constituted a joint family. The learned Judge negatived the claim. He held that though it was well established in Madras that an adopted daughter of a dancing girl inherits to her adoptive mother, yet there was no such thing as coparcenary between the mother, and the daughter. The practice of adoption amongst the devadasis had nothing to do with religious benefit but was purely a custom arising out of the natural desire of the women to have a daughter to look after her in her old age and to receive her property on her death. The learned Judge therefore refused to concede to the adopted daughter the status and rights of an adopted son under the Hindu law. He insisted on a specific plea of a custom and evidence in support of it that the adopted daughter became a coparcener with the adoptive mother.

(11) When Pullamma was adopted by Nandamma, she became entitled to inherit to Nandamma. Equally Nandamma would have had the right to inherit to Pullamma. But, did Pullamma become a 'sapinda' of all the collateral relations of Nandamma. The analogy of Hindu law does not help us, because that law does not recognise the adoption of a daughter, and the adopted daughter cannot be equated to an adopted son. In our opinion, in the absence of a custom it cannot be said that a girl adopted by a woman of the dancing girl community becomes entitled to all rights of collateral succession unless there is a custom pleaded & proved to that effect. Instances are not known in which a person has been held entitled to succeed to the person's immediate ascendant or descendant without being entitled to rights of collateral succession. One is the case of an illatom son-in-law who may succeed to his father-in-law as a son but cannot claim rights of collateral inheritance — 'Muthala Reddiar v. Sankarappa Reddiar', AIR 1935 Mad 3(2) (N). Another is the case of an illegitimate son who can only inherit to his father and not to collaterals AIR 1918 Mad 1946 (FB) (H).

(12) It is a well recognised legal principle that a custom cannot be enlarged by parity of reasoning. Attempts to rely upon analogous customs in support of an alleged custom have always been repelled vide — 'Palaniappa Chettiar v. Chockalingam Chetti', AIR 1930 Mad 109 (O). In — 'Seetha Neithyar Amma v. Kelu Menon', AIR 1939 Mad 564 (P), Madhavan Nair J. dealing with a custom of adoption prevailing among the Nair community in Malabar observed:

> ".....the law applicable to the case being essentially a customary law, the question can be decided only by having recourse to evidence as to custom in the absence of texts or express decision of this court."

(13) In the present case, there is neither text nor decision to support the claim of the first respondent. Nor is there proof of custom. His claim must therefore fail.

(14) The Letters Patent Appeal is allowed and the decree of the lower appellate court is restored with costs here and before Panchapagesa Sastri J.

B/D.H. Appeal allowed.

A.I.R. 1953 MADRAS 574 (Vol. 40, C. N. 222)

SOMASUNDARAM J.

In re P. R. Joseph and others, Accused.

Criminal Revn. Case No. 489 of 1952 (Case Referred No. 19 of 1952, D/- 14-11-1952.

(a) Criminal P.C. (1898), S. 349 — Scope.

The two circumstances, under which the Magistrate may send up records under the section are, (1) the punishment to be inflicted must be different in kind from that which he is empowered to inflict, (2) the punishment must be more severe than that which he can inflict. In no other circumstances can he do so. (Para 4)

Anno: Cr. P. C., S. 349 N. 2.

(b) Criminal P.C. (1898), S. 349 — Punishment "different in kind".

Whipping under the Whipping Act, 1909 and sending young persons, youthful offenders or children to the various schools mentioned in the Madras Children Act are punishments different in kind from imprisonment or fine. If the Second or Third Class Magistrate not competent to inflict the above punishments is of opinion that any accused should receive the sentence of whipping or should be sent to one of the schools mentioned in the Madras Children Act, then cl. (1) of S. 349 will apply and when there are more accused than one, cl. (1-A) of the section will apply. (Para 5)

Anno: Cr. P. C., S. 349 N. 6.

(c) Criminal P. C. (1898), Ss. 349 (1-A) and 562 — Several accused. 1936 Mad WN Cr 235, Dissent.

No sentence is passed when the accused is dealt with under the provisions of cl. (1) or cl. (1-A) of S. 562, Criminal P. C. The order to be passed under S. 562, Criminal P. C., is therefore not a punishment and the question of punishment different in kind does not arise in such a case. AIR 1924 Nag 37; AIR 1914 All 543 (2) and AIR 1924 All 765, Rel. on. (Para 6)

Since S. 349 applies only to cases where punishment "different in kind" is sought to be inflicted a case under S. 562 cannot be governed by it and the Magistrate, where there are several accused can send the record of only those accused whom he wants to be dealt with under S. 562. Cases where provisions of S. 562 are sought to be applied are governed by S. 380; AIR 1943 Mad 390, Foll. (Paras 6, 7)

Anno: Cr. P. C., S. 349 N. 10; S. 562 N. 1.

(d) Criminal P. C. (1898), Ss. 349 and 380 — Scope.

Under S. 349 the Magistrate does not convict the accused, but is of opinion only

that he is guilty and the records are sent only with that opinion, and a superior Magistrate can pass any judgment. Under S. 380, the superior Magistrate receives the records after the Second or Third Class Magistrate convicts the accused of the offence with which he is charged, so that the superior Magistrate cannot acquit him after receiving the records under S. 380, Criminal P. C. (Para 8)

Anno: Cr. P. C., S. 349 N. 2; S. 380 N. 2.

Asst. Public Prosecutor, for the State.

CASES CITED:

(A) ('36) 1936 Mad WN 1351: 1936 Mad WN Cr 235
(B) ('43) AIR 1943 Mad 390: 1943 Mad WN Cr 9(1): 44 Cri LJ 568
(C) ('48) AIR 1948 Mad 86: 1947 Mad WN Cr 18: 48 Cri LJ 361
(D) ('24) AIR 1924 Nag 37: 24 Cri LJ 738
(E) ('14) AIR 1914 All 543(2): 37 All 31: 16 Cri LJ 43
(F) ('24) AIR 1924 All 765: 46 All 828: 25 Cri LJ 1244
(G) ('42) AIR 1942 Mad 657(1): 1942 Mad WN Cr 123: 44 Cri LJ 91

ORDER: This is a reference by the learned Sessions Judge of South Malabar under the following circumstances. The four accused were tried by the Second Class Magistrate, Fort Cochin, for an offence under S. 323, I. P. C. The Magistrate found all of them guilty of the offence under S. 323, I. P. C. and sentenced accused 1 to a fine of Rs. 50, in default to two months rigorous imprisonment. In respect of the other accused, i.e., accused 2 to 4 he was of opinion that they should be dealt with under S. 562 (1-A) Criminal P. C. and as he was not empowered to pass orders under the above section, he sent up the records to the Sub-Divisional Magistrate, Fort Cochin for action. The Sub-Divisional Magistrate, Fort Cochin, let off the accused with an admonition under cl. (1-A) of S. 562, Criminal P. C. Accused 2 to 4, who were thus let off with an admonition, then preferred an appeal in C. A. No. 10 of 1952 to the Sessions Court, South Malabar. At the time of the hearing of the appeal, the Local Public Prosecutor raised an objection that the Second Class Magistrate was not competent to send to the Sub-Divisional Magistrate the case relating to accused 2 to 4 alone and that the entire records including the case of accused 1 should have been sent to the Sub-Divisional Magistrate. This objection was apparently based on a decision of this court in —'Emperor v. Narayanaswami Naidu', 1936 Mad WN Cr. 235 (A). The learned Sessions Judge agreeing with the contention of the Public Prosecutor has made a reference to this court under S. 438, Cl. (1) Criminal P. C. and has asked for appropriate orders to be passed. In his letter of reference, he refers to two other decisions of this court, which are reported in —'Piramanayagapandaram v. Emperor', AIR 1943 Mad 390(B), and —'In re Munisami', AIR 1948 Mad 86(C), and points out the conflict in authority.

(2) The question now is whether in the circumstances of this case all the accused should have been sent up or only the case of those, who in the opinion of the Second Class Magistrate are to be treated under S. 562, cl. 1-A, Criminal P. C. should be sent up. The argument that all the accused must be sent up is based on the provisions of Cls. (1) and (1-A) of S. 349, Criminal P. C., which are as follows: (His Lordship after quoting the provisions of the clauses proceeded to state:) This section has been interpreted by Pandrang Row J. in —'1936 Mad WN Cr. 235(A), to apply to cases like the present one, that is to say, that in such cases all the accused should be sent up. In that case, two accused were tried, the first for an offence under Ss. 498 and 379 I. P. C. and the second for an offence under S. 379 I. P. C. Both were found guilty, but the first accused was sentenced to three months rigorous imprisonment and the case of the second accused was sent up to the Sub-Divisional Magistrate for being dealt with under S. 562, Cl. (1). Pandrang Row J. held that the procedure followed is opposed to the express provisions of the law contained in S. 349(1-A) Criminal P. C. The convictions of both the accused were set aside and the Magistrate was asked to forward both the accused to the Sub Divisional Magistrate, if he still thought that the second accused should be dealt with under S. 562, Criminal P. C. A contrary view is expressed by Byers J. in —'AIR 1943 Mad 390(B). In the above case, forty one persons were convicted by the Second Class Magistrate, and of them twenty eight were sentenced to three months rigorous imprisonment and the rest were sent up to the Sub-Divisional Magistrate for being dealt with under S. 562(1), Criminal P. C. The Sub Divisional Magistrate took the view relying on the decision in —'1936 Mad WN Cr. 235(A); that all the accused should have been sent up. He therefore asked the District Magistrate to make a reference to the High Court. In the reference made by the District Magistrate, who did not agree with the view taken by the Sub-Divisional Magistrate, Byers J. held that S. 349(1-A) Criminal P. C. has no application to the procedure under S. 562, Criminal P. C. and the order of the Second Class Magistrate was upheld.

(3) The other decision referred to by the learned Sessions Judge —'AIR 1948 Mad 86(C)', is a decision by Yahya Ali J. This does not touch the point in question as it is a case in which the Second Class Magistrate tried two persons for the offence of theft and receipt of stolen property and convicted both of them; and though he was of the view that one of them should be dealt with under S. 562, Criminal P. C. he sent up the case of both the accused to the Sub Divisional Magistrate. Yahya Ali J. therein held that S. 562, Criminal P. C. read with S. 380, Criminal P. C. does not prohibit sending up both the accused to the Sub Divisional Magistrate.

(4) On a consideration of all the authorities and the relevant sections in Criminal P. C. I am of opinion that the view taken by Byers J. is the correct one. Section 349(1-A) Criminal P. C. will apply only to cases which fall under clause (1) of S. 349 Criminal P. C. Clause 1 of S. 349 Crl. P. C. will apply only to cases where the Magistrate is of opinion that the accused is guilty and that he ought to receive a 'punishment different in kind' (underlining is mine) or more severe than that which the Magistrate is empowered to inflict. The two circumstances, therefore, under which he may send up the records are (1) the punishment to be inflicted must be different in kind from that which he is empowered to inflict, (2) the punishment must be more severe than that which he can inflict. In no other circumstances can he send up the records under S. 349, Criminal P. C.

(5) This leads us to a consideration of the question as to what exactly the punishments are, which can be inflicted by the Second and Third Class Magistrates and what are the other punish-

ments, which, in the opinion of the Magistrate, the accused must receive, but which he cannot inflict. The punishments to which the offenders are liable under the provisions of the Indian Penal Code are contained in S. 53 I. P. C. which are (1) death, (2) transportation, (3) imprisonment, (rigorous or simple), (4) forfeiture of property, and (5) fine. To this must be added whipping which has been introduced by the Whipping Act (Act IV of 1909) and sending young persons, youthful offenders and children, all under the Madras Children Act to the various schools mentioned therein. Of the above punishments, those which the various magistrates can inflict are contained in S. 32, Criminal P. C. Under the above section a sentence of whipping can be passed only by the Presidency Magistrates and First Class Magistrates. Similarly, under the Madras Children Act, among Magistrates, only the Magistrates mentioned in S. 4 of the Act can exercise the powers conferred by the Act. A Magistrate with the Second or Third Class powers cannot inflict whipping, nor can a First Class or Second Class Magistrate unless specially empowered exercise the powers under the Madras Children Act. Whipping is a punishment different in kind from imprisonment or fine, so is sending young persons, youthful offenders or children to the various schools mentioned in the Madras Children Act. If the Second or Third Class Magistrate not competent to inflict the above punishments is of opinion that any accused should receive the sentence of whipping in accordance with the provisions of the Whipping Act or should be sent to one of the schools mentioned in the Madras Children Act, then cl. (1) of S. 349 will apply and when there are more accused than one, cl. (1-A) of the section will apply. It is only to such cases that S. 349, Criminal P. C., applies, in addition, of course, to cases where more severe punishment is to be inflicted.

(6) Dealing with the accused under the provisions of S. 562, cl. (1) or clause (1-A) is not a punishment. S. 562, Criminal P. C. itself says that the court may, instead of sentencing him at once to any punishment, direct that he be released on his entering into a bond, with or without sureties, to appear and receive sentence when called upon during such period (not exceeding three years) as the court may direct and in the meantime to keep the peace and be of good behaviour. Similarly in clause (1-A) of S. 562, Criminal P. C., the court may, instead of sentencing him to any punishment, release him after due admonition. It is clear, therefore, that, no sentence is passed when the accused is dealt with under the provisions of cl. (1) or cl. (1-A) of S. 562, Criminal P. C. The order to be passed under S. 562, Criminal P. C., is therefore not a punishment and the question of punishment different in kind does not arise in such a case. I may refer to a decision of the Nagpur High Court in — 'Baba v. Emperor', AIR 1924 Nag. 37 (D), which takes the same view that an order under S. 562, Criminal P. C., cannot be said to be a punishment. The decisions in — 'Emperor v. Ghasite', AIR 1914 All 543 (2) (E) and — 'Emperor v. Hiralal', AIR 1924 All. 765 (F), also lend support to this view.

(7) Apart from this, as pointed out by Byers J. S. 562, Criminal P. C., itself prescribes the procedure to be followed by the Second and Third Class Magistrates, in whose opinion the provisions of S. 562 Criminal P. C., have to be applied to any accused. In such cases S. 380 Criminal P. C., applies.

(8) The fundamental difference between Ss. 349 and 380 Criminal P. C., is that in the former case, the Magistrate does not convict the accused, but is of opinion only that he is guilty and the records are sent only with that opinion, whereas in the latter case, the superior Magistrate receives the records after the Second or Third Class Magistrate convicts the accused of the offence with which he is charged, so that the superior Magistrate cannot acquit him after receiving the records under S. 380 Crl. P. C. Vide the decision in — 'Venkataswami Naicken v. Emperor', AIR 1942 Mad 657 (1) (G). In a reference under S. 349, Criminal P. C., a superior Magistrate can pass any judgment, sentence or order as he thinks fit and according to law. The cases of those who have to be dealt with under S. 562, Criminal P. C., fall under S. 380, Criminal P. C., and not S. 349, Criminal P. C.

(9) The result is that the procedure followed by the Second Class Magistrate is correct. There is nothing irregular or illegal in the order passed by the Sub-Divisional Magistrate regarding accused 2 to 4. The objection raised by the Public Prosecutor, South Malabar fails, and the appeal by the accused in the C. A. No. 10 of 1952 will be taken on file by the learned Sessions Judge and disposed of according to law treating the procedure followed by the Second Class Magistrate, Fort Cochin, as a proper one.

(10) I am indebted to Mr. G. Gopalaswami for the assistance he rendered me in the case.

A/M.K.S. Order accordingly.

A.I.R. 1953 MADRAS 576 (Vol. 40, C. N. 223)

CHANDRA REDDI J.

Kamalam, Petitioner v. Saradambal and others, Respondents.

Civil Misc. Petn. No. 9784 of 1952 and S. R. No. 12371 of 1951, D/- 16-9-1952.

Court-fees Act (1870), Sch. 2, Art. 17B (Madras) and Sch. 1, Art. 1 — Applicability — Administration suits and appeals therefrom — (Civil P. C. (1908), O. 20, R. 13).

An administration suit for division of the assets of a deceased person amongst his heirs should be valued under Art. 17-B, Schedule 2 of Court-fees Act. An appeal arising out of such a suit is also governed by the same provision and not by Art. 1, Schedule I of the Act. Case law discussed. (Para 20)

Anno: Court-fees Act, Sch. II, Art. 17 (vi) N. 1; Civil P. C., O. 20, R. 13 N. 2.

T. S. Kuppuswami Iyer, for Petitioner; Govt. Pleader, for State of Madras.

CASES CITED:

(A) ('42) AIR 1942 Mad 247: I L R (1942) Mad 455
(B) ('38) Civil Misc. Appeal No. 235 of 1938 (Mad)
(C) ('38) AIR 1938 Mad 435: ILR (1938) Mad 598 (FB)
(D) ('50) AIR 1950 Mad 26: 1949-2 Mad L J 402
(E) ('30) AIR 1930 Pat 1: 8 Pat 818
(F) ('41) AIR 1941 Mad 313: 1940-2 Mad LJ 946
(G) ('22) AIR 1922 Mad 211: 45 Mad 246
(H) ('50) AIR 1950 Mad 353: 1949-2 Mad L J 782
(I) ('28) AIR 1928 Cal 878: 56 Cal 188

ORDER: This is a reference under S. 5, Court-fees Act. The facts leading up to this

reference may be briefly stated. The plaintiff brought an administration suit against her mother and her three sisters for partition of the plaint schedule property into four shares and for delivery of separate possession of her share and for rendition of accounts of other assets and income from the family property. For purpose of jurisdiction, the suit was valued at Rs. 1,000/- and a fixed court-fee of Rs. 100 was paid under Art. 17-B of Sch. 2, Court-fees Act. A preliminary decree was passed, and there was a direction for an inquiry into other assets and income from the family. A Commissioner was appointed for the purpose and on looking into the accounts, he found that defendant 2 who was virtually in management of the estate was liable to pay the plaintiff a sum of Rs. 3152-8-9. Basing on the Commissioner's report, the District Judge gave a decree 'inter alia' for that sum against defendant 2. Defendant 2 filed an appeal against that judgment valuing it under Art. 1, Sch. 1 & paying an 'ad valorem' court-fee on the sum of Rs. 3152-8-9. Realising that she made a mistake in thinking that the matter is governed by Art. 1, Sch. 1, Court-fees Act and in paying a higher court-fee, the appellant has claimed a refund of the excess court-fee.

(2) According to the appellant, the appeal would fall for purposes of court-fee under Art. 17-B of Sch. 2 and not under Art. 1. Sch. 1, Court-fees Act, and as she made a 'bona fide' mistake in paying a higher court-fee, the excess should be refunded to her. This petition for refund is opposed by the Government Pleader who contends that the original court-fee paid is correct and that the matter cannot be brought under Art. 17B of Sch. 2. Therefore the point for determination is, which of the two provisions of the Court-fees Act, whether Art. 1 of Sch. 1 or Art. 17B of Sch. 2 applies to this case.

(3) Before I proceed to examine the cases cited on either side, I will refer to the relevant provisions of the Court-fees Act. Article 1, Sch. 1 provides that in respect of the plaint or Memorandum of appeal (not otherwise provided for in this Act) an 'ad valorem' court-fee mentioned in col. 3 should be paid. First column of Art. 17-B of Sch. 2 runs thus:

> "Plaint or memorandum of appeal in every suit where it is not possible to estimate at a money value the subject matter in dispute and which is not otherwise provided for by this Act."

(4) The first question to be answered is what is the provision of the Court-fees Act that is applicable to an administration suit. In — 'Khaja Moideen Sahib v. Abdul Gaffoor', AIR 1942 Mad 247 (A), it was laid down that an administration suit for partition of the assets amongst the heirs of a deceased person and for accounts should be valued under Art. 17-B of Sch. 2, Court-fees Act. That was a suit for the administration of the estate of a deceased Mahomedan woman, for division of the assets amongst the heirs and for accounts. One of the point for decision was whether an administration suit should be treated as a suit for accounts within the meaning of S. 7 (iv) (b), Court-fees Act or as one coming under Art. 17-B. The learned Judge decided that the appropriate provision of the Court-fees Act was Art. 17-B and not S. 7 (iv) (b) as, in his opinion, an administration suit is not a suit for accounts. He agreed with the opinion expressed by Wadsworth J. in — 'Civil Misc. Appeal No. 235 of 1938 (Mad) (B)'.

(5) I express my respectful accord with the view taken by Horwill J. in — 'AIR 1942 Mad 247' (A) and Wadsworth J. in—'C. M. A. No. 235 of 1938 (Mad)' (B). As pointed out by Wadsworth J. an administration suit by an heir is not merely a suit for accounts. The main relief in such a suit is one of division of the assets of the deceased (both moveable and immoveable) amongst the heirs. Such being the case, the proper provision for purposes of Court-fee is Art. 17-B as the subject-matter of the suit is incapable of valuation.

(6) The next point for consideration is whether the fact that the subject matter of the appeal is an ascertained sum of money payable by the appellants makes any difference so far as the applicability of Art. 17-B is concerned. It is argued by Mr. Kuppuswami Iyer for the appellant petitioner that only a fixed court-fee is payable under Art. 17-B although what is attacked in the appeal is the direction to pay a fixed amount to the plaintiff. On the other hand the stand taken by the Government Pleader is that Art. 17B ceases to apply to an appeal the subject matter of which is capable of valuation. According to him the subject matter in dispute in appeal is not co-extensive with that involved in the suit and hence, the appellant petitioner cannot invoke the provisions of Art. 17-B.

(7) In support of the contention that an 'ad valorem' court-fee has to be paid and not a fixed court-fee under Art. 17-B of Sch. 2 he placed reliance on a Full Bench decision of this Court in — 'In re: Dhanu Kodi Nayakkar', AIR 1938 Mad 435 (FB) (C). That was a suit for accounts and a preliminary decree was passed for ascertaining accounts. In the final decree, the defendants were held liable to pay certain amount to the plaintiff. In the appeal by the defendant against that judgment, he sought to value the relief claimed by him arbitrarily. It was held by the Full Bench that he could not do it, because, S. 7 (iv) (f), Court-fees Act referred to the plaintiff who could put his own value, and had no application to the defendant. I do not think that this case has any bearing on the question for decision before me. If it is conceded, that the present case falls within the purview of S. 7 (iv) (f) then the decision cited will be applicable.

(8) Another ruling cited by the Government Pleader is that of Mack J. in — 'Peravadhannulu v. Peravadhannulu', AIR 1950 Mad 26 (D). The learned Judge expressed the opinion, following — 'AIR 1938 Mad 435' (C) that in an appeal against a decree passed in a partition suit for payment of a specific sum, 'ad valorem' court-fee has to be paid under Art. 1, Sch. 1, Court-fees Act on the subject matter of the appeal. The learned Judge remarked that

> "for fiscal purposes the liability of a manager of Hindu joint family business to account to other members of the joint family cannot be differentiated from an ordinary suit for account as between partners."

(9) The exact nature of the reliefs asked for is not clear from the report. So it is difficult to see how far the principle underlying it is applicable to the case on hand and whether it contains a correct statement of law. If, however, what is meant by the observations extracted above is that there is no difference for fiscal purposes between an ordinary suit for accounts and a suit for partition and for an account of

outstandings due to the joint family, having family business, I have to express my respectful dissent from it. The right of a coparcener to demand an account, when it existed is an incident to the right of partition of the family properties. The principle is the same even with regard to the joint family business.

(10) In this context the observations of Jwala Prasad J. in — 'Jyotibati Chaudhrain v. Lackhmeshwar Prasad', AIR 1930 Pat. 1 (E) are apposite.

"Ordinarily, therefore, there can be no suit for accounts against a karta. He can be asked not to render an account as an agent on behalf of other members, but only to disclose the properties including cash in his hands and that might necessitate looking into the accounts. A disclosure of property is not rendition of account, the word "account" in a suit for partition and accounts against a karta being used for convenience sake, and not in the legal sense to bring it within the expression used in S. 7 (iv) (f), Court-fees Act. Section 7 (iv) (f) applies to a suit for accounts. The test is: "Can a junior member without claiming a partition, bring a suit for accounts against a karta? If he cannot, then the relief as to accounts becomes subsidiary to the principal relief of partition. Therefore it will not be correct to say that wherever there is a relief asking for accounts in the sense of disclosure as to the existing state of the family finances, the suit embraces two subject matters namely, a partition and an account. A suit for accounts implies a liability to account."

(11) The other cases relied on by the Government Pleader as supporting his plea are — 'Bala Venkatarama v. Maruthamuthu', A I R 1941 Mad 313 (F) and — 'in re: Porkodi Achi', AIR 1922 Mad 211 (G).

(12) In — 'AIR 1941 Mad 313' (F), a suit was filed on a promissory note executed by certain persons as trustees, a decree was passed against them personally and the aggrieved trustees filed an appeal against it. They wanted to value the appeal under Art. 17-B on the ground that they did not question the decree but were only seeking to avoid a personal liability. It was laid down by Venkataramana Rao J. that Art. 17-B was not applicable as the amount for which they were made liable, was ascertained. I do not think this case has any bearing on the point for determination before me because the suit being for the recovery of a definite sum, it could not be said that it was not possible to estimate the subject matter in dispute. Such a case cannot attract the provisions of Art. 17-B. Therefore the contention that Art. 17-B was applicable was rightly rejected in that case, if I may say so with respect, by the learned Judge.

(13) In — 'AIR 1922 Mad 211' (G), a sale by the mother was set aside, in a suit by her daughter as an heir to the estate of her father, subject to her paying certain amount to the vendee which was found to have been incurred by the mother for a binding purpose. In the appeal, the plaintiff wanted to get rid of the direction for the payment of the money to the defendant and the appeal was valued under Art. 17B, Court-fees Act. The appellant sought to pay a fixed court-fee of Rs. 10 on the ground that the condition imposed was incapable of being estimated in money value. The learned Judge observed that the valuation of the condition was clearly determined by the amount payable and no other valuation was possible. That case cannot give any assistance in the determination of the question before me because that was not a suit attracting the provisions of Art. 17-B of Sch. 2, Court-fees Act.

(14) I will now refer to the decisions cited by Mr. Kuppuswami Iyer for the position that an appeal arising out of a suit falling under Art. 17-B is governed by the same provision, although the subject-matter in dispute in the appeal is a definite sum.

(15) In — 'Veluchami Pillai v. Sankaralingam Pillai', AIR 1950 Mad 353 (H) one of the parties in a partition suit was directed to pay a certain amount to the plaintiff towards equalisation of the shares in a final decree proceedings. The question arose whether the appeal against that decree was to be valued under Art. 17-B of Sch. 2 or under Art. I of Sch. 1, Court-fees Act. The learned Judge relying upon the ruling of the Calcutta High Court in — 'Jyoti Prasad Singha v. Jogendra Ram Roy', AIR 1928 Cal 878 (I) and a decision of the Patna High Court in — 'AIR 1930 Pat 1' (E) to which I have already alluded, decided that the matter should be treated as wholly incapable of valuation and therefore coming within the meaning of Art. 17-B of Sch. 2, Court-fees Act.

(16) In — 'AIR 1928 Cal 878' (I), in the original final decree granted by the Court, there was a direction for payment of costs aggregating to Rs. 1573 to the successful party. Subsequently, this direction was deleted. The plaintiff preferred an appeal claiming the sum which was originally granted to him by way of costs. The question was whether the 'ad valorem' court-fee was required to be paid under Art. 1 of Sch. 1 or whether it was sufficient to pay a fixed court-fee under Art. 17-B of Sch. 2. In dealing with that question, the learned Judge observed that "It does not matter whether the ground of attack is with reference to the allotment of specific portion of immoveable or moveable property or the ground of attack is the question of costs." He also proceeded on the assumption that when owelty was directed to be paid to one of the parties, the party aggrieved was entitled to prefer an appeal valuing it as in a partition suit and that there was no difference in principle between that and a case where the appeal was directed against the order on the question of costs.

(17) In — 'AIR 1930 Pat 1' (E) there was a suit for partition, which resulted in a decree 'inter alia' for a specific sum of Rs. 60,426 in favour of the plaintiff against the manager of the joint family. The aggrieved manager preferred an appeal against that decree. The point having arisen as to the correct provisions of the Court-fees Act applicable, it was decided that the Court-fee was payable under Art. 17-B. In my opinion, the principle adumbrated in these cases is a sound one and I express my respectful agreement with it.

(18) Although in all these three cases, the decrees which were attacked in the appeals were passed in partition actions, the principle is the same and applies to an administrative suit like the present one. In my opinion if a suit is to be valued for purposes of court-fees under Art. 17-B, the appeal arising out of it is also governed by the same provision of the Court-fees Act.

(19) In this context, the expressions used in Art. 17-B should be borne in mind, namely,

"plaint or memorandum of appeal in every suit where it is not possible to estimate at a money value the subject-matter in dispute. x x x x" The construction to be placed on this clause depends on the question whether the expression "in every suit, where it is not possible to estimate at a money value" governs only the plaint, or the memorandum of appeal as well. If it governs memorandum of appeal also then although the subject-matter of the memorandum of appeal is capable of valuation, still it falls within the purview of that article, because the memorandum of appeal is in the suit in which it is not possible to estimate at a money value the subject-matter in dispute. A plain reading of the clause inclines me to the view that the clause governs both the words "suits and memorandum of appeal" preceding it.

(20) What emerges from the above discussion is that an administration suit for division of the assets of a deceased person amongst his heirs should be valued under Art. 17-B of Sch. 2, Court-fees Act and in an appeal arising out of such a suit, court-fee need not be computed on an 'ad valorem' basis under Art. 1 of Sch. 1, Court-fees Act as it is also governed by Art. 17-B of Sch. 2.

(21) It follows that it was not necessary to pay the 'ad valorem' court-fee on the sum aggregating to Rs. 3152-8-9 and a fixed court-fee under Art. 17-B would have been sufficient. The appellant is, therefore, entitled to a refund of the excess amount of court-fee paid by her. Consequently, the office is directed to issue the necessary certificate. The reference is answered accordingly.

(22) As an indulgence is granted to the petitioner in directing the refund of the court-fee, she will pay the costs of the Government Pleader, which I fix at Rs. 30.

B/M.K.S. Reference answered.

A.I.R. 1953 MADRAS 579 (Vol. 40, C.N. 224)

GOVINDA MENON AND BASHEER AHMED SAYEED JJ.

In re Kannan, Accused-Prisoner.

Referred Trial No. 58 of 1952; (Crl. Appeal No. 342 of 1952), D/- 3-11-1952.

Penal Code (1860), Ss. 304, 300 — Attempt to beat man with shoe in street.

In this country if a person were to beat another with a shoe, that is considered to be the height of shame and particularly in the midst of a number of villagers right in the street. An attempt to beat a man with a shoe would, therefore, give sufficient provocation to the man intended to be beaten: Held that as there was grave and sudden provocation, the offence was not one of murder under S. 300, Penal Code but only under S. 304, Part. I. (Sentence of death was, therefore, altered into one of 7 years' rigorous imprisonment).

(Para 3)

Anno: I. P. C., S. 300 N. 9, S. 304 N. 7.

K. Narayanaswami Mudaliar and V. Gopala Goundan, for Accused; Public Prosecutor, for the State.

GOVINDA MENON J. : This is a case in which there can be no doubt or dispute as to whether the appellant-accused has caused the death of the deceased Kannayiram. But the only point which requires consideration is whether the offence comes within the ambit of S. 302 Penal Code or whether it is reduced to one under S. 304, Penal Code.

(2) The prosecution case is short and simple. There have been instances of previous ill-feeling between the accused and the deceased. On 2-4-1952 at about 4 p.m. when the deceased, his mother P. W. 1 and another person P. W. 2 were returning from a shandy along the village street, had passed certain houses and approached the house of the accused, the mother of the accused came out and abused the mother of the deceased, P. W. 1 in a very vile and foul language. There was exchange of words between the two women. The deceased sat in front of one Arunachala Goundan's house. Thereafter it is stated that the accused's mother advanced with a broomstick and brandished it against the deceased. On hearing this confusion and noise the accused, who was in his shop, came out and there was exchange of words between the accused and the deceased, then P. W. 3, a neighbour, who was there, intervened and separated them. At that time the accused is alleged to have taken out a pen-knife from the pocket of his shorts and given a stab to the deceased on the left chest. The injury, according to the doctor, was a very serious one, which resulted in immediate death. The deceased fell down and died instantaneously. P. W. 5, a brother of the deceased, who came on the scene, straightaway went to the village Munsiff, P. W. 9 and gave him a complaint at 4-30 p.m. which is marked in the case as Ex. P. 3. The body of the deceased was taken from the place, where he fell down and put on a cot in the vicinity. The accused is also alleged to have gone straightaway to the Village Munsiff and asked him for protection. The Village Munsiff detained him and sent a report to the Police. The Police officer, P. W. 13, arrived on the scene at about 6 a.m. the next day. The accused was in the Village Munsiff's house and was taken into custody. The Sub-Inspector investigated the matter & a charge sheet was filed against the accused which resulted in a committal to the Sessions Court and subsequent trial by the Sessions Judge. The Sessions Judge found him guilty of an offence under S. 302, Penal Code and imposed the extreme penalty of law. Though, according to P. W. 9 the accused admitted the offence of stabbing the deceased and prostrated before P. W. 9 imploring him to save him, both before the Committing Magistrate and the learned Sessions Judge the accused did not admit having stabbed the deceased. He gave a version, which, on the face of it, cannot be accepted. Before the Sessions Judge, he has stated that he was not having any knife and that he did not know what he did in his anger.

(3) The question, which we have to consider, is whether first of all, it was the accused that stabbed the deceased. On this aspect of the case, we have the evidence of the eye-witnesses, P. Ws. 1 to 4. All these witnesses speak about the quarrel and the accused stabbing the deceased. P. Ws. 1 and 2 say that after the deceased was stabbed, he took out a shoe from his foot and tried to beat the accused with it. As against this, we have the evidence of P. W. 13, the Sub-Inspector that at the time of the investigation P. W. 1 told him that the deceased began to beat the accused with a sandal and it was then that the accused took out a knife from his shorts' pocket and stabbed the deceased. P. W. 13 also deposed that a shoe was recovered from the scene of occurrence. P. W. 1 in cross-examination had

to admit that she told the Police that her son threw a sandal at the accused after he was stabbed. So far as P. W. 2 is concerned, he also admits that the deceased went a few steps, threw a sandal against the accused, fell down and died. P. W. 3's evidence is to the effect that there was wordy quarrel between the deceased and the accused, and then the accused said that he would beat the deceased with a sandal and that the deceased thereafter took off a shoe and kept in his hands. He further deposed that the deceased attempted to beat the accused with the shoe, but he prevented him from doing so. P. W. 4 in cross-examination had to state that the deceased had a shoe in his hands and went to beat the accused. Though these witnesses now want to say that the incident regarding the attempt to beat with the shoe was after the stab, it seems to us, that portion of the prosecution evidence is not entitled to credence at our hands. It is unlikely that, after the deceased sustained a very serious injury as the one which was inflicted on him, it would have been possible for him to take the shoe from his foot and try to beat the deceased. The Doctor, P. W. 8, says that the injury was an oblique punctured wound 1½ inches by 1 inch on the left side of the chest in the region of the breast, 2 inches internal to the left nipple. According to the doctor the death was due to shock and haemorrhage due to injury of the heart as is evident from the internal examination. When the doctor says that a small portion of the left lung was protruding through the wound that the pectoral muscles were pierced through the costal cartillege of the left fourth rib at the junction of the sternum, which was cut through, and that also the intercostal space obliquely extending from 3 inches casto-condreal junction on to the junction of costal cartillege of the fourth rib with the sternum, the injuries were very severe which fact cannot be disputed. After having received such serious injuries, where the heart and lungs were affected we do not believe that the deceased would have had the strength to attempt to beat the accused with a shoe.

What would have happened is, that on account of the mothers of the accused and the deceased quarrelling with each other the sons joined the fray and when the deceased either beat or attempted to beat the accused with a shoe, he retaliated by stabbing the deceased with a pen-knife, which he was carrying in his shorts' pocket. It may also be remembered that it was the deceased, according to the evidence, that threw out the first challenge. He should have been considered to be the aggressor. In such circumstances, we are of opinion that the accused had not only provocation, but such provocation was grave and sudden. In this country if a person were to beat another with a shoe, that is considered to be the height of shame and particularly in the midst of a number of villagers right in the street. We are inclined to hold that the attempt to beat a man with a shoe would give sufficient provocation to the man intended to be beaten. The accused must, therefore, be said to have had not only grave provocation but sudden provocation as well. There is no evidence to show that the accused came there with the object of causing anybody any injury. The knife which had been produced and which is found stained with human blood is a small pen knife which is usually carried by persons. It is not the prosecution case that there was any premeditation so far as the offence is concerned. In such circumstances, we do not feel justified in agreeing with the Sessions Judge that the offence is one of murder for the reasons stated by us above, but we are of opinion that the accused can be found guilty only of an offence under S. 304, Penal Code, Part I. We, therefore, set aside the conviction under S. 302, Penal Code and sentence to be hanged by neck; but convict the accused of an offence under S. 304, Penal Code and sentence him to rigorous imprisonment for seven years.

C/D.R.R. Conviction altered.

A.I.R. 1953 MADRAS 580 (Vol. 40, C.N. 225)

SUBBA RAO AND RAMASWAMI JJ.

Kondavitti Brahmayya and others, Appellants v. Rajeswaraswami Temple, situate at Ponnekallu, Guntur Taluk, by its trustees Guduru Sitaramayya and others, Respondents.

Appeal No. 237 of 1950, D/- 8-10-1952.

(a) Evidence Act (1872), S. 35 — Absence of original grant — Entries in Inam Register are of great evidentiary value and are almost conclusive — (Grant — Inam). **(Para 2)**

Anno: Evid. Act, S. 35 N. 20.

(b) Hindu Law — Religious endowment.

Grant in favour of deity for worship — Archakas performing religious ceremonies regularly — Held that though they could not insist to be in possession of portion of properties in lieu of services, it was held that they should be given properties for expenses of ceremonies. (Para 4)

G. Venkatarama Sastry, for Appellants; K. Ramaseshayya, N. C. Sekhar and R. Rama Rao, for Respondents.

SUBBA RAO J.: This appeal arises out of O. S. No. 178 of 1949, a suit filed by the plaintiff-respondent 1, for recovery of possession of the plaint schedule property and for mesne profits. The plaintiff, defendant 27 and one Nagayya are the trustees of the temple of Sri Rajeswaraswami of Ponnekallu. Defendants 1 to 7 are the archakas of the suit temple and defendants 8 to 26 are the lessees under defendants 1 to 7. The plaintiff alleging that the plaint schedule properties are the properties of the deity, filed the aforesaid suit for recovery of possession. Defendants 1 to 7 denied that the properties are the properties of the deity and claimed that the suit lands were granted to the archakas burdened with service to the deity. They also claimed that they acquired a right by adverse possession. As many as seven issues were framed in the suit and they reflect the contentions of the parties. They are,

1. Whether the plaintiff has title to the suit lands
2. Whether the defendants acquire title by adverse possession?
3. Whether the suit lands are 'service inams' and whether the defendants are entitled to be in possession of the same?
4. To what mesne profits, if any, is the plaintiff entitled?
5. To what relief?
6. Whether plaintiff is legally constituted trustee?
7. Whether plaintiff's suit is not maintainable on account of O. S. No. 103 of 1934, District Munsif's Court, Guntur?

The learned Subordinate Judge held that the deity is the owner of the plaint schedule properties and gave a decree for possession.

(2) The first question that arises in the appeal is whether the deity has title to the plaint schedule items or whether they were granted to the archakas subject to the service to the deity. The Inam register is almost conclusive on this question. Column 11 gives the name of the grantor. It shows that the lands were granted by Vasireddi Venkatadri Naidu. Column 13 shows the name of the grantee. The name of the grantee is given as Sri Rajeswaraswami. Under Col. 8 the following recital is found :

"For the worship of the Idol in Pagoda of Ponnekallu. Worship is performed."

Under Cols. 16 and 17 giving particulars regarding the present owner, the name of the deity Sri Rajeswaraswami is given though under the name of the deity the worshipper's name is also given. Columns 20 and 21 show that the Inam Commissioner confirmed the grant so long as the service is performed. It has been held that in the absence of the original grant, the recitals in the Inam register are of great evidentiary value. The recitals indicate beyond any reasonable doubt that the grantee is the deity and the object of the grant is the worship of the deity. The learned counsel relied upon the mention of the name of the worshipper in Col. 16 in support of the contention that the grant should have been made only to the archaka burdened with service. If that was the fact, under Col. 13 the name of the archaka would have been given and under cols. 16 and 17 the name of the deity would have been omitted. The name of the worshipper obviously was given in Col. 16 as there was no separate trustee at the time and the worshipper filed a statement before the Inam Commissioner giving the details of the inam. If there is any doubt, that is dispelled by the recitals in the inam statement, Ex. A. 2, filed by the archakas themselves. In col. 1 under the heading "name of the Inamdar" the deity's name — Sri Rajeswaraswami — is given. The "present enjoyer" is also described as the same. In col. 4 under the heading name of the original grantee and the relationship existing between him and the present enjoyers' Sri Swamivaru's Devastanam is mentioned. If really the archakas were the grantees their names would have been mentioned and their relationship would also have been given. Under col. 5, particulars of the family of the present enjoyers, again the Devastanam is mentioned. These recitals are consistent with that found in the Inam register. We, therefore, have no hesitation to agree with the finding of the Court below that the original grant was made to the deity.

(3) If so, it follows that the plaintiff would be entitled to a decree for possession and the learned Subordinate Judge rightly gave a decree for possession. But the learned counsel for the appellants contended that in view of some unreported judgments of this Court they are entitled to continue to be in possession, at any rate, of two-thirds of the plaint schedule properties, even though the subordinate Court and this Court have held that they have no title to the properties. In A. S. No. 218 of 1946, Satyanarayana Rao and Chandra Reddi JJ. held that having regard to the circumstances of that case the archakas would be entitled to be put in possession of two-third of the temple properties in lieu of remuneration. Satyanarayana Rao J. rightly observed in the judgment as follows:

"No doubt on our findings it would follow that the plaintiffs would have no right to retain possession of the lands."

But the learned Judges proceeded to make an allotment between the temple and the archakas and directed two-thirds of the lands to be put in possession of the archakas in lieu of remuneration. From the observations extracted above, it would appear that the learned Judges would have decreed possession of the plaint schedule properties; but obviously as the other side did not object, they made an equitable distribution of the properties having regard to the circumstances of that case. A copy of the judgment of the Chief Justice and Panchapakesa Aiyar J. in A. S. No. 286 of 1945, has not been placed before us. We presume that in that case also the allotment was made as the parties agreed to that course. In C. M. A. No. 8 of 1949, Govinda Menon and Basheer Ahmed Sayeed JJ. observed as follows :

"According to the decisions of this Court, if the archakas have been properly performing the nitya naivedya aradhana and other religious ceremonies in the temple, they are entitled to an allotment of nearly 2/3rd of the net income for performing these ceremonies and also for present services. If the Court, after evidence, is satisfied that since the filing of the suit, the defendant-archakas have properly performed the ceremonies in the temple and have not committed any default, in this behalf, then the lower Court will direct that they be paid 2/3rd of the net income remaining in Court, after defraying all the expenses ..... As regards the future, we direct that if and when the lower Court is satisfied that ceremonies are being properly conducted, the 2/3rd of the net income will be paid over to the archakas. If any default is committed in the performance of the ceremonies the lower Court will withhold payment to the archakas."

The learned Judges were dealing with an appeal filed against an order appointing a receiver to take possession and manage the properties pending the suit. The order made by the learned Judges was obviously intended to be an interim order and was presumably made without prejudice to the rights of the parties in the suit. We do not think that the learned Judges meant to lay down as a proposition of law that irrespective of the circumstances in a particular case, the archaka should be allotted two-thirds of the properties of the temple. If that is so, it may lead to the following anomaly among others. Suppose the archakas have been in possession of the temple properties which at present are fetching an income of Rs. 10,000. Though a few hundreds would quite suffice for the remuneration and padithram and other expenses, the trustee would be bound to put the archakas in possession of properties fetching an income of about Rs. 7000. The learned Judges in the aforesaid three decisions we are sure never intended to lay down a proposition which would lead to this startling result. The allotment of a particular share would depend upon the total income of the lands, the value of the articles required for worships, the amount of reasonable remuneration intended to be provided and other similar circumstances.

(4) At the same time we may observe that the archakas have been in uninterrupted possession of the plaint schedule properties for

over a long period of time. It is also likely that they will continue to be in the village and function properly if they are given properties sufficient for the expenditure of nitya naivedya deeparadhana and remuneration. Though in law they are not entitled to insist that they should be put in possession of a portion of the lands of the deity, it appears to us proper, as it appeared to other Judges of this Court, that the temple authorities may in consultation with the Commissioner put the archakas in possession of a reasonable proportion of the lands, having regard to the circumstances of this particular case. Those observations are not intended to preclude archakas from accepting a salary. In the result the appeal fails and is dismissed with costs.

C/R.G.D. Appeal dismissed.

A. I. R. 1953 MADRAS 582 (Vol. 40, C. N. 226)

RAGHAVA RAO J.

Mylasu Gopalarao, Petitioner v. Chitta Seetharamiah and another, Respondents.

Civil Revn. Petn. No. 2007 of 1950, D/- 7-10-1952.

(a) Provincial Small Cause Courts Act (1887), S. 25 — Other remedies available — (Civil P. C. (1908), Ss. 24(4) and 96).

Small Cause suit transferred by High Court under S. 24, Civil P.C. Transferee Court's decision, in spite of it having original jurisdiction only, is a small cause decision and revision under S. 25 of the Act and not an appeal under S. 96, Civil P. C., lies. AIR 1916 Mad 891(2), Rel. on; AIR 1929 Mad 513, Ref. (Para 5)

Anno: Prov. Sm. C. C. Act, S. 25 N. 13. Civil P. C., S. 24 N. 15 Pt. 3; S. 96 N. 22 Pt. 1.

(b) Provincial Small Cause Courts Act (1887), S. 25 — New pleas.

Point about which there is no hint either in the pleadings or the issues framed will not be allowed to be raised in revision. (Para 7)

Anno: Prov. Sm. C. C. Act. S. 25 N. 18.

B. U. Subramaniam, for Petitioner; Ch. Sankara Sastry and T. Veerabadrayya, for Respondents.

CASES CITED:
(A) ('16) AIR 1916 Mad 891(2): 38 Mad 25
(B) ('29) AIR 1929 Mad 513: 56 Mad LJ 649

ORDER: A small cause suit filed in the District Munsif's Court of Eluru was transferred by an order of this Court, to the Subordinate Judge's Court at Eluru for disposal along with two other suits. In the suit out of which this revision arises there was a decision rendered by the transferee Court, the sub-Court at Eluru, against which the defendant has filed this revision petition.

(2) Mr. Ch. Sankara Sastri, the learned advocate appearing for the plaintiffs, has taken a preliminary objection to the maintainability of this revision petition on the ground that against the decision of the Subordinate Judge an appeal would lie to the District Court. So, says counsel, this revision is incompetent. In other words, learned counsel says that the decision pronounced by the Subordinate Judge must be regarded as a decision in the exercise of his original jurisdiction and not a decision in the exercise of small cause jurisdiction. It is pointed out by Mr. Sankara Sastri that in fact the sub-Court at Eluru had no small cause jurisdiction at the time that the transfer took place. So, says counsel, the jurisdiction actually exercised by the sub-Court at Eluru must be referred to its original jurisdiction and not to any small cause jurisdiction. As counsel drew my attention to S. 24, C. P. C., in connection with their arguments, it has struck me that S. 24(4) of the Code creates a real difficulty in the way of this preliminary objection raised by Mr. Sankara Sastri. (His Lordship after quoting the provision stated:) This, to my mind, puts an end to all enquiry after a transfer has taken place as to whether, after the transfer, it is the original jurisdiction of the transferee Court that must be said to have been exercised, or the small cause jurisdiction of the Court from which the transfer took place.

(3) Mr. Sankara Sastri concedes that in this case he is not disputing the validity of the order of transfer made by the High Court. But he says that notwithstanding the order of transfer, the jurisdiction actually exercised by the transferee Court is referable only to the original jurisdiction vested in the transferee Court from the inception and not to the small cause jurisdiction which can be reasonably supposed to have been transferred to it by the High Court on account of its order of transfer of the cause itself from the file of the Munsif's court to the sub-Court.

(4) If a provision like the one embodied in S. 24(4), C. P. C., did not exist, the contention of Mr. Sankara Sastri might have some force. In most cases it is difficult to say, after the kind of transfer under sub-s. (1) has been made, whether the subsequent trial of the transferred suit must be referred, where the transfer has been to a Court possessed of original jurisdiction, to such original jurisdiction or to the small cause jurisdiction vested in the Court in which the suit was originally instituted as a small cause suit. It is precisely to avoid enquiries into matters of such difficulty, after the order of transfer has taken place, that the provision in S. 24(4), C.P.C., seems to my mind to have been made by the Legislature in order to ensure that the decision of the transferee Court shall be regarded, for the purpose of procedure including a question of appealability, as in a small cause suit which it originally was undoubtedly. The effect of sub-s. (4) in my opinion is to make the decision by the Sub-Court at Eluru in the present case a small cause decision and not an original side decision.

(5) The only point which has given some room for anxious consideration on my part in this matter is the fact that when the order of transfer was made, the Sub-Court at Eluru had no small cause jurisdiction. But for the reasons that I have given, I think that if one has to apply the language of S. 24(4), C.P.C., as it stands the decision of the Sub-Court at Eluru in the present case was a small cause decision which accordingly would be revisable under S. 25, Provincial Small Cause Courts Act and not appealable under S. 96, C.P.C.

(6) The fact that the Sub-Court at Eluru had only original jurisdiction and no small cause jurisdiction at all may entail a disability for it to entertain a suit which is of a small cause nature. But where the transfer of the suit has been made by the High Court, the original disability in the Sub-Court does not

in my opinion survive it, so as to make the kind of preliminary objection raised by Mr. Sankara Sastri tenable. In support of the view that I have taken there is a Bench decision of this Court reported in — 'Sankararama v. Padmanabha', AIR 1916 Mad 891(2) (A). So if authority were needed for the conclusion that I have reached, that in this case the revision petition is competent, that decision 'prima facie' furnishes authority in that direction. Mr. Sankara Sastri has attempted to distinguish that ruling, as one single learned Judge of this Court is said by him to have distinguished it in — 'Murugesa Mudaliar v. Venkatakeshavalu Chetty', AIR 1929 Mad 513 (B). It is unnecessary for me to deal with this point of distinction between the case in AIR 1916 Mad 891(2) (A) and the present case on the facts, as I am satisfied that the statement of principle contained in that decision, which is really what governs me sitting here as a single Judge, is supported by the 'prima facie' view that I have formed on the language of S. 24(4), C.P.C. It is to my mind therefore clear that the preliminary objection raised by Mr. Sankara Sastri must be overruled and this civil revision petition must be proceeded with on the merits.

(7) Turning to the merits of the small cause revision Mr. B. V. Subramaniam, the learned advocate for the petitioner-defendant, has taken the point before me that no decree could have been passed for the rent part of the suit claim on the basis of the lease between the respondents and his client because, on a construction of Ex. A. 1, the lease between the respondents and the owner of the property, one Mulukutla Venkata Ramakrishnayya, the respondents ceased to have any title to the property on the date on which they granted the lease in their turn to the present petitioner. The point in question, as learned counsel has frankly admitted before me after a verification of the pleadings and the issues, is not one which was raised by him in the Court below, I do not think, sitting in revision as I do, I can allow this point to be raised, of which there is no hint, as I have said, in the pleadings in the case or in the issues as framed by the District Munsif before the transfer of the suit to the Sub-Court at Eluru.

(8) Mr. Subramaniam draws my attention to the fact that in the judgment of the Court below it has been observed that it is not necessary to go into the question of the construction of Ex. A-1 or of whether there were any rights in the respondents at the time of their alleged lease to the petitioner. In my opinion the Court below rightly observed to that effect because the point was not one which had been taken either in the pleadings or in the issues.

(9) There is no other point which has been argued before me or attempted to be argued before me in this case very properly, because any other point would not be within the purview of my revisional jurisdiction under S. 25, Provincial Small Cause Courts Act. This revision petition is therefore dismissed with costs.

C/M.K.S. Revision dismissed.

A.I.R. 1953 MADRAS 583 (Vol. 40, C.N. 227)

RAJAMANNAR C. J. AND VENKATA-RAMA AIYAR J.

V. Peddarangaswami, Appellant v. The State of Madras, represented by the Collector of Bellary and another, Respondents.

Appeals Nos. 792 and 793 of 1948, D/- 10-11-1952.

(a) Civil P. C. (1908), S. 35-A — Scope and object.

The award of compensatory costs under S. 35A is intended to deal with exceptional cases in which the exercise of the ordinary discretion under S. 35 would not afford a sufficient compensation. So, before awarding compensatory costs the Court should satisfy itself that the claim was false or vexatious to the knowledge of the plaintiff and that the interests of justice require compensatory costs to be awarded. (Para 14)

Anno: Civil P. C., S. 35-A N. 2.

(b) Civil P. C. (1908), S. 9 — No suit lies where there is no such right as that claimed.

The grant of prospecting licenses and mining leases is regulated by rules made by the Government of India. These rules are really in the nature of administrative instructions for the guidance of revenue authorities who are entrusted with the grant of the licenses and the leases. These rules do not confer rights enforceable in a Court of law, nor can the infringement of any of the rules give rise to a cause of action on which an action can be founded. It is true that once a grant has been made either of a licence or of a lease validly and in accordance with the rules by the competent authority, i.e., either by the Government or by such authority to whom the Government may delegate their powers, then such a grant may be binding on the Government and confer rights on the grantee. But no one has an absolute right to obtain a license or a lease which can be enforced against the Government in a civil Court. (Para 12)

Where the Board of Revenue to whom the power of granting mining leases had been delegated, decides not to grant a mining lease to a particular applicant in the exercise of its jurisdiction, the civil Court has no jurisdiction to set aside that decision even if it may not be strictly according to mining rules. (Para 13)

Anno: C.P.C., S. 9 N. 41.

V. N. Shama Rao, for Appellant; Govt. Pleader, C. V. Mannadiar and B. V. Ramanarasu, for Respondents.

CASES CITED:
(A) ('76-78) 1 Mad 205 (FB)
(B) ('83) 6 Mad 303
(C) ('03) 12 Mad LJ 453: 26 Mad 268
(D) ('03) 12 Mad LJ 417: 26 Mad 742
(E) ('07) 2 Mad LT 141: 30 Mad 270

RAJAMANNAR C. J.: These two appeals arise out of two suits tried together along with another suit (which, however, has not come up in appeal) and disposed of by a common judgment by the learned District Judge of Bellary. The appellant is the plaintiff in both the suits. For a determination of the questions which arise in these appeals it is necessary to relate the events which led up to the suits. It is sufficient to commence the narration with the grant of a prospecting licence

to the appellant on 23-5-1941 (Ex. A. 1) which conferred on him the sole right, subject to the conditions contained in the licence, to mine, bore, dig and search for iron and work and carry away red oxide of iron within an area of 76 acres being a portion of S. No. 326 of Janikunta village in Bellary district. The licence was for a term of one year commencing from 28-5-1941. The contesting respondent in the appeals, one Vishnu Nimbkar, obtained a similar prospecting licence for red oxide on 11-6-1941 (Ex. B. 1) in respect of S. No. 3 in the village of Thumti in the same district measuring 288 acres. This survey number was adjacent to the area in respect of which the appellant had been granted a licence. Nimbkar also obtained a regular mining lease for a term of the ten years commencing from 5-1-1942 of two other portions of S. 326 comprising about 304 acres (Ex. B. 26. a).

It is common ground that the appellant did not do any prospecting during the period covered by the licence in his favour. It is also clear from the evidence that Nimbkar who was represented by his agent C. Srinivasa Rao was engaged regularly in working and extracting ore in considerable quantities. On 19-2-1942 the appellant wrote to the District Collector, Bellary, complaining, that Srinivasa Rao, the agent of Nimbkar, had removed about 50 tons of red oxide from the area covered by his prospecting licence. This communication was forwarded by the Collector for inspection and report. On 23-4-1942 the appellant requested the Collector of Bellary to grant him a prospecting licence for one more year as he had not been able to do any prospecting owing to "unavoidable circumstances." The Collector granted this request and directed a renewal of the prospecting licence for a period of one year from 28-5-1942 (Ex. B. 6). Apparently no fresh licence was executed, because the office took the view that a fresh licence was not necessary for a renewal, as the conditions were the same and it was sufficient for the Collector to issue proceedings to the effect that the licence had been renewed (vide Ex. B. 6).

On 20-10-1942, Srinivasa Rao on behalf of Nimbkar applied for the grant of a mining lease for the same area for which the appellant had obtained a prospecting licence (Ex. B. 2). The appellant raised objections as to the genuineness and validity of this application which were also pressed before us. But in our opinion there is no substance in these objections. The application was produced from proper custody and its genuineness is conclusively established by the challan (Ex. B. 2. a) obtained on 21-10-1942 for the deposit of a sum of Rs. 500 as the prescribed security which should accompany an application for a mining lease. Whether this application was duly stamped or not, it is difficult to be certain. But the absence of a stamp is a matter only for the consideration of the Government authorities, and the appellant cannot rely upon any defect, even assuming there was one. The appellant also presented an application for the grant of a mining lease for the same area on 6-11-1942 (Ex. B. 3). But this was not accompanied by the deposit of any security. It must, however, be mentioned that the appellant had deposited a sum of Rs. 100 in connection with the grant of the prospecting licence to him and under the rules this deposit could be carried over to his credit in connection with the application for the mining lease. On 26-11-1942 the appellant sent in another similar application.

(2) Meanwhile the appellant filed a suit against Nimbkar in the Court of the District Munsif of Bellary, O. S. No. 487 of 1942 on 21-9-1942 for the recovery of 65 tons of red oxide alleged to have been removed by him from the area covered by the prospecting licence in favour of the appellant or their value, Rs. 585 and for the issue of an injunction restraining Nimbkar from entering on the said area or removing any minerals therefrom. Nimbkar 'inter alia' pleaded that the ore was not dug from the area granted to the appellant. This suit was dismissed by the District Munsif on 5-2-1943 on the ground that it was not maintainable because there was no valid prospecting licence in plaintiff's favour, the renewal of the licence not having been registered. On 18-3-1943 the Collector passed an order directing that neither party, i.e., neither the appellant nor Nimbkar, should work in the disputed area for a period of one month. Nimbkar's agent protested against this order, but apparently with no effect. Meanwhile the term of the prospecting licence in favour of the appellant which had been renewed was drawing to a close. Therefore on 6-4-1943 he wrote to the Collector requesting him to grant the lease on or before the expiry of the period of the licence and in any event to extend the term of the licence until the lease was granted. He followed it up with another application for a lease on 27-5-1943 (Ex. B. 71). On the same day he also prayed that the licence may be extended till the grant of the lease. He repeated his request by his letter dated 17-7-1943. On 21-8-1943 the Collector passed an order permitting Nimbkar's agent to remove the ore from the disputed area after depositing Rs. 9 a month. The Circle Officer reported to the Collector on 30-9-1943 that under the orders of the Range Officer the boundary between Janikunta and Thumti had been revised and the portion under dispute had been included in Janikunta.

(3) Against the dismissal of his suit by the District Munsif the appellant filed an appeal to the District Court (A. S. No. 77 of 1943) but that appeal was dismissed on 24-3-1944. Thereupon he filed a second appeal (S. A. No. 1997 of 1944) which was eventually allowed by Kuppuswami Aiyar J. on 8-8-1945. The suit was remanded to the Court of first instance for trial and disposal. After remand it was transferred to the file of the District Judge where it was numbered as O. S. No. 11 of 1946.

(4) On 9-5-1944 the Collector submitted to the Board of Revenue his report on the two applications for the grant of a mining lease made by the appellant and Nimbkar respectively, in which he strongly recommended the grant of the lease to Nimbkar. The following portion of his report fully sets out the reasons for his recommendation:

"5. Now both the parties have applied for the entire area of 76 acres on mining lease. Mr. Subbarangiah Chetti has not made any attempt to prospect for ore or even enter upon the land and he cannot, therefore, complain of encroachment. The prospecting licence held by him for the period from 28-5-1942 to 28-5-1943 is an unregistered one and not therefore valid. He has not undertaken any mining operations ever since the licence was granted to him. He appears to be a mere speculator who wants to keep away the other applicant out. His application for the mining lease was also received late on 20-11-1942 and is not accompanied by a security deposit of Rs. 500 as laid down in R. 36. The application of Sri C. Srinivasa Rao was received much earlier on 20-10-1942 and was followed by the security deposit of Rs. 500 which was credited into the Imperial Bank of India in challan No. 263 dated 21-10-1942. He

has also enclosed to his application a statement showing the areas held by him in the province under mining concessions. He holds a certificate of approval renewed for 1944 and published at page 158 of Mis. Notifications part II of the F. S. Gazette dated 8-2-1944. He has been carrying on mining operations and it appears he had been supplying the Government of India, Supply Department, with the ore in large quantities and he is not, therefore, a mere speculator. He holds mining concessions in the adjoining lands in the same field and other fields in the vicinity. I, therefore, request that the Board may be pleased to accord sanction for the grant of a mining lease for the entire area of 76 acres in S. No. 326 of Janikunta village for red oxide of iron."

The Board called for certain files relating to the matter and they were duly sent with a covering letter by the Collector (Ex. B. 70). The Board, while calling for the files, also asked the Collector to ascertain from both the applicants whether they were willing to have the lease for a period of five years subject to the condition that it would be liable to termination without compensation if the Government required the land after the War. In pursuance of this direction the Collector, on 14-8-1944, addressed letters to both the applicants (Exs. A. 4 and B. 39). In the letter addressed to Nimbkar's agent, the Collector, as directed by the Board, informed him that he should stop further mining in the disputed area until final orders were passed by the Board of Revenue. The agents of both the appellant and Nimbkar on their behalf expressed their willingness to accept a lease for a period of five years subject to the condition suggested by the Board (Exs. B. 14 and B. 40). Nimbkar's agent also complained against the order directing him to stop further work in the disputed area. On 7-12-1944 the Board of Revenue passed proceedings with the previous approval of the Government sanctioning the grant of a mining lease for a period of five years to Nimbkar subject to certain special conditions which are not very material. The order directing Nimbkar to stop further work was consequently withdrawn. The Collector intimated to the appellant that his application had been rejected. A temporary lease was executed in favour of Nimbkar on 28-12-1944 (Ex. B. 16) & a pucca lease subsequently. The Government by that time had apparently realised that there had been a muddle as regards the boundaries of the areas granted under the prospecting licences to the appellant and Nimbkar and evidently adopted the solution of granting the lease to Nimbkar of the entire area of 114 acres in S. No. 326. Nimbkar was also granted a lease for S. No. 3 in Thumti village in accordance with the revised boundaries (Ex. B. 43 dated 17-7-1945).

(5) The appellant filed a petition to the Government of Madras protesting against the grant of the licence to Nimbkar and the rejection of his application, but the petition was rejected (Ex. A. 5). He appears to have filed another petition to His Excellency the Governor. But that petition also was rejected (Ex. A. 5. a, dated 29-5-1945). On 3-12-1945 he issued a notice to the Government under S. 80, Civil P. C. and filed a suit in the District Court on 7-2-1946 (O. S. No. 7 of 1946) praying that the Government may be directed to specifically perform the agreement to lease by executing and registering a mining lease for at least a period of five years from 14-8-1944 in respect of the area covered by the prospecting licence in his favour. He also claimed from the Government and Nimbkar or either of them a sum of Rs. 20,000 or such other sum as the Court may determine, by way of damages and mesne profits and also future profits from the date of plaint till the date of delivery of possession.

(6) In the plaint the appellant based his claim on two grounds. One was that under the provision contained in para. 4 of the prospecting licence in his favour he was entitled as of right to a mining lease. The other was that the communication from the Collector enquiring whether the appellant was willing to accept a lease for a period of five years and his reply constituted an offer and acceptance and, therefore, there was a completed contract. The learned District Judge held that the suit was not maintainable by the appellant who was a mere licencee and that there was no contract between him and the Government for the grant of a mining lease for five years. He, therefore, dismissed the suit. A. S. No. 792 of 1943 is the appeal from this suit.

(7) Mr. Shama Rao, learned counsel for the appellant, did not seriously press before us the second of the two grounds on which the plaint was based, and we think, very rightly. In no sense was there an offer by the Government to grant a lease. The Government were only enquiring from both the applicants whether they would be willing to have a lease for a shorter period than what they had asked for. Pressed to its logical conclusion the result of accepting the appellant's contention would be that there would be two concluded contracts between the Government on the one hand and the appellant and Nimbkar respectively on the other in respect of the same area.

(8) The main question which falls to be decided in this appeal is whether the appellant is entitled to any right enforceable in a Court of law under any of the provisions of the prospecting licence in his favour. The licence contains covenants by the licencee, the powers of the Government and the rights of the licencee. Appellant relies on para. 4 (1) and (2) which runs as follows:

"1. During the subsistence of this licence the licencee shall have the right subject to compliance with the said rules to a mining lease in accordance with the said rule in respect of Red Oxide of iron over so much of the said land as the licencee may desire and the Governor shall think fit to grant and to the first offer such mining lease in respect of precious stones within the said lands as the Governor may think fit to grant.

2. If during the term hereby granted the licencee shall apply in accordance with the said rules a mining lease of the said lands or any part thereof this licence shall upon the expiration by efflux of time of the term hereby granted if the licencee shall by notice in writing to the Collector so require be extended for a further term to end either on the date on which such lease shall be granted or on such other date as the Collector shall in his discretion prescribe".

The appellant's contention is that under para. 4 (1) he has a right to obtain a mining lease as he has complied with the relevant mining rules; he is also entitled, till the grant of a regular licence, to the extension of the term of his prospecting licence under para. 4 (2).

(9) The contention on behalf of the Government and Nimbkar is two-fold. They plead firstly that the appellant has not complied with some of the relevant rules and secondly that even if the appellant is aggrieved as regards any of his alleged rights under the licence, his only remedy is to refer the question to the Governor whose decision is

final and binding on the parties, as provided by para. 5 of the licence. That paragraph in so far as it is material for this case is as follows:

"If and whenever any dispute or question shall arise regarding the construction, meaning or effect of these presents or the rights, powers, liabilities or duties of the licencee hereunder or as to the amount of payment of any royalty or other money payable by virtue hereof or otherwise however in relation to these presents such dispute or question shall be referred to the Governor whose decision thereon shall be final and binding on the parties hereto".

The defaults on the part of the appellant alleged by the respondents are (1) the failure to deposit a security of Rs. 500 along with his application for a mining lease, and (2) his failure to do any prospecting work during the period of the prospecting licences in his favour. Rule 36 provides that with the application for the grant of a mining lease the applicant shall deposit as security in respect of the preliminary expenses such sum not exceeding Rs. 500 as the Collector may determine, or with the Collector's permission give security to the like amount to the satisfaction of the Collector. If the application relates to an area for which the applicant holds a prospecting licence, any amount held in deposit in respect of such prospecting licence will be carried to his account. The appellant did hold a prospecting licence and had deposited a sum of Rs. 100 in respect of it. That would be carried to his account under this rule. We think that the appellant would be under an obligation to deposit further amounts only if the Collector determined a sum to be deposited in excess of Rs. 100 already held in deposit on appellant's account. There is no substance in this objection.

(10) There is, however, more substance in the other objection, namely, that the appellant failed to do any prospecting work. This is a matter of admission on the part of the appellant. Under R. 38-A the Collector, on receipt of an application for the grant of a mining lease is bound to initiate enquiries to satisfy himself (a) that the applicant is a suitable person to hold a mining concession, (b) that he intends to undertake operations immediately and (c) that he is not a mere speculator who wants to keep the other applicants out. The Collector in his report, already referred to earlier in this judgment, in unequivocal terms expressed his satisfaction that the appellant was a speculator who wanted to keep the other applicant out and who had no real intention of undertaking operations. It may, therefore, be said that the appellant was not on this account entitled as of right to a mining lease.

(11) There is also considerable force in the contention on behalf of the respondents that para. 5 precludes the appellant from resorting to any remedy except that provided therein. As the only right which the appellant claims is a right under para. 4 (1) of the licence, it may be said that the question which has arisen is regarding the construction, meaning and effect of the licence and the rights of the licencee thereunder. Mr. Shama Rao, learned counsel for the appellant tried to escape from the mischief of this provision by contending that the provision was in the nature of an arbitration clause, and the respondents, if they wanted to rely upon it as such, had to follow the proper procedure, namely, they should have applied for a stay of the suit and made a reference to arbitration. He also contended that the clause should be held to be null and void as it virtually made one of the parties to a dispute the sole arbiter of the dispute. No one can be a judge in his own cause, he urged. We do not think that the clause relied upon by the respondents is in the nature of an arbitration clause, though the provision contained in the proviso to that paragraph is certainly in the nature of an arbitration clause. As for the other objection, the reply is that such rights as the appellant seeks to enforce are rights which he claims under the licence which he has accepted & he must be bound by the provisions of that licence. Actually we find that the appellant has resorted to the remedy provided in paragraph V of the licence. He has filed a petition to the Governor and that has been rejected. He cannot have any further remedy under the licence.

(12) Apart from these objections there is one more formidable objection to the maintainability of the suit. The grant of prospecting licences and mining leases is regulated by rules made by the Government of India. These rules are really in the nature of administrative instructions for the guidance of revenue authorities who are entrusted with the grant of the licences and the leases. These rules do not confer rights enforceable in a Court of law, nor can the infringement of any of the rules give rise to a cause of action on which an action can be founded. It is true that once a grant has been made either of a licence or of a lease validly and in accordance with the rules by the competent authority, i. e. either by the Government or by such authority to whom the Government may delegate their powers, then such a grant may be binding on the Government and confer rights on the grantee. But no one has an absolute right to obtain a licence or a lease which can be enforced against the Government in a civil Court.

(13) These rules are similar in their scope and application to the Darkhast rules. Both relate to the grant of rights and privileges as regards lands in which the State has full rights of ownership & power of disposal. It has been consistently held that the Darkhast rules do not by themselves confer any rights on any one to claim and obtain a grant of land on Darkhast. As early as 1876 Holloway J. expressed the opinion that these rules do not constitute rights enforceable in a Court of law — 'Fakir Muhammad v. Thirumalachariar', 1 Mad. 205 (F B) at p. 222 (A). The decision in — 'Subbaraya v. Sub Collector, Chingleput', 6 Mad. 303 (B) takes the same view. In that case though certain mirasidars of a village were entitled to claim the benefit of a preference under the Darkhast rules, it was held a civil Court could not compel the revenue authorities to grant a patta to the mirasidars in preference to strangers. They had a preferential claim under the Darkhast rules, but the revenue authorities had an uncontrolled discretion. Bhashyam Aiyangar J. in — 'Secy. of State v. Kasturi Reddi', 26 Mad. 268 (C), drew a distinction between the enforcement by a private person of a claim based on an actual grant by an officer on behalf of the Crown and the enforcement of a claim to obtain a grant from the State based on rules relating to Darkhast. The learned Judge observed:

"It may be that no one can advance in a civil Court any claim against the Crown or any one claiming under it, to the grant to him, under the darkhast rules, of land for which he has applied to the Revenue authorities under those rules — ('Subbaraya v. Sub Collector, Chingleput', 6 Mad. 303).... But when a person claims that a grant has been made to him by an officer on behalf of the Crown, the mere fact that the alleged grant purports to have been made under the darkhast rules does not affect the

jurisdiction of civil Courts to determine whether a grant has been made which would bind the Crown or anyone claiming under it subsequent to such grant. — '(The Collector of Salem v. Rangappa', 12 Mad. 404.)"

See also the observations of Bhashyam Aiyangar J. in — 'Sappani Asari v. Collector Coimbatore', 26 Mad. 742 at p. 754 (D). In — 'Muthuveera Pandyan v. Secy. of State', 30 Mad 270 (E) it was held that the propriety of a decision of a darkhast authority acting within the scope of its powers cannot be a subject of investigation by the civil Courts. The question whether a Revenue officer acting within the scope of his authority did or did not adhere to the prescribed rules cannot be investigated by a civil Court. Miller J. who agreed with Benson J. in that case said:

"The Deputy Collector was undoubtedly acting within the scope of his authority in hearing and determining the appeals; and in my opinion the civil Courts have no power to investigate the question whether his decision of the appeal was one which he could or could not have arrived at by strictly following the rules laid down for the guidance of officers in disposing of applications for waste lands".

Applying this principle to the facts of the present case, it follows that the Board of Revenue to whom the power of granting mining leases had been delegated were acting within the scope of their authority in considering the applications of the appellant and Nimbkar. They had the power and jurisdiction to decide to whom the lease should be granted. Even if their decision may not be strictly according to the mining rules, a civil Court cannot set aside their decision on that ground. The appellant cannot, therefore, maintain the suit, and it was rightly dismissed. The appeal is also dismissed with costs.

(14) We cannot, however, support the lower Courts' award of compensatory costs to the Government and Nimbkar separately in addition to the award of ordinary costs, two sets. The award of compensatory costs is now governed by S. 35-A Civil P. C. It is intended to deal with exceptional cases in which the exercise of the ordinary discretion under S. 35 would not afford a sufficient compensation. So, before awarding compensatory costs the Court should satisfy itself that the claim was false or vexatious to the knowledge of the appellant and that the interests of justice require compensatory costs to be awarded. We are unable to agree with the learned Judge that the claim of the appellant can be said to be false or vexatious to his knowledge. The appellant might have thought that the provision in para. 4 (1) of the prospecting licence in his favour conferred a right on him to obtain a mining lease. It may be that this contention of his has been found to be untenable. But, on that ground, it cannot be said to be false or vexatious. We set aside the decree of the Court below in so far as it awards compensatory costs to the Government and Nimbkar. The award of ordinary costs of the suit will, of course, stand.

(15) The learned Judge also dismissed the other suit filed by the appellant, from which A. S. No. 793 of 1948 has arisen, to recover from Nimbkar the value of the ore alleged to have been dug and removed by him from the area covered by the prospecting licence in the appellant's favour. He held that the appellant had not proved any trespass on his land or that he has suffered any damage. Now, it is clear that the only substantial question which arises in the suit is whether the pits from which Nimbkar dug the ore in dispute were situated within the area covered by the prospecting licence in favour of the appellant. If that question were to be decided in favour of the appeliant, he would certainly be entitled to relief. Equally, if the finding on that issue was against the appellant, the suit must fail. Learned counsel for the respondent, Nimbkar, was unable to point to us a considered finding of the learned District Judge on this issue. In paras. 7 and 8 the learned Judge no doubt referred to some of the documentary evidence relating to this issue. But he did not attempt to solve what he calls the "survey tangle". He referred to the Government solving the tangle by the grant of a licence of a further 114 acres in S. No. 326 of Janikunta to Nimbkar. But that was subsequent to the period with which we are concerned in this suit and cannot obviate the necessity of finding whether the pits worked by Nimbkar were situated in the area covered by the appellant's prospecting licence. As we have decided to remand the suit for fresh and satisfactory disposal, we do not wish to say anything on the merits. However, we must say in justification of this course that it appears to us that something can be said in favour of the appellant. There is evidence to show that the officers of the Government, on investigation and enquiry, came to the conclusion that the disputed area really fell within the ambit of the appellant's licence. No doubt, this opinion of the officers of the Government is not conclusive of the matter. We have only mentioned it to show that the learned Judge was not warranted in brushing aside the appellant's case without fully discussing the evidence adduced on the point.

(16) We allow Appln. No. 793 of 1948 and set aside the decree of the District Judge dismissing the suit. The suit will be remanded to the District Court of Bellary to be tried and disposed of in accordance with law. The appellant will be entitled to a refund of the court-fee paid on the memorandum of appeal. The costs of this appeal will abide the result of the suit.

B/K.S. Case remanded.

A.I.R. 1953 MADRAS 587 (Vol. 40, C.N. 228)

SATYANARAYANA RAO AND KRISHNASWAMI NAYUDU JJ.

Varadarajan, Appellant v. Muthu Venkatapathi Reddy and others, Respondents.

A. A. O. Nos. 117 and 355 of 1947 and Civil Revn. Petn. No. 390 of 1947 and A. A. O. No. 254 of 1947, D/- 16-9-1952.

Civil P. C. (1908), O. 21, Rr. 90 and 92 — Restoration of petition under R. 90 dismissed for default.

The restoration of a petition under O. 21, R. 90 dismissed for default would make the confirmation of sale already made ineffective. Such an order of confirmation may be treated as automatically vacated or even may be considered to be null and void. 10 Moo Ind App 203 (PC), Ref.; AIR 1946 Mad 344 and AIR 1934 All 433, Rel. on. (Para 11)

Anno: C P.C., O. 21, R. 92 N. 2 Pt. 22a.

S. Jagadisa Iyer, for Appellant; R. Gopalaswami Iyenger, for Respondents.

CASES CITED:

(A) ('46) AIR 1946 Mad 344: 1946-1 Mad LJ 216
(B) ('34) AIR 1934 All 433: 154 Ind Cas 106
(C) ('20) AIR 1920 Mad 1: 43 Mad 185 (FB)
(D) ('63-66) 3 WR 25: 10 Moo Ind App 203 (PC)

KRISHNASWAMI NAYUDU J.: In O. S. No. 20 of 1937 on the file of the District Court of South Arcot a mortgage decree was passed on 6-1-1939 for a sum of Rs. 3540-15-4, the mortgagee being the first defendant and the 2nd defendant being his minor son represented by the father 1st defendant as guardian-ad-litem. One Muthu Venkatapathi Reddiar as the assignee-decree-holder brought the mortgaged property to sale, the sales having been held on 11th and 12-9-1944, and three persons Mahadeva Goundan, Natesa Goundan and Swami Kannu Goundan and the decree-holder purchased the property at the auction. M. P. No. 302 of 1944 was filed on behalf of the minor second defendant for setting aside the sale under O. 21, R. 90 and S. 47, C. P. C. Mainly on the ground that there was no proper advertisement and publication of the sale and that the property which was of the value of about Rs. 16.000 fetched a low price of about Rs. 6442. Sufficient security in immoveable properties was furnished on behalf of the second defendant-petitioner and during the pendency of the petition the 2nd defendant having become a major he was declared a major and he elected to proceed with the petition, executed a fresh security bond and registered it and the petition was posted for enquiry to 10-4-1945. The Court having been engaged in sessions work on that day the petition was adjourned to 10-7-1945. The petitioner was called on 10-7-1945 and found absent and his vakil reported no instructions with the result the petition was dismissed. From the endorsement on the petition it is seen that the advocate asked for adjournment, the adjournment was refused and the petition was dismissed. On 12-7-1945, the Court passed an order confirming the sale. The petitioner filed a petition under O. 9 and S. 151, C. P. C. for setting aside the order of dismissal but the same was dismissed on the ground that such an application does not lie. Then he appealed to the High Court against the order of dismissal of M. P. No. 302 of 1944 in C. M. A. No. 447 of 1945 and by order of the High Court dated 28-3-1946 the District Judge of South Arcot was directed to restore the petition, M. P. No. 302 of 1944, on the petitioner paying to the respondents a sum of Rs. 500 as and towards their costs upto that date within one week of the reopening of the District Court. There is a further direction that the District Judge shall dispose of the petition on the merits in the light of the observations contained in the judgment. In the judgment, the learned Judge observed that the petitioner was a college student and his antecedent conduct with reference to the petition did not justify the view that he was really unmindful of the petition and did not care as to what happened to it and that he should be given an opportunity to satisfy the District Judge that he had good grounds for non-appearance on the date of the hearing and that his petition was not a frivolous or vexatious one. The learned Judge's order proceeds as follows:

"If the appellant pays within one week of the reopening of the District Court, Cuddalore, to the respondents a sum of Rs. 500 as and towards their costs of the proceedings held so far, to be retained by them in any event and irrespective of the result of the petition, the order of the lower Court will stand set aside and the petition will be restored to file and disposed of according to law. The District Judge will first go into the question, whether the appellant had satisfactory grounds for being absent on 10th July, which is the subject-matter of the miscellaneous petition filed by the appellant for the restoration of the petition under O. 21, R. 90, C. P. C. which was dismissed for default. If he is satisfied that the appellant had good grounds for non-appearance, the petition will be dealt with on its merits".

(2) The petitioner complied with the order for costs and it is found from the endorsement on the petition, that M. P. No. 302 of 1944 was restored to file on 27-6-1946. On 13-8-1946 the petitioner paid into Court the amount due under the decree and on 27-8-1946 he filed M. P. No. 187 of 1946 for vacating the order of confirmation of sale made on 12-7-1945. On 31-8-1946, the petitioner filed another petition M. P. No. 213 of 1946 under O. 34, R. 5, C. P. C. and asked for setting aside the sales. All these petitions were heard and orders were passed on 25-2-1947 dismissing them. C. M. A. No. 117 of 1947 is against the order dismissing M. P. No. 302 of 1944, which was restored to file and which was for setting aside the sale under O. 21, R. 90, C. P. C. C. M. A. No. 355 of 1947 is against the order dismissing M. P. No. 187 of 1946 filed for vacating the order of confirmation and C.. R.P. No. 390 of 1947 is against the order dismissing M. P. No. 213 of 1946 filed under O. 34, R. 5, C. P. C.

(3) It is contended on behalf of the 2nd defendant-appellant that the learned District Judge erred in dismissing the petitions both on grounds of fact and of law. It is urged that M. P. No. 302 of 1944 having been directed to be restored to file by the High Court in its order in C. M. A. No. 447 of 1945 and accordingly restored by the District Court by its order dated 27-6-1946, the confirmation of sale made on 12-7-1945 after the disposal by the District Court on 10-7-1945 of M P. No. 302 of 1944 would stand automatically vacated and that, in any event, the learned District Judge erred in not vacating the order of the confirmation even on the application M. P. No. 187 of 1946 filed by the appellant. Further, it is urged that the learned District Judge erred in dismissing M. P. No. 302 of 1944 and that the evidence adduced did not justify the conclusion arrived at, namely, that the appellant had not sufficient cause for his failure to appear on 10-7-1945.

(4) It may be convenient to consider the order of dismissal on the merits before dealing with the other question raised. The direction of the High Court to the District Judge is that he should go into the question whether the appellant had satisfactory grounds for being absent on 10th July and if the District Judge was satisfied that the appellant had good grounds for non-appearance, he could proceed to deal with the application on its merits. From the conduct of this petition prior to the date of dismissal it will be seen that security was furnished while he was a minor and after he became a major he himself elected to proceed with the petition and further filed a security bond by himself. For the first time the petition was posted and came up for hearing on 10-4-1945 and on the ground that the Court was engaged with sessions work it was adjourned to 10-7-1945. In fact that was really the first day of the hearing.

(5) The appellant was a student in the Honours class in the Annamalai University and the college reopened on 3-7-1945 and therefore he had to go away to the college. He says he informed his erstwhile guardian Natesa Goundan that he

would go to the college and his guardian told him that he would take the witnesses on the date of the hearing. He says that he trusted him and went to the college, but later he found that Natesa Goundan committed fraud in collusion with the purchaser and while he took the witnesses to the Court, he did not take them to the house of the vakil and made them return on the representation that the case was adjourned. P. Ws. 2 and 3 are the witnesses who say that they attended the Court on 10-7-1945 and that Natesa Goundan did not take them to the advocate but left them in the Court compound under a banyan tree and after some time came and represented that the petition stood adjourned to 13-7-1945 and thereafter they returned. Excepting a minor discrepancy in the evidence of these witnesses as to whether they returned by bus or by walk, substantially the evidence of these witnesses supports the case of the appellant that in so far as these witnesses were concerned, they were present in Court and the hearing of the petition could have been proceeded with even in the absence of the appellant and since the appellant was a minor at the time of the sale he could not have been of much help in adding to the evidence of these witnesses. Respondent 3, examined himself as R. W. 1, and from the printed copy of his evidence it is found that he stated that he had come to Court with his witnesses on the hearing date (10-7-1945), and that both Natesa Goundan and P. Ws. 1, 2 and 3 came. But the learned District Judge in his judgment while referring to the evidence of R. W. 1 mentions R. W. 1 as having stated that on that day neither the guardian of the petitioner, Natesa Goundan, nor P. Ws. 1, 2 and 3 came to Court. There is this discrepancy in the evidence as recorded and the evidence as understood by the learned Judge. If the witnesses were present as stated by R. W. 1, then there could be no ground for holding that the appellant was not ready to go on with the enquiry. But, whatever may be the evidence of R. W. 1, we find it difficult to reject the evidence of P. Ws. 2 and 3, against whom nothing is alleged as being in any way interested in the appellant and both of them have sworn that they came to Court but were made to wait in the compound and had to return on the false representation of the erstwhile guardian of the appellant that the case had been adjourned. The learned Judge does not disbelieve the evidence of the appellant as P. W. 1. It appears to us that the appellant had made arrangements for the conduct of the enquiry, and relied upon Natesa Goundan to take the witnesses and, in our opinion, it would be sufficient to hold that he was diligent and by reason of the opening of the college he had sufficient cause to be away. It is unlikely from the way in which the petition was conducted that having furnished security and after taking every step including securing the attendence of the witnesses, the appellant is likely to have allowed the petition to go by default. Further, the direction of the High Court is that the District Judge should give an opportunity to the appellant to show that he had good grounds for non-appearance on the date of the hearing and that his petition was not a frivolous or vexatious one. We are of opinion that there was sufficient cause for his non-appearance and that in no view could it be held that the petition was a frivolous or vexatious one. The learned District Judge should not have dismissed the petition, without further considering the question whether it was a frivolous or vexatious one. The order dismissing M. P. No. 302 of 1944 is therefore liable to be set aside.

(6) In view of the restoration of M. P. No. 302 of 1944, the petition under O. 21, R. 90, C. P. C. by the order of the District Judge endorsed on the petition itself dated 27-6-1946 in pursuance of the order of High Court and in view of our order setting aside the order of dismissal of M. P. No. 302 of 1944 it is necessary to consider whether the confirmation of sale made on 12-7-1945 continues to be effective or, as it is urged on behalf of the appellant, became automatically vacated.

(7) Order 21, R. 92 provides that where no application is made under R. 90, or where such application is made and disallowed, the Court shall make an order confirming the sale, and thereupon the sale shall become absolute, and where such application is made and allowed, the Court shall make an order setting aside the sale. By reason of the restoration of M. P. No. 302 of 1944, the position is that the application under O. 21, R. 90, must be deemed to be pending and not disposed of. The confirmation of the sale could only be after the disallowance of that application and not at any time during its pendency. The confirmation in the present case was made on 12-7-1945 after the dismissal by the District Judge on 10-7-1945 of the petition for setting aside the sale. The confirmation was then perfectly in order. Could that order of confirmation though validly made be said to have its effect even after the restoration of the petition? The decision of a Bench of this Court in — 'Venkatanarasimham v. Nagoji Rao', AIR 1946 Mad. 344 (A) is directly in point. In that case, there was an application for setting aside the sale on the grounds of certain irregularities in the conduct of the sale. A compromise petition was filed by which parties agreed to the petition being allowed on part of the decree amount being paid. The judgment-debtor deposited the sum and applied for setting aside the sale under O. 34, R. 5. When the petition under O. 34, R. 5 came up for hearing, the judgment-debtor-petitioner was absent and it was dismissed for default and the sale was confirmed. Two applications were filed by the judgment-debtor for setting aside the orders dismissing the application for default and the orders of dismissal were set aside in those applications. The judgment-debtor also by way of abundant caution, as in the present case, filed another application for setting aside the confirmation of sales. The learned Judges held that the effect of setting aside the orders of dismissal for default operates automatically to set aside the orders of confirmation of the sales.

(8) In — 'Charitter Shukul v. Lal Behari Singh', AIR 1934 All 433 (B) an application was filed on behalf of a minor judgment-debtor for setting aside the sale and a compromise was effected on his behalf whereby the application was withdrawn and the sale was confirmed. In a suit subsequently filed on behalf of the miner the compromise itself was questioned and set aside. By reason of setting aside the compromise it was held, that the declaratory decree holding the compromise to be not binding on the minor, all that follows therefrom including the order confirming the sale must also be null and void.

(9) To a similar effect are the observations of Abdur Rahim O. C. J. in — 'Muthu Korakki Chetti v. Mahammad Madar Ammal', AIR 1920 Mad 1 (FB) (C) at pp. 197 and 198. The question

that arose in that case was as to the time from which the period of three years had to be computed under Art. 180, Limitation Act and therefore it was necessary to find when the sale became absolute. At pp. 5-6, the learned Officiating Chief Justice observes:

"Even without the help of the Privy Council rulings which I shall presently notice, I should answer that in the given circumstances, the sale did not become absolute until the petition made to set it aside had been disallowed. Rule 92 has primarily in contemplation cases where the application to set aside the sale is made within the limit of thirty days allowed by the law so that any order confirming the sale would be ordinarily made after the disposal of such applications. But if the Court in this case was justified — and I take it that it was in entertaining the application to set aside the sale after it had made the order confirming the same, can it be said that, whatever be the result of the application, the order confirming the sale remained effective so as to make the sale absolute from the date on which it was drawn up? To my mind, obviously not. The effect of entertainment of the application to set aside the sale after the order of confirmation must, having regard to the intention of the Legislature as disclosed in this rule and quite apart from any general theory in such connections be to render the order ineffective so as to make the sale absolute."

(10) It is clear from the language of O. 21, R. 92 that the Court can confirm the sale only if there has been no application under R. 89, R. 90 or R. 91 filed within the period of 30 days from the date of the sale and if within the period of 30 days there is such an application and such application is disallowed the Court shall then confirm the sale. But at any time within 30 days after the sale or during the pendency of an application under O. 21, R. 89, R. 90 or R. 91, the Court has no power to confirm the sale and such confirmation could not be valid. That the power of the Court to confirm is dependent upon the existence and pendency of an application under R. 89, R. 90 or R. 91 or the disallowances of such application receive further support from the observation of Abdul Rahim, Offg. C. J., in the case referred to that the Court allows the judgment-debtor to file an application after the expiry of the period of 30 days after the confirmation of sale, still when such an application has been filed the confirmation made earlier becomes ineffective, the reason being that the pendency of an application is a bar to the confirmation being made or remaining effective.

(11) It is urged by Mr. Gopalaswami Aiyangar that on the language of O. 21, R. 92, it cannot be held that there could be any automatic vacation of the confirmation once made, since on the failure to make an application or disallowances of such an application the sale does not become automatically confirmed, but the Court shall make an order confirming the sale and if the Court makes an order confirming the sale it could not stand automatically vacated, but the Court should again pass an order vacating the confirmation. The principle under which it could be said that by reason of the restoration of a petition for setting aside the sale, the confirmation made earlier would stand automatically vacated is that laid down in the Privy Council decision in —'Shama Purshad v. Hurro Purshad', 10 Moo Ind App 203 (PC) (D) where it was held that certain orders and decrees which are subordinate and dependent upon earlier orders and decrees could remain in force so long as the order or decree on which they were dependent are not reversed or superseded. They are dependent decrees and orders and when the decrees or judgment on which they depend are reversed they could continue to remain in force. It is urged that this principle cannot be made applicable since even the absence of an application for setting aside the sale within the period prescribed by law would require the Court to make an order for confirmation. If only an application to set aside the sale is filed and such an application is disallowed that order might be held to enable the Court to confirm the sale and when that order disallowing the sale is subsequently reversed in appeal, the confirmation which is dependent on the original order might be considered to have been superseded. But the same argument would not be available where there was no application at all. It is true that O. 21 R. 92 contemplates two contingencies: (1) the absence of any application and (2) an application and disallowance thereof and it is only in the latter case, the order of confirmation may be considered to be dependent on an order of Court. But it cannot be ignored that under O. 21 R. 92 the order of confirmation is a dependent order depending not only on an earlier order of Court but also on certain circumstances existing or not existing, namely there being an application for setting aside the sale or not. The principle in 'Shama Purshad Roy Chowdhry's case' has direct application in other cases for instance in the case of a preliminary and final decree where the final decree is passed and subsequently the preliminary decree is set aside in appeal, the result of which would be the final decree becomes superseded. Also in suits filed under the summary procedure when an application for leave to defend is rejected and a decree is passed, subsequently when leave to defend is granted, the decree passed would become vacated. Similarly in cases of an ex parte decree and the result of an allowance of an appeal against it. Even if that principle of dependent orders and decree laid down in 'Shama Purshad Roy Chowdhury's case' cannot be held to be completely applicable to cases arising under O. 21 R. 92, we have no doubt that the order of confirmation is a dependent order and the restoration therefore of a petition under O. 21 R. 90 would make the confirmation already made ineffective. Such an order of confirmation may be treated as ineffective or automatically vacated as observed by the learned Judges in AIR 1946 Mad 344 (A) or even may be considered to be null and void as held by the Allahabad High Court in AIR 1934 All 433 (B), the net result being that such order continues to have no legal effect or force.

(12) It is further urged by Mr. Gopalaswami Aiyangar that the order of confirmation made on 12-7-1945 had not been set aside in appeal and that the High Court in allowing the appeal filed against the order in M. P. No. 302 of 1944 dated 10-7-1945 should also have made an order setting aside the confirmation. But this argument ignores that an order of confirmation is not one of the orders enumerated under O. 43, C. P. C. where there is a right of appeal. Further, the order of confirmation is subsequently made on 12-7-1945 and not part of the order dated 10-7-1945 dismissing the petition and as such the appellant could not have raised an objection to the order even under S. 105, C. P. C. In the view we have taken it is unnecessary for the

Court in such circumstances to pass even a formal order setting aside the confirmation, since the confirmation would cease to have any legal effect. In any event, the appellant had applied in M. P. No. 187 of 1946 for vacating the order of confirmation and that application being stated to have been filed out of abundant caution should have been ordered.

(13) In the result C. M. A. Nos. 117 of 1947 and 355 of 1947 are allowed. C. R. P. No. 390 of 1947 is against the order dismissing the appellant's application under O. 34, R. 5, C. P. C. which was dismissed for the reason that M. P. Nos. 302 of 1944 and 187 of 1946 have been dismissed. By reason of the setting aside of those orders, this petition is allowed. The appellant will have his costs in C. M. A. No. 117 of 1947 from the respondent purchasers. M. P. No. 302 of 1944 and M. P. No. 213 of 1946 are remanded to the lower Court for disposal according to law.

B/G.M.J. Order accordingly.

A.I.R. 1953 MADRAS 591 (Vol. 40, C.N. 229)

RAJAMANNAR C. J. AND VENKATARAMA AIYAR J.

State of Madras, represented by Revenue Secretary, Appellant v. North Madras Firewood Trading Co., Respondent.

C. C. C. Appeal No. 34 of 1950, D/- 23-10-1952.

Sales Tax — Madras General Sales Tax Act (9 of 1939), S. 8 — Commission agent.

Where according to a contract between the Commissioner of Civil Supplies and the respondent firm of firewood suppliers, the respondent was given an exclusive monopoly to transport firewood from a certain place after purchasing the same from a seller of that place at a price fixed by the Government, and sell the same in the city of Madras at a price fixed by the Government (which price included cost of transport, cutting etc.) after retaining his commission at a rate fixed by the Government, the respondent could not be deemed to act on his own behalf but merely as a commission agent of the owners of firewood who were the seller-principals though the rate of commission was fixed by the Government. The respondent was therefore entitled to the benefit of S. 8 and was not liable to sales tax on the turnover. (Para 4)

Government Pleader, for Appellant; V. V. Srinivasa Ayyangar and N. R. Raghavachariar, for Respondent.

RAJAMANNAR C. J.: The State of Madras is the appellant before us. The appeal arises out of a suit brought by the respondents, a registered firm carrying on business in firewood, for a declaration that the demand from and levy of sales-tax on them by the State for the period ending 31-3-1945 were illegal and unjustified and for a refund of the amount of such sales-tax paid by them. The learned Additional City Civil Judge decreed the suit, holding that the demand and levy were illegal.

(2) The facts necessary for a disposal of this appeal may be stated briefly as the scope of the controversy in the suit lies within a narrow compass. In or about December 1943, there was acute scarcity of firewood in the City and the Government were anxious to introduce in the City a system of rationing of firewood. For this purpose it was necessary to provide for a regular and satisfactory supply of firewood. The respondent-firm, who were engaged in firewood business, submitted to the Government that they had been carrying on the business of supplying firewood as commission agents for over 25 years, that if the Government were to get all their supplies direct from the producers it would entail them much expenditure and suggested that they may be employed to procure for the Government such quantity of firewood as the Government may require for distribution in the City.

The Government apparently accepted the proposal. On 31-1-1944, an agreement was entered into between the respondent-firm and the Commissioner of Civil Supplies, Madras, under which the respondents undertook to supply such quantity of firewood as the Commissioner may from time to time require from the private forests and topes in particular areas of Chingleput and Nellore districts. The respondents who were described as the "suppliers" were given exclusive monopoly to transport the firewood from these areas to the City. The firewood was to be supplied at prices which were fixed from time to time by the Government as the wholesale price for firewood within the City of Madras. This price was to be paid by the Collector of Madras to the suppliers. Paragraph 6 of this agreement is as follows:

> "It is understood that ordinarily the suppliers will acquire the firewood by contract with the owners of the topes in the said areas ..... The price fixed as the proper price for the same shall be in relation to the sale price such that the suppliers (after paying the purchase price and the expenses of cutting, transport and supply etc.) will have such margin of profit as the Govt. may deem fair and proper."

In pursuance of this arrangement, the course of dealings between the three parties, viz., the producers, i.e., the owners of the firewood, the respondent-firm and the Government was as follows: The respondent-firm were transporting the firewood from the areas specified and collecting from the Collector, or to be more accurate from the dealers to whom the firewood was eventually consigned, the cost of firewood supplied by them, and after retaining a sum of Rs. 0-13-0 per ton of casuarina and Re. 1-0-0 per ton of junglewood as their commission, paying over the balance to the sellers. It appears from the correspondence, that this rate of commission was fixed by the Government and agreed to by the owners of the firewood, i.e., the sellers. When, however, the respondents attempted to deduct more than the agreed rate of commission the sellers complained to the Government and we find the Board of Revenue passing proceedings warning the respondents against charging more than the agreed and fixed commission. Subsequently, there was another agreement entered into between the State and the respondent-firm on 9-10-1944, Ex. B. 4. Though the terms of this agreement were not identical with the terms of the prior agreement, there was no change in the course of dealings between the parties. A concrete instance of such dealings is to be found in a letter addressed by the Firewood Movement Officer, Nellore District, to the Collector of Nellore on 11-10-1944, Ex. A-19, wherein he states:

> "Casuarina firewood is paid for at Rs. 23-8-0 per ton delivered at Madras wharf. Of this, a sum of Rs. 0-13-0 is deducted by the Agency. This commission is authorised by the Government. The net price is therefore Rs. 22-11-0 per ton."

We are not concerned with the subsequent correspondence between the Government and the respondents and the complaints which sometimes the producers were making to the Government

against the unauthorised levy of more than the agreed commission by the respondents.

(3) The respondents-firm obtained a licence under S. 8, Madras General Sales-tax Act, as commission agents. They returned a turn-over of Rs. 8,72,914-15-9 for the year 1944-45 and submitted that they were entitled to the exemption under S. 8 of the Act. When the Sales-tax Officers demanded sales-tax on this turn-over, the respondents objected on the ground that they had been supplying the firewood on behalf of the owners of the firewood who were the principal sellers and they took only such commission as was fixed by the authorities. This objection was, however, overruled. The Deputy Commercial Tax Officer held that having regard to the nature of the transaction and other attendant circumstances the business of the respondents could not be considered to have been done on commission basis and hence their entire turn-over was liable to sales-tax. The respondents filed an appeal to the Commercial Tax Officer, Madras, but the appeal was dismissed. The appellate authority took the view that though the respondents had been taking only a sum of Re. 0-13-0 or Re. 1-0-0 for every ton of firewood supplied to the Commr. of Civil Supplies, they really sold the firewood to the Commr of Civil supplies in fulfilment of a contract entered into by them as owners and they could not therefore be treated as selling agents of the persons from whom they got the firewood; that they were not also buying agents for the Commissioner of Civil Supplies; and they were therefore clearly liable, as dealers, to be taxed under the Madras General Sales-tax Act. Thereupon the suit out of which this appeal arises was filed.

(4) The application of S. 8 to the respondents depends upon a determination of the nature of the concerned transactions, i.e., we have to ascertain whether the respondents were buying or selling for an agreed commission on behalf of known principals. If, from the course of dealings it is clear that the respondents were buying or selling on their own behalf, then of course they will not be entitled to the benefit of the provisions of S. 8. In our opinion, on the fact of the case, as to which there is no dispute, only one conclusion is possible, viz., that the respondents were acting merely as commission agents of the owners of the firewood, who were the known seller-principals. Though the language of the agreement, Ex. B. 4 may, taken by itself, support the contention that the respondents were treated by the Government as the sellers, there can be no doubt that the Government never treated the respondents that way. The Government knew, and proceeded throughout on the basis that the sellers were the persons who owned the firewood.

The Government, instead of themselves buying the firewood from the owners, gave a sort of monopoly to the respondents to procure from the sellers the firewood and to supply them, i.e., the Government. It was agreed, or in any event it must be taken as an implied terms of the agreement between the parties, that the respondents should get a commission, which itself was fixed by the Government. Ordinarily no doubt it is the principal who fixes the commission payable to the commission agent; but it must not be overlooked that we are dealing with a set of circumstances out of the ordinary way. There was an emergency and the Government were acting under extraordinary powers conferred on them by emergency legislation in fixing the prices and in controlling the movement and distribution of essential commodities like firewood. That is why we find the Government in the interest of all parties, fixing the commission payable to the respondents as agents for the owners of the firewood. The Govt. having proceeded all along on the assumption that all that the respondents were entitled to was commission at a fixed rate, cannot now claim to treat them as independent dealers. We agree with the learned trial Judge's finding that the plaintiff's dealings come within the meaning of S. 8 of the Act and that therefore they are not liable to pay the tax.

(5) The appeal therefore fails and is dismissed with costs.

C/R.G.D. Appeal dismissed.

A.I.R. 1953 MADRAS 592 (Vol. 40, C.N. 230)

GOVINDA MENON J.

Rajaratna Vadugunatha Pillai, Petitioner v. Srinivasa Raghava Aiyangar and others, Respondents.

Civil Revn. Petn. No. 584 of 1951, D/- 16-10-1952.

Court-fees Act (1870), S. 17 — Alienations in favour of different persons at various times and places.

Where the guardian of the plaintiff, when he was a minor alienated minor's properties in favour of various defendants at various times and places, the cause of action as against all the defendants is not the same. Each of the alienations is a different subject and in an action against them court-fee has to be paid separately on each of them. AIR 1930 Mad 833 (FB); AIR 1950 Mad 155, Disting. (Para 1)

Anno: C. F. Act, S. 17 N. 2 Pt. 18, N. 16 Pt. 1.

N. Rajagopala Iyengar, for Petitioner; Government Pleader and Srinivasa Raghava Iyengar, for Respondents.

CASES CITED:

(A) ('30) AIR 1930 Mad 833:
59 Mad LJ 469 (FB)

(B) ('50) AIR 1950 Mad 155:
1949-2 Mad LJ 565

JUDGMENT: The order of the learned Subordinate Judge directing court-fee to be paid on the several alienations separately is correct. This is a case where the fourth defendant as guardian of the plaintiff when he was a minor alienated minor's properties in favour of various defendants at various times and places. It cannot be said that the cause of action as against all the defendants is the same. But it is contended on behalf of the petitioner that the subject is the same and therefore S. 17, Court-fees Act would not be applicable. What that section says is that where a suit embraces two or more distinct subjects court-fee has to be paid separately on the value of each subject and not on the aggregate value of all the reliefs. There is no doubt that each of the alienations is a different subject and court-fee has to be paid on them separately. The learned advocate for the petitioner relies upon two decisions of this Court in — 'Parameswara Pattar, in re', AIR 1930 Mad 833 (FB) (A) and — 'Thangaswami Pillai v. Dhanabagyammal', AIR 1950 Mad 155 (B). Neither of these cases is one to set aside the alienations in favour of different persons at different times and in my opinion these cases cannot apply.

(2) This civil revision petition is dismissed with costs. The petitioner will be given two months' time from this date to pay the court-fee.

C/H.G.P. Revision dismissed.

A. I. R. 1953 MADRAS 593 (Vol. 40, C. N. 231)

SUBBA RAO J.

Bojja Venkataraju, Petitioner v. The State of Madras, represented by the Secretary to Government, Local Administration Dept., Fort St. George, Madras, Respondent.

Writ Petn. No. 200 of 1952, D/- 12-9-1952.

Madras Village Panchayats Act (10 of 1950), Ss. 47 (1) and 131 — Removal of President — Legality.

The Inspector of Local Boards acts illegally in removing the President under S. 47 (1) in respect of acts alleged to have been committed by him prior to the date when the Act came into force. (Para 5)

Neti Subramaniam and J. V. Krishna Sarma, for Petitioner; V. V. Raghavan, for the Govt. Pleader, for the State.

ORDER: This is an application under Art. 226, Constitution of India for issuing a writ of certiorari to quash the order of the Government of Madras dated 28-8-1951 in R. O. C. No. 65013-50 H. 4.

(2) The petitioner was elected president of the Panchayat Board, Bhogapuram, Pithapuram taluk in the year 1940. The Madras Village Panchayats Act (Act 10 of 1950) came into force on 1-4-1951. After the Act came into force, on 31-7-1951, the Inspector of Local Boards issued a notice to the petitioner to show cause why he should not be removed from his office. In that notice, four irregularities alleged to have been committed by the petitioners were detailed:

1. The President failed to convene meetings of the Panchayat Board in May and November 1948, January, February, April, June, July, August and November 1949 and in the months of June, July, August, October and November 1950.

2. When three members of the Panchayat Board ceased to be members for not attending three consecutive meetings, he failed to report the same to the authorities concerned.

3. He was favouring Prathipadu hamlet of Bhogapuram in preference to Bhogapuram, as he was residing in that place.

4. He did not afford access to Harijan members to attend the meetings and that they were denied access to enter the Panchayat Board Office at the time of meetings.

(3) The petitioner submitted explanation denying the allegations. The Inspector of Local Boards made an order dated 28-8-1951 removing the said Bojja Venkataraju from the office of the President of the Bhogapuram Panchayat Board with effect from 4-9-1951. The petitioner filed an appeal to the Government and the Government declined to interfere with the order of the Inspector of Local Boards. Mr. N. Subramaniam, the learned counsel for the petitioner raised before me three points:

1. The Government and the Inspector of Local Boards were actuated by mala fides in removing him from the office.
2. That the petitioner's removal is contrary to the express provisions of S. 47 (1), Madras Village Panchayats Act of 1950 as all or most of the acts complained of were done long before that Act came into force.
3. Neither did the notice state that the irregularities alleged to have been committed by the petitioner were wilful nor was there a finding that the irregularities were wilful within the meaning of that section.

(4) The question of mala fides was based upon the following allegations: In the village, there were two groups of Congressmen, one the ministerial group and the other anti-ministerial group. The petitioner belonged to the anti-ministerial group. An attempt was therefore made through the Secretary of the All India Congress Committee to influence the Minister in charge to amalgamate Bhogapuram Panchayat with the neighbouring Panchayat Board and when that attempt failed, to get the petitioner removed from the office. To substantiate this grave allegation, the learned counsel for the petitioner stated that petitions were sent through the Secretary, All India Congress Committee, who forwarded the same with his recommendation to the Minister-in-charge, and that the Minister in charge took personal interest in the file and expeditiously passed orders within a month. A perusal of the records does not support the allegations made against the Government. The records submitted to the Court disclose that a petition for amalgamation was sent through the Secretary, All India Congress Committee who forwarded it to the Minister in charge with a note "Please look into the matter and do the needful."

But the same records disclose that notwithstanding the recommendation of the Secretary, the Government directed the Inspector of Local Boards to make an enquiry and he reported that amalgamation was not in the interests of the Panchayat Boards. Accepting the recommendation, the Government dropped the proposal. Far from showing that the Government was influenced by the recommendation of the Secretary, it shows that notwithstanding the recommendations, they disposed of the matter on the merits in favour of the petitioner. Then it is said that the petition mentioned in the affidavit was not the petition forwarded to the Minister prior to the dropping of the amalgamation proceedings, but a petition sent subsequently. No doubt, an allegation to that effect was made in the affidavit and it was not specifically denied in the counter, but the records submitted to the Court do not show that any such petition was forwarded to the Government. If it was sent, just like the other petition, it would have found a place in the records.

I cannot therefore accept the allegation that some other petition was sent with the recommendations of the Secretary of the All India Congress Committee to the Minister-in-charge. From the mere fact that the petitioner belonged to the opposite group working against the official Congress, and from the other laudable circumstance that the Secretariat disposed of the matter expeditiously, I find it impossible to hold that either the Government or the Inspector of Local Boards were influenced by the ministerial group or through some other influential quarter. I hold on the record placed before me that the petitioner failed to substantiate the allegations made in the petition. I must once again state what I have been stating in many similar other applications before me, that while it is necessary in the interests of our country that the Government and their officials should act bona fide in discharge of their duties, it is equally important that members of the public should not make grave and unfounded allegations against the Government unless they are in a position to substantiate the allegations made.

(5) There is some force in the next argument advanced by the learned counsel for the peti-

tioner. The learned counsel argued that the Inspector of Local Boards acted illegally in removing the President under S. 47(1), Madras Village Panchayats Act, 1950 in respect of acts alleged to have been committed by the petitioner prior to the date when the Madras Village Panchayats Act came into force. Section 47(1) reads:

"The Inspector may, by notification and with effect from a date to be specified therein, remove any president or vice-president who, in his opinion, wilfully omits or refuses to carry out or disobeys the provisions of this Act or any rules, by-laws, regulations or lawful orders issued thereunder, or abuses the powers vested in him."

This Act came into force on 1-4-1951. Prima facie, therefore, the omission or refusal to carry out, or disobedience to the provisions of the Act or the rules framed thereunder must necessarily relate to the acts committed, or omissions made, after the Act came into force. But the learned Government Pleader contended that by reason of the transitory provision, the Inspector of Local Boards has a power to take into consideration acts done by the President at a time prior to the date when the Act came into force. He relied upon S. 131 in support of his contention. Section 131 says:

"With regard to the first reconstitution in accordance with the provisions of this Act of Panchayats in existence at the commencement thereof, and otherwise in first giving effect to the said provisions, they shall be read subject to the rules in Sch. III."

Schedule III deals with transitional provisions. There is no rule in Sch. III enabling the Inspector of Local Boards to take into consideration the acts done by the President in contravention of some provisions of a different Act. Rule 13 only saves any action taken by any authority before the commencement of the Act unless that is inconsistent with that Act. I, therefore, agree with and accept the contention of the learned counsel for the petitioner that the Inspector of Local Boards cannot take into consideration acts done or omissions made by the petitioner in his capacity as a President functioning under a different Act. Even so, the learned Government Pleader contended that the Acts taken into consideration by the Inspector of Local Boards related only to a period after 1-4-1951. Even a perusal of the counter-affidavit filed on behalf of the Government shows that all the acts were committed long prior to the Act came into force. The meetings alleged not to have been convened relate to the years 1948, 1949 and 1950. The three members were disqualified in the year 1944. The expenditure incurred by the petitioner in respect of the hamlet in which he was living related to a period ending with 31-3-1951. The Harijans were prevented from attending the office long prior to the Act came into force.

The order passed upon the said facts is, in my view, contrary to the provisions of S. 47(1) of the Act. The Inspector of Local Boards therefore acted illegally in removing the President of the Panchayat Board under S. 47(1) of the Act. For the aforesaid reasons, I quash the orders of the Inspector of Local Boards and the Government of Madras. As regards costs, I do not think this is a fit case for awarding costs to the petitioner. As I have already stated, he made grave allegations against the Government and failed to establish the same. Further, the point now raised has not been specifically stated in the affidavit filed in support of the petition. For the aforesaid reasons, I direct the parties to bear their own costs.

B/V.R.B. Orders quashed.

A. I. R. 1953 MADRAS 594 (Vol. 40, C. N. 232)

SOMASUNDARAM J.

Havildar Venkatachallam, Petitioner v. Sappar Palayam and another, Respondents.

Criminal Revn. Cases Nos. 647 and 648 and Cr. Revn. Petns. Nos. 641 and 642 of 1951, D/- 6-11-1952.

Criminal P. C. (1898), S. 145 — Duty of Court to maintain civil Court decrees.

In a case where the petitioner after going to civil Courts several times and obtaining an order in his favour, is frustrated in his attempts to be in possession by the high handed action of the counter petitioners, it is the duty of the Magistrate to support the decisions of the civil Courts and see, as far as possible, that the decrees of the civil Courts are maintained by declaring the petitioner to be in possession of the property. Otherwise it would only amount to putting a premium upon the high handed and unlawful activities of the other side. (Para 2)

Anno: Cr.P.C., S. 145 N. 10, 11, 43, 45.

A. Dorairaj, for Petitioner; Public Prosecutor, for the State.

ORDER: Cr. R. C. No. 647 of 1951: This is a revision filed by the petitioner in the lower Court against the order passed under S. 145, Cr. P. C. in M. C. No. 18 of 1951 of the file of the Additional First Class Magistrate, Saidapet, in which the counter-petitioners (respondents herein) were declared to be in possession of the disputed land. This is one of those cases where the petitioner after going to civil Courts several times obtaining an order in his favour is frustrated in his attempts to be in possession by the high handed action of the counter-petitioners. The land was assigned to the petitioner on 29-8-1924. On account of the trouble given by the counter petitioners and their attempts to disturb the possession of the petitioner herein, a suit was filed by the petitioner in O. S. No. 449 of 1926 on the file of the District Munsif's Court, Poonamallee. The title was declared to be in favour of the petitioner and possession was directed to be given to him. He filed E. P. No. 1083 of 1927 and obtained delivery of possession on 24-1-1927. The appeal against the decree and judgment of the District Munsif filed by the counter-petitioners in A. S. No. 310 of 1927, District Court, Chingleput, was dismissed on 3-5-1929. Subsequently after two years, the counter-petitioners again attempted to disturb the possession of the petitioner herein. The petitioner filed C. C. No. 1132 of 1929 before the Stationary Sub-Magistrate, Saidapet, and there the counter-petitioners gave an undertaking that they would not interfere with the possession of the petitioner herein.

(2) Things went on smoothly till 1941 and again the cr.-petnrs. attempted to disturb the possession of the petitioner. Thereupon, the petitioner filed O. S. No. 144 of 1941 on the file of the District Munsif's Court, Poonamallee, for an injunction restraining the counter-petitioners from interfering with his possession and

enjoyment and the suit was finally disposed of on 15-8-1941, giving a permanent injunction against the counter-petitioners from interfering with the possession of the petitioner. Having failed in their attempts the counter-petitioners clandestinely in league with the village Munsif, who happened to be on their side, obtained patta for the land. Thereafter on representations being made by the petitioner to the higher authorities, the patta was cancelled and re-transfer was ordered on 12-3-1948. In spite of this, the counter-petitioners again started giving trouble and the Magistrate under these circumstances instead of declaring the petitioner to be in possession of the properties has put a premium upon the unlawful activities of the counter-petitioners and declared the counter-petitioners to be in possession of the property. It is the duty of the Magistrate in cases like this to support the decisions of the civil Courts and see, as far as possible, that the decrees of the civil Courts are maintained. Otherwise it would only amount to putting a premium upon the high handed and unlawful activities of the other side. In the circumstances, I declare the petitioner to be in possession of the property and forbid and restrain the counter-petitioners (respondents) herein from interfering with the possession of the petitioner.

(3) In Cr. R. C. No. 648 of 1951 the petitioner has purchased a portion of the property from the petitioner in Cr. R. C. No. 647 of 1951 and he should therefore be declared to be in possession of the portion of the property which he has purchased. The counter-petitioners are also restrained from interfering with the possession of the petitioner in Cr. R. C. No. 648 of 1951.

(4) The petitions are allowed.

B/D.R.R. Petitions allowed.

A. I. R. 1953 MADRAS 595 (Vol. 40, C. N. 233)

GOVINDA MENON AND
BASHEER AHMED SAYEED JJ.

J. Loomchand Sait, Appellant v. The Official Liquidators, Peerdan Joharmall Bank Ltd., Respondents.

O. S. Appeal No. 88 of 1951, D/- 17-12-1952.

(a) Companies Act (1913), S. 179 — Sanction of Court.

In the absence of specific terms that sanction should be previously obtained, sanction required by the Official Liquidators could be given by the concerned authority at any time, even after the proceedings have actually been instituted or even in the course of the proceedings. Case law discussed. (Para 7)

Anno: Companies Act, S. 179 N. 1.

(b) Companies Act (1913), Ss. 177, 282A — Form of complaint.

Even if the proceedings are not in the name and on behalf of the company, they must be deemed to be by the company through its liquidators when the Official Liquidators have taken the proceedings in the matter of the company in liquidation. 18 All 198 (FB), AIR 1933 All 789 (FB), Rel. on. (Para 8)

Anno: Companies Act, S. 282A N. 1.

(c) Constitution of India, Art. 20(2) — Double punishment — (Companies Act (1913), S. 282A) — (Criminal P. C. (1898), S. 403).

Section 282-A of the Companies Act cannot be construed as providing for a double punishment. It is only an alternative punishment arising when default is committed. Section 282-A does not offend against Art. 20(2) of the Constitution. (Para 9)

Anno: Com. Act, S. 282-A N. 1; Cr.P.C., S. 403 N. 1.

(d) Banking Companies Act (1949), S. 45G — Absence of rules.

It cannot be validly urged that the proceedings that have been instituted and have been investigated into by the Judge sitting on the Original Side and dealing with company matters are without jurisdiction or that they are in any way defective or vitiated by reason of the non-framing of the rules under S. 45-G. (Para 10)

(e) Banking Companies Act (1949), Ss. 45A, 45C — Summary trial.

The proper and competent Court contemplated by the scheme of the Act would only be the High Court and not the Presidency Magistrate's Court, even if the offence has been tried in a summary way. AIR 1950 Mad 657 and AIR 1944 Mad 424, Distinguished. (Para 11)

(f) Banking Companies Act (1949), S. 45-C — Summary trial.

Merely because the procedure followed has been that of a warrant case, while the case is being tried in a summary way, it cannot be said that the Judge dealing with proceedings for the winding up of the Banking company was not competent to try the offence. (Para 12)

(g) Companies Act (1913), S. 282-A — Fraudulent intention.

To render the accused liable to the penalties imposed by S. 282-A there should be proof of fraudulent intention. 7 Common Pleas 405, (1906)-1 KB 534, Ref. (Para 13)

Anno: Companies Act, S. 282A N. 1.

D. Suryaprakasa Rao and T. K. Raman Nambisan, for Appellant; A. Balasubramaniam, for Respondents.

CASES CITED:

(A) ('48) AIR 1948 PC 82: 49 Cri LJ 261
(B) ('51) AIR 1951 Mad 610: 1951-1 Mad LJ 101: 52 Cri LJ 405
(C) ('37) AIR 1937 Mad 667: ILR (1937) Mad 841
(D) ('53) AIR 1953 Cal 153: 56 Cal WN 18: 1953 Cri LJ 389
(E) ('22) AIR 1922 Mad 51: 45 Mad 167
(F) ('37) AIR 1937 All 714: ILR (1937) All 779: 39 Cri LJ 38
(G) ('47) AIR 1947 Mad 343: 1947-1 Mad LJ 54
(H) ('20) AIR 1920 Cal 113(2): 47 Cal 555 (FB)
(I) ('48) AIR 1948 Cal 42: 48 Cri LJ 236
(J) ('49) AIR 1949 Cal 689
(K) ('96) 1896 All WN 28: 18 All 198 (FB)
(L) ('33) AIR 1933 All 789: 55 All 912 (FB)
(M) ('50) AIR 1950 Mad 657: (Cri. R. C. No. 703 of 1949): 1950-1 Mad LJ 314
(N) ('44) AIR 1944 Mad 424: (Cri. R. C. No. 393 of 1943): 1944-1 Mad LJ 390: 46 Cri LJ 347
(O) ('36) AIR 1936 All 830: 38 Cri LJ 111 (FB)
(P) 7 Common Pleas 405
(Q) (1906) 75 LJKB 329: (1906) 1 KB 534
(R) (1901) 70 LJ Ch 753: (1901) AC 477
(S) (1877) 36 LT 124: 4 Ch D 140
(T) (1896) 65 LJ Ch 290: (1896) 1 Ch 331
(U) ('49) AIR 1949 Mad 657: 50 Cri LJ 917

BASHEER AHMED SAYEED J.: The appellant in this appeal is one Loomchand Sait, who was the Managing Director of the Peerdan Joharmal Bank Ltd., in liquidation. He has preferred this appeal against the order of Krishnaswami Nayudu J. who held that the appellant had acted fraudulently and had brought himself within the purview of S. 282-A of the Companies Act. The learned Judge found all the charges framed against him proved and sentenced him to pay a fine of Rs. 1000 and directed him to pay Rs. 42, 527-12-9, deliver the jewels, particulars of which were given in the schedule to the charge excepting some three items referred to in the judgment and also to pay a sum of Rs. 87,000 plus Rs. 199-12-0 being the value of the securities wilfully misapplied by the said appellant on or before 12-9-1951. In default, he ordered that the appellant should undergo imprisonment for two years. The appellant was given time till 12-9-1951 to which date the matter stood adjourned. On 14-9-1951, the appellant having failed to comply with the order, dated 29-8-1951, the matter came up before the learned Judge on 14-9-1951. The respondent was ordered to undergo imprisonment as directed in the order dated 29-8-1951 for a period of two years and that the necessary warrant should issue. This appeal is preferred against the said order.

(2) The earlier history of the application taken out by the Official Liquidators of the said Peerdan Joharmal Bank Ltd., in Thiruchirapalli (in liquidation) under S. 282-A of the Companies Act, for passing appropriate orders against the respondent, has been elaborately set out in the order passed by Krishnaswami Nayudu J. under appeal, and it is therefore unnecessary to traverse the entire ground in this judgment. Suffice it to mention that the application of the liquidators in its final form was ordered by Mack J. on 11-1-1950 by which he held that the appellant was liable to bring in a sum of Rs. 2,00,000, being the value of the securities, jewels and of the unaccounted cash balance. He was directed to pay a fine of Rs. 1000 under S. 282-A and ordered to pay up within three months the sum of Rs. 2,00,000 and in default sentenced to suffer imprisonment for a period of two years. The appellant preferred O. S. A. No. 20 of 1950 against this order of Mack J. The appellate Court set aside the order of Mack J. and remanded the application to be heard and disposed of in an elaborate judgment delivered by the Honourable the Chief Justice sitting with Viswanatha Sastri J. On remand, Krishnaswami Nayudu J. after hearing the evidence on behalf of the applicants, the Official Liquidators, framed three charges against the appellant on 25-4-1951 under S. 282-A of the Companies Act. After holding an elaborate enquiry into the said three charges, which have been set out in the order of the learned Judge, and after giving every opportunity to the appellant who was represented by counsel to cross-examine the applicant's witnesses and also adduce defence evidence, the learned Judge, as already stated, came to the conclusion that the charges had been proved and imposed the sentence of fine of Rs. 1000 and imprisonment for two years.

(3) When the appeal came on for hearing before us the appellant wanted legal counsel to be appointed by the Court to conduct his case, but we could not persuade ourselves to comply with his request. Thereupon, the appellant engaged the services of Mr. Rajah Aiyar assisted by three other counsel. Mr. Rajah Aiyar argued the appeal at length and placed before us every aspect of the case which was in favour of the appellant. We are thankful to Mr. Rajah Aiyar for his able argument.

(4) After having heard the arguments of Mr. Rajah Aiyar and those of the Official liquidators and having perused the entire evidence in the case, both oral and documentary, and having considered all the legal points raised by the learned counsel on both sides and having given our anxious consideration to the case, we have come to the conclusion, for the reasons set out hereinafter, that there are no merits in this appeal, that the order under appeal should be confirmed and that the appeal dismissed.

(5) The first point that Mr. Rajah Aiyar has urged on behalf of the appellant is that no leave has been obtained by the Official Liquidators for instituting proceedings against the appellant under S. 282-A of the Companies Act, as required by S. 179 of the said Act. Mr. Rajah Aiyar has invited our attention to the language of S. 179(a) of the Companies Act which is to the following effect:

> "The Official Liquidator shall have power, with the sanction of the Court, to do the following things: (a) to institute or defend any suit or prosecution, or other legal proceeding, civil or criminal, in the name and on behalf of the company, etc."

and contends that the sanction of the Court for instituting criminal proceedings against the appellant was a condition precedent and that, inasmuch as no sanction was obtained by the Official Liquidators for the filing of the present application against the appellant the proceedings against him are vitiated by this serious legal defect. He also drew our attention to the fact that the order of appointment given to the Official Liquidators also did not contain any power authorising the Official Liquidators to institute proceedings under S. 179 (a) of the Companies Act. The first order passed by Mack J. on 22-11-1949, it has been pointed out, does not give authority to the Official Liquidators to institute criminal proceedings under S. 282-A, but only under S. 238-A of the Act.

The notice of motion alone mentions for the first time S. 282-A along with other sections. This section has been introduced by the Official Liquidators without sanction from the Court in the said notice of motion. Therefore, it is urged by Mr. Rajah Aiyar that the proceedings are incompetent and improper. If reliance were to be placed on the order dated 11-1-1950, Mr. Rajah Aiyar would argue, that that order having been set aside by the appellate Court which treated the application as one under S. 238-A did not hold the field any more. So, it was not of any avail, though it mentions that the advocate of two creditors made a request that the appellant might be dealt with under S. 282-A and that action was therefore taken under that section by the learned company Judge. Sec. 282-A says that action has to be taken "on the complaint of the company" and that it was not enough that the creditors of the company made a request to treat the application of the liquidators as one under S. 282-A; nor was it open to the learned Judge to take action 'suo motu', no complaint having been made under S. 282-A of the Act.

(6) It must, however, be observed that though the appellate order says that S. 238-A did not apply and directed that the application should be enquired into and disposed of under S. 282-A still the point of want of previous sanction, was not raised before the said appellate Court, nor even before the learned company Judge, who passed the order under appeal.

(7) We have carefully examined the language of S. 179(a) of the Companies Act and also the various other sub-clauses of which this section is comprised. We do not think that the language of the section warrants the interpretation put upon it by the learned counsel for the appellant that it enacts that previous sanction should be obtained by the Official Liquidators for instituting criminal proceedings against the defaulting managing director. If it were the intention that previous sanction should be obtained for instituting criminal proceedings, the language of the section would have been in a mandatory form as contained in various enactments such as the Civil Procedure Code, and the Criminal Procedure Code and certain other Acts where it has been provided that "no suit or proceedings shall lie or be taken without the previous sanction" of the Court or the authority concerned (Vide Ss. 195 and 196, Cri. P. C., S. 92 C. P. C., S. 70 of the Stamp Act, S. 223 of the Local Boards Act and S. 399 of the City Municipal Act). Far from being a prohibitory section, as is the case in other enactments, the section in the Companies Act is an enabling one which says that the liquidators shall have power, with the sanction of the Court, to institute criminal proceedings. We do not think that there is sufficient justification for us to import into the language of S. 179 the words "previous sanction".

If the words "previous sanction" were to be imported into this section, then the administration of the affairs of the company in liquidation under the various sub-clauses of this section would become well nigh impossible, for, it would then become necessary that the liquidators should run up to the Court even for ordinary acts of administering the properties and affairs of the company. At that rate, it would be inconceivable that the administration of the company in liquidation could ever be carried on. So, it is that the section has provided in general terms that the liquidators shall have power, with the sanction of the Court, to do acts which are enumerated in the various sub-clauses without laying it down that such sanction is a condition precedent to the taking of steps for the administration of the company by the Official Liquidators. On the point that previous leave is necessary, the learned counsel has invited our attention to a decision in — 'Gokulchand Dwarkadas v. The King', AIR 1948 P. C. 82(A), wherein it has been observed that S. 537 Cri. P. C. does not cure the lack of leave. We do not think that in the circumstances of this case that decision has any applicaton. Reference has also been invited to the decisions in — 'Thangamani In re, AIR 1951 Mad 610 (B), — 'Dowood Mohideen v. Sahabdeen', AIR 1937 Mad 667 (C), to support the contention that the general power to institute proceedings is not sufficient and that leave is a condition precedent for the filing of the complaint under the Companies Act. On the facts of this case, we are unable to see that these decisions have any bearing.

In the absence of specific terms that sanction should be previously obtained, it follows, as a necessary corollary, that the sanction required by the Official Liquidators could be given by the concerned authority at any time, even after the proceedings have actually been instituted or even in the course of the proceedings. On the materials placed before us by the Official Liquidators, we find that, as a matter of fact, the learned company Judge has given the sanction to institute proceedings under S. 238-A of the Companies Act even before the institution of the proceedings took place and has also given further sanction under S. 282-A of the Act, in the course of the application taken out by the liquidators for proceedings against the appellant. In the order passed by the learned company Judge in Appln. No. 3054 of 1949 on 22-11-1949, the Official Liquidators were directed to file an application for the commitment of the appellant to prison for violation of the directions given to him on 7 and 14-10-1949. In the notice of motion in Appln. No. 4572 of 1949, the applicants prayed for appropriate orders under Ss. 238-A and 282-A. This notice of motion was filed under four sections, viz., 183, 185, 238-A and 282-A of the Companies Act and under Rule 9 of the Original Side rules and under the Banking Companies Ordinance dated 23-9-1949. Paragraphs 21 and 22 of the affidavit filed in support of the notice of motion in Appln. No. 4572 of 1949 mention that the appellant had rendered himself liable to be dealt with under Ss. 238-A and 282-A of the Companies Act and that it was therefore, just and necessary that the Court should be pleased to summon Loomchand Sait, the appellant, and commit him for contempt of Court and pass appropriate orders under Ss. 238-A and 282-A of the Companies Act. It is, therefore, clear that the Court was approached by the Official Liquidators not merely under S. 238-A but also under S. 282-A of the Companies Act.

While the order of Mack J. proceeded at the outset to state that he had treated the application substantially as one under S. 238-A for punishing Loomchand Sait for breach of his obligations under sub-ss. 1 and 2 of S. 238-A, in the course of his order, at a later stage, the learned Judge has observed as follows:

> "There is abundant material before me to commit Loomchand Sait immediately to prison to undergo the maximum sentence of two years rigorous imprisonment on these counts proved against him under S. 238-A (1)(b). I should have had no hesitation in adopting this course but for a plea made by Mr. Ganapati Aiyar on behalf of the two creditors that in their own interests and in the interests of the general body of creditors action may be taken instead under S. 282-A of the Companies Act as, if Loomchand Sait is sent to prison, the creditors may not recover a substantial dividend as they would be deprived of his assistance in recovering the bank's liabilities ..... I have decided to give Loomchand Sait in view of his having run this bank for nearly 17 years an opportunity of implementing his assertion that he can still find 16 annas in the rupee to be paid to his creditors and to apply to this case S. 282-A under which also this application has been filed and not to send Loomchand Sait immediately to prison though he richly deserves it in view of my findings under S. 238-A."

In para. 7 of his order, the learned Judge further discusses the scope of both Ss. 238-A and 282-A and the various requirements that have to be satisfied for action being taken under either of the sections and finally winds up by saying that it would be manifestly desirable in the interests of winding up administration and that he could see no legal impediment in the way of S. 282-A being applied in suitable cases in the interests of creditors, although the immediate commitment to prison of the delinquent director or managing agent under S. 238-A would be legally justified.

A reading of the relevant passages of the order of the learned company Judge referred to and extracted above would clearly prove that even if it were contended with any force that previous sanction had not been accorded to the Official Liquidators for instituting criminal proceedings, such sanction had been actually given to the Offi-

cial Liquidators in the course of the proceedings by the learned company Judge. Since we are of the opinion that S. 179 of the Companies Act does not preclude the giving of sanction by the concerned authority even in the course of the proceedings or on application, we do not think that there is anything wrong in the learned company Judge having accorded sanction in the course of the proceedings. In this view, it will be futile to contend that the Official liquidators had not obtained sanction from the Court for instituting criminal proceedings which have terminated in the conviction and sentence of the appellant. We think S. 179 has been substantially complied with, there being no statutory prohibition against proceedings being instituted without the previous sanction of the Court. S. 17 of the Presidency Towns Insolvency Act, we may state, has been interpreted to mean that sanction could be given even during the course of the proceedings.

The learned Official Liquidators have invited our attention to the decisions in —'Mrityunjay v. Provot Kumar', AIR 1953 Cal 153(D); —'The Official Receiver, Coimbatore v. Kanga', AIR 1922 Mad 51(E); —'Emperor v. Bishan Sahai Vidyarthi', AIR 1937 All 714(F); —'Subramania Aiyar v. The Pondanur Bank Ltd. Thiruvadamarudur', AIR 1947 Mad 343(G), and —'Laduram Mathmul v. Nandalal', AIR 1920 Cal 113(2)(H), wherein the broad principle has been enunciated that the grant of leave is a matter between the Court and the receiver or the Official Liquidators and that the sections requiring leave of the Court in the Companies Act and in the Insolvency Acts are only administrative provisions which are the matters entirely between the Official Liquidators or the Official Receivers and the Court. It is also urged by the learned Official Liquidators that if leave is not obtained, it will be merely an error which can be rectified at a later stage. In the view we have taken, we do not think that we need go into this question any further. The learned Official Liquidators have invited our attention to a comparison of S. 171 with S. 179 of the Companies Act and they urge that the language of the two sections is different, that whereas S. 171 of the Companies Act requires that leave should be obtained as a condition precedent, the same is not the case with S. 179 of the Act. They have also relied upon the decisions in —'Bhagirath Chandra v. Emperor', AIR 1948 Cal 42(I) and —'Sunilchandra v. Krishnachandra', AIR 1949 Cal 689(J), where even the requirements of S. 171 have been liberally interpreted.

(8) Mr. Rajah Aiyar has next urged that the complaint in this case by the Official Liquidators ought to have been filed in the name and on behalf of the company, and that, in this case, it has been filed merely by the Official Liquidators of the company. The proceedings are not, according to him, in the name and on behalf of the company as required by law. He invites our attention to S. 177 of the Companies Act, which provides for the formalities to be observed in proceedings under the Companies Act. S. 177 is to the following effect :

> "The Official Liquidator shall be described by the style of the Official Liquidator of the particular company in respect of which he is appointed, and not by his individual name."

The question is whether the requirements of this section have been substantially complied with by the form in which the proceedings have been instituted by the Official Liquidators of the company before the Court dealing with the company matters. It is true that S. 282-A says that action is to be taken on the complaint of the company and Mr. Rajah Aiyar would urge that the Judge cannot take any action 'suo motu'. In this case, the Official Liquidators it is that have moved the Court for the investigation into the default committed by the appellant and, as has already been pointed out, the notice of motion filed by the liquidators has been filed only under S. 282-A as well as the other sections. There is, therefore, no question of the Judge taking action 'suo motu' in this case. The complaint has been by the liquidators on behalf of the company for which they have been appointed Official Liquidators. Besides, an examination of the cause-title of the application and the notice of motion that have been taken out by the liquidators clearly set out that the applications are in the matter of the Companies Act 7 of 1913 and in the matter of the Peerdan Joharmal Bank Ltd. in liquidation and the proceedings are stated to be between N. Krishnaswami Aiyangar, the petitioner and Peerdan Joharmal Bank Ltd. the respondent and also between A. Balasubramaniam and C. S. Vidyasankaran, joint Official Liquidators, applicants and J. Loomchand Sait, respondent.

It is true that the applicants in the said application and the notice of motion have not been described as the Peerdan Juharmal Bank Ltd. (in liquidation) by the joint official liquidators, Messrs. A. Balasubramaniam and C. S. Vidyasankaran. The question is as to whether by their inscribing their name as they have actually done instead of adopting the form which they should have done, it would be so serious a defect as to vitiate the entire proceedings and whether it would go to prove that the proceedings have not been in the name and on behalf of the company. In our opinion, the non-compliance with this formal requirement in the matter of the description of the applicants in the said notice of motion and the application, cannot and will not alter the substance of the applications which, we have to state, are substantially in the name and on behalf of the company. In — 'Muhammad Yusuf v. The Himalaya Bank Ltd', 18 All 193 (F.B.) (K), it has been held that where the Official Liquidator described himself merely as "the Official Liquidators, the Himalaya Bank Ltd, in liquidation" and did not describe himself as "The Himalaya Bank Ltd, in liquidation, the plaintiff", there was a substantial compliance with the provisions of Act 6 of 1882 (the Indian Companies Act) and that even if it was considered that any amendment was necessary under the Civil Procedure Code such an amendment would not introduce a new plaintiff into the suit so as to let in the operation of S. 22 of Act 15 of 1877, Limitation Act. Even so, in — 'Shiamlal Diwan v. Official liquidator, U. P. Oil Mills Co. Ltd', AIR 1933 All 789 (F.B.) (L), the learned Judges have held that even if the proceedings are not in the name and on behalf of the company, they must be deemed to be by the company through its liquidators when the Official Liquidators have taken the proceedings in the matter of the company in liquidation. We do not think, therefore, that there is any grave defect in the omission committed in the manner and form of description of the applicants in the two applications that have been filed by the Official Liquidators in this matter.

(9) A more substantial point of law that has been urged by Mr. Rajah Aiyar, the learned

counsel for the appellant, is that under Art. 20(2) of the Constitution of India, no person can be prosecuted and punished for the same offence more than once. He contends that S. 282-A of the Companies Act provides a double punishment in that it provides for a fine not exceeding a thousand rupees also a term of imprisonment not exceeding two years for the same offence. The terms of S. 282-A are as follows :

"Any director, managing agent, manager or other officer or employee of a company who wrongfully obtains possession of any property of a company, or having any such property in his possession wrongfully withholds it or wilfully applies it to purposes other than those expressed or directed in the articles and authorised by this Act, shall, on the complaint of the company or any creditor or contributory thereof, be punishable with fine not exceeding one thousand rupees and may be ordered by the Court trying the offence to deliver up or refund within a time to be fixed by the Court any such property improperly obtained or wrongfully withheld or wilfully misapplied or in default to suffer imprisonment for a period not exceeding two years."

A reading of this section shows that what is provided for in the first instance is a fine not exceeding Rs. 1000 to be imposed upon the director or other person found guilty and an order to be passed by the Court directing the person complained of to deliver or refund the property improperly obtained or wrongfully withheld or wilfully misapplied by him; and in the second place, the section goes on to provide that, if the person against whom the fine and the order have been passed commits default, he may be ordered to suffer imprisonment for a period not exceeding two years.

This default clause imposing a term of imprisonment might come into operation either in case the person fined fails to pay the fine imposed or when he fails to comply with the order passed against him. It may also be that the said default clause might come into operation when the person against whom the fine and the order have been passed commits default in both. The intention and the language of the latter part of S. 282-A seem to be that there should be a term of imprisonment imposed upon the person, who has already been fined and ordered to do a certain thing, if he fails to comply with either or with both. If the words "of either or both" had been inserted between the words "default" and "to suffer", the language of the section would have become complete and explicit. Though these words do not actually occur in the language of the section, still we think that what has been aimed at by the section is only that in default of either paying the fine or complying with the order for delivery etc., or both, there should be a punishment by way of imprisonment for a term not exceeding two years. We do not think that the language of the section is capable of being so interpreted as to say that it provides for a double punishment for one and the same offence.

It provides a punishment in the first instance on proof of an offence, and enables the Court to pass an order along with the punishment, and in default of the party complying with the payment of the fine or the compliance with the order, a punishment for such default has been prescribed. It is only an alternative punishment arising when default is committed. It is quite in consonance with the principles of criminal jurisprudence on which our criminal laws are based, & we do not think that this S. 282-A offends against Art. 20(2) of the Constitution of India. Though the commentaries so far available on this Art. 20(2) are meagre, still, the commentaries that have been placed before us, viz., that of Mr. Basu on the Indian Constitution and the Constitution of India by Mr. N. R. Raghavachariar do not enable us to say that S. 282-A of the Companies Act, could be construed as providing for a double punishment. The commentators have discussed the point of double punishment while dealing with Art. 20 (2) and have opined that the word "and" in the phrase "prosecuted & punished" could be taken either as a conjunctive or a disjunctive word. Whatever might be the comment on that aspect of the language contained in Art. 20 (2), in this case, there can be no substance in the contention that the appellant has been prosecuted and punished twice over for the same offence; much less is it a case of the appellant being simply punished twice over for the same offence. In other words, whether the word "and" occurring in the phrase "prosecution and punished" be simply taken as a conjunction or a disjunctive "word", in our opinion, it cannot be contended with any force that the appellant in this case has been either prosecuted twice or punished twice for the same offence. Therefore, we are unable to agree with the argument of the learned counsel for the appellant that the punishment imposed on the appellant in this case would amount to a double punishment for one and the same offence.

(10) The third point urged by the learned counsel for the appellant is that inasmuch as the present proceedings have been also taken under the Banking Companies Act and so far no rules having been framed by the Court under the Banking Companies Act, as required by S. 45 (G) of the said Act, the proceedings out of which this appeal has arisen must be considered to be vitiated and void. Sec. 45(G) of the Banking Companies Act is in the following terms:

"The court may make rules consistent with this Act concerning the mode of proceedings to be had for the decision of all claims or questions and all other proceedings, whether civil or criminal, which are to be decided pursuant to the provisions of Part III or Part III-A and concerning all other matters for which provision has to be made for enabling the court to effectively exercise its functions under the said provisions."

While it has not been brought to our notice that any rules have actually been framed for criminal proceedings under the said Act by the High Court, which is the Court defined under S. 45-A, no authority has been placed before us to show that simply because rules required by S. 45-G have not been framed, the proceedings taken under the Companies Act as well as the Banking Companies Act are null and void and that the High Court has no jurisdiction to inquire into the same and pass orders thereon. If the rules have not been framed as required by the said S. 45-G in our opinion, the existing rules framed under the Companies Act under which also this application has been taken out would be applicable to the proceedings in question. Even otherwise, if no rules have been framed under the Banking Companies Act under which this application is said to have been taken out since the matter is one that is dealt with on the Original Side of the High Court by the Judge dealing with company matters, we think that the procedure laid down by the Original Side rules will apply until such time as the rules

required to be proved for under S. 45-G of the Banking Companies Act, have actually been framed. In any case, we do not think that it could be validly urged that the proceedings that have been instituted and have been investigated into by the learned Judge sitting on the Original Side and dealing with company matters are without jurisdiction or that they are in any way defective or vitiated by reason of the non-framing of the rules under S. 45-G of the Banking Companies Act.

(11) In this connection, the learned counsel for the appellant has pointed out that under S. 45-G, the Court may, if it thinks fit, take cognisance of and try in a summary way any offence alleged to have been committed by any person who has taken part in the formation or promotion of the banking company which is being wound up or any past or present director, manager or officer thereof.

There is also a proviso to this section which is in the following terms:

"Provided that the offence is one punishable under the Indian Companies Act, 1913, 7 of 1913, with imprisonment for a term which does not exceed two years, or with fine which does not exceed one thousand rupees."

The second clause of this section 45-C sets forth details as to what the trying Court should do if the case is tried summarily under sub-s. 1 of the said section. To this clause also there is a further clause which says that nothing contained in Sub-s. (2) of S. 262 of the Cr. P. C., 1898, shall apply to any such trial. The third sub-clause of this section (S. 45-C) lays down thus:

"All offences in relation to winding up alleged to have been committed by any person specified in sub-sec. (1), which are punishable under the Indian Companies Act, 1913, 7 of 1913, and which are not tried in the summary way under sub-sec. (1) shall, notwithstanding anything to the contrary, contained in that Act or the Criminal Procedure Code, 1898, 5 of 1898, or in any other law for the time being in force, be taken cognizance of and tried by a Judge of the Court other than the Judge for the time being dealing with the proceedings for the winding up of the banking company."

The fourth sub-clause of the section says:

"Notwithstanding anything to the contrary contained in the Cr. P. C. 1898, 5 of 1898, the Court shall take cognisance of any offence under this section without the accused being committed to it for trial and all such trials shall be without the aid of a jury."

It is argued by the learned counsel for the appellant that in so far as the offence complained of against the appellant is one which is capable of being punished with imprisonment for a period which does not exceed two years or with fine which does not exceed Rs. 1000, the case should have been tried in a summary manner. In which case, his contention is, that, as per the Criminal Procedure Code, such cases should be tried only by a Presidency Magistrate in the Presidency town and not by the High Court. Reliance for this position is placed on the decisions in — 'K. Sundaresa Aiyar In re', AIR 1950 Mad 657 (M) and 'In re Veerappan', AIR 1944 Mad 424 (N)'. We do not think that these decisions apply to the facts of the present case. Even so, the learned counsel has invited our attention to the decision in — 'Harishchandra v. Kavindranarain Sinha', AIR 1936 All 830 (FB) (O) and argues that the High Court has no jurisdiction under S. 85 (sic) of the Companies Act. We are unable to agree with this contention. The Banking Companies Act has defined the Court as the High Court which has jurisdiction to try cases under the Banking Companies Act and the procedure has been prescribed by S. 45-C of the said Banking Companies Act, and we do not think that there has been any irregularity in the procedure followed by the Company Judge in the trial of this case. But the argument is that if the trial has been in a summary manner as contemplated by S. 45-C, the proper Court vested with the jurisdiction to try the offence would have been the Presidency Magistrate's Court and not the High Court. We do not think that we can agree with this contention for the reason that the Court has been defined in S. 45-A of the Banking Companies Act as the High Court exercising jurisdiction in the place where the registered office of the banking company which is being wound up is situated. Therefore, the proper and competent Court contemplated of the scheme of the Act would only be the High Court and not the Presidency Magistrate's Court, even if it is contended that the offence has been tried in a summary way.

(12) In the alternative, the contention of the learned counsel for the appellant is that if the offence has not been tried in a summary way under sub-s. (1) of S. 45-C, then it should have been tried by a Judge other than the Judge for the time being dealing with the proceedings in winding up of the banking company. His point is that in the present case, the procedure that has been followed is that of a warrant case, i.e., where witnesses have been first examined and the appellant has been called upon to enter into his defence. In such an event, according to the learned counsel, the Judge who should have tried this offence should not be the Judge dealing with the winding up proceedings of the Banking company but some other Judge. But, actually, in the present proceedings, the same Judge dealing with company matters has also been the Judge who tried the offence and imposed the punishment against the appellant. On this ground, the learned counsel for the appellant argues that the whole proceedings have been vitiated and they should be treated as incompetent and as a nullity. The appellant ought not to have been tried by the same Judge who was dealing with the winding up of the banking company of which the appellant has been the managing director. The Official Liquidators, however, contend that the offence, in the present case, has been tried only in a summary way but the procedure followed has been that prescribed for warrant cases. They urge that it is open to the Court which tries an offence in a summary way to adopt the procedure of a warrant case, and in this case, since the offence is one that is liable to be punished by a fine not exceeding Rs. 1000 and a term of imprisonment not exceeding two years, the Court has, in fact, tried the offence only in a summary way and not tried it as a warrant case, keeping in view the sub-cl. (1) and the proviso to S. 45-C of the Banking Companies Act.

Merely because the procedure followed has been that of a warrant case, while the case is being tried in a summary way, it cannot be said that the Judge dealing with the proceedings for the winding up of the Banking company was not competent to try the offence. Though a reading of the judgment of the learned Judge who tried the offence, 'prima facie', shows that the pro-

cedure followed has been the one prescribed for a warrant case, still it is not certain and no evidence has been placed before us to show that the offence has not been tried in a summary way. It has therefore to be presumed that the offence has been tried only in accordance with S. 45-C sub-cl. (1) and not tried as contemplated in sub-cl. (3) of the said S. 45-C. That being the case, we think that the Court which has tried the offence for which the appellant has been convicted, has jurisdiction and has exercised the power vested in it to try the offence in a summary way and the proceedings cannot, therefore, be said to be vitiated. If the case has been tried in a summary way, as we think it has been, then S. 45-C sub-cl. (2) provides that sub-cl. (2) of S. 262 of the Cr. P. C., 1898 shall not apply to any such trial. We therefore cannot feel ourselves persuaded to agree with the contention of the learned counsel for the appellant that there has been any defect such as to nullify the trial of the appellant for the offence for which he has been convicted.

(13) There was a further point raised by the learned counsel for the appellant that in this case no fraudulent intention has been proved on the part of the appellant as is required by S. 282-A of the Companies Act. When the case was remanded by the appellate Court it did observe that to render the appellant liable to the penalties imposed by S. 282-A of the Companies Act, there should be proof of fraudulent intention. The learned Chief Justice, who delivered the judgment of the appellate court has referred to the decisions in — 'Barrett v. Markham', 7 Common Pleas 405 (P) and also to the decision in — 'Madden v. Rodes', 1906-1-K. B. 534 (Q), wherein it has been laid down that the person who is proceeded against for withholding or misapplying monies belonging to the company should be proved to have had a fraudulent intention in doing so. Of course, it has been observed by the learned Chief Justice in the said judgment that fraud cannot be directly proved but it could be inferred from the circumstances. In this case, the learned Judge, who has tried this appellant, has, in the last two paragraphs of his judgment found that the Official liquidators have established that the appellant has acted fraudulently and that the appellant had brought himself to be proceeded against under Sec. 282-A of the Indian Companies Act.

The learned Judge has further observed that the whole conduct of the appellant in regard to the cash in the safe and the jewels would show his fraudulent intention to utilise public money for private purposes and that there was no question of his acting honestly, and dealing fairly with the properties belonging to the bank, that therefore, it was a clear case of fraud and dishonesty on the part of the appellant. The point urged by the learned counsel for the appellant in this connection is that the charges have been framed in a wrong manner and as the charges stand they only state that the appellant had wrongly withheld the properties in his possession and not that he had acted fraudulently or dishonestly in doing so. The essence of the charge, according to the counsel for the appellant, is merely misapplication of properties and not that he had any fraudulent intention in such misappropriation. As has been pointed out by the learned trial Judge, the fraudulent intention on the part of the appellant could be inferred from his conduct in regard to the funds and properties of the bank of which he was the managing director. We have been taken through the entire evidence, oral and documentary, in this case by the learned counsel on both sides and we do not think that any sufficient reason has been shown to us to dissent from the conclusions which the learned trial Judge has arrived at in holding that the circumstances of this case prove beyond doubt that the conduct of the appellant was motivated by a fraudulent and dishonest intention to deprive the bank of its properties.

We do not also think that there is much substance in the contention of the learned counsel for the appellant that the trial Judge had prejudged the appellant's case by his order dated the 25th April 1951 in which the learned trial Judge held that there was a 'prima facie' case made out to justify the court to frame charges against the appellant.

(14) The learned counsel for the appellant invites our attention to S. 281 of the Companies Act which provides that if it appears to the court hearing the case that the person proceeded against for negligence, default, breach of duty or breach of trust, has acted honestly and reasonably he ought fairly to be excused for the negligence, default, breach of duty or breach of trust, that the court may relieve him either wholly or partly, from his liability on such terms as the court may think fit. We do not think that, on the facts of this case, the learned counsel for the appellant have succeeded in establishing to our satisfaction that there is justification to invoke the aid of this section in favour of the appellant. The explanations given by the appellant for his conduct in respect of the properties belonging to the company do not enable us to come to the conclusion that he has acted honestly and reasonably. All the circumstances which have been placed before us go to prove only the contrary, namely, that the appellant has not acted in any 'bona fide' manner, much less honestly or reasonably. Except the point that at a time when there was a run on the bank the appellant had tried to meet the situation there is nothing else which can be said to his credit. The facts reveal that in dealing with the properties of the bank, the appellant has tried not merely to help himself at the expense of the bank, but also to help all his near and dear relations with funds belonging to the bank and the amounts thus disbursed to his relations amount to several lakhs of rupees and the Official Liquidators submit that there is no possibility of the bank recovering even a small proportion of these several lakhs disbursed to these close relations of the appellant.

Such a conduct on the part of the appellant cannot be said to be any circumstances that should enable the court to think that the appellant could be fairly excused for his negligence, default or breach of duty, or breach of trust in order to deserve any relief either wholly or partly. In fact, notwithstanding this reprehensive conduct on the part of the appellant as has been proved by the evidence in the case, we did give him an opportunity to prove his bona fides so as to see what relief could be afforded to him. We directed him to pay a sum of Rs. 50,000 in the aggregate in instalments to the Official liquidators within a reasonable time to be fixed and to pay a sum of Rs. 10,000 by way of first instalment thereof within a week. We also gave him time to consider over the matter and make up his mind whether he would be agreeable to the suggestions made by us, but his learned counsel represented that the appellant was not in a position to agree to the proposal A sum of Rs. 50,000 bore a very infinitesimal proportion to the huge sum of about

Rs. 18,00,000/- in which the bank was indebted to its creditors and also bore a small proportion to the sum of Rs. 2,00,000 that the appellant was called upon to pay by the order which is under appeal. We therefore find it impossible to exercise any indulgence in favour of the appellant even under S. 281 of the Companies Act, which was invoked by the learned counsel on his behalf.

(15) On the question of the liability of the appellant in respect of the Government securities which formed also the subject matter of the charges against him, the learned counsel for the appellant relies upon a resolution of the Board of directors condoning the disposal of the Government securities by the appellant and contends that in the face of this condonation by the Board of directors, the charge in respect of the Government securities cannot stand. We have perused the resolution said to have been passed by the Board of directors and we do not think that it is capable of being interpreted in the sense in which the learned counsel for the appellant would like to have it. The resolution, in our opinion, is only a record by the company of what the appellant is said to have done and it does not appear to us to contain the approval by the Board of Directors of the conduct of the appellant in respect of the Government securities. In fact, the latter part of the resolution directs the appellant to rectify the position which resulted from his conduct. This the appellant has not chosen to do.

In such circumstances, it cannot be said that the resolution of the Board of Directors affords any protection against the charge which he has been called upon to answer. Reliance in this connection has been placed on the decisions in — 'Dorey v. Cory', (1901) A. C. 477 (R), Blyth's case, 4 Ch. D. 140(S) and In re — 'Kingston Cotton Mill Co.', (1896) 1-Ch. 331 (T), and the learned counsel argues that the directors must be deemed to have acted as a man of business in having disposed of the Government securities and if his conduct has been merely imprudent, it cannot be criminally liable, and he must be deemed to have resorted to honest, reasonable and bona fide payments with a view to save the credit of the Bank. Such honest and reasonable conduct cannot be the subject of criminal charge under S. 282-A of the Companies Act, is the contention of the learned counsel for the appellant. He has invited our attention to a decision in Natesan in re, — 'AIR 1949 Mad 657 (U), in this connection. We do not think that we can accept the argument of the learned counsel for the appellant on this aspect of the case. In our view, the conduct of the appellant cannot be brought within the scope of the rule laid down in these decisions.

(16) On a consideration of all the contentions and the arguments placed before us by the learned counsel for the appellant, we do not think that any sufficient ground has been shown to us to dissent from the order of the learned trial Judge. We are, therefore, of the opinion that the charges have been proved against the appellant on the evidence that has been placed before the trial court and the conviction and sentence by the learned trial Judge are correct. We, therefore, while confirming the conviction and sentence, dismiss this appeal. The Official Liquidators will have their costs of this appeal from out of the assets of the bank in their hands. The appellant will surrender before the Registrar on 19-12-1952.

A/D.H. Appeal dismissed.

A. I. R. 1953 MADRAS 602 (Vol. 40, C. N. 234)

RAMASWAMI J.

In re Messrs N. M. Hussain & Co., by Janab S. D. Ranguwalla, Petitioner.

Cri. Revn. No. 846 and Cri. Revn. Petn. No. 833 of 1951, D/- 27-8-1952.

Houses and Rents — Madras Buildings (Lease and Rent Control) Act (25 of 1949), S. 3 — "Within a week" — (Words and phrases — 'Within a week').

In computing the period of one week, the date of occurrence must be excluded. (Paras 3 and 4)

V. Rajagopalachari, G. Venkatasami Chetti and R. V. Raghavan, for Petitioner; State Prosecutor, for the State.

CASES CITED:

(A) (1808) 33 ER 748: 15 Ves Jun 248
(B) (1841) LJ 10

ORDER: This is a criminal revision case filed against the conviction and sentence of the learned Chief Presidency Magistrate in C. C. No. 4131 of 1951.

(2) The facts are short, and undisputed. The petitioner before us is the owner of premises No. 312 of Thambu Chetti Street, G. T. Madras. This property had been let out by him to X. On that X vacating the premises, this owner sent a communication to the Accommodation Controller on 6-6-1949. There is no dispute now that this communication reached the Controller on the 7th. This petitioner has been waiting till the 14th and finding no reply from the Accommodation Controller, occupied his own premises.

(3) The question is whether the landlord has not complied with S. 3 of Madras Act 25 of 1949 as it stood before the words "within a week" were amended into "within 10 days". The section gives option to the Accommodation Controller, on receiving a notice from the owner of the house of a vacancy, to communicate to him within a week, a reply whether he intends to allot the house to a tenant or whether he is not going to exercise the option but allow the owner himself to occupy it. Therefore it becomes very important whether in this case the communication from the Controller was received by this landlord within a week of his sending the notice to the Controller. The lower Court came to the conclusion that we must exclude the 7th and on that basis "within a week" would mean the 15th and not the 14th. Therefore the court held that this house owner had not complied with the order of the Controller allotting the house to one Rider.

(4) The position taken by the Chief Presidency Magistrate is both in accordance with common sense, the spirit of the Act, as well as the authorities on the subject. Common sense requires that "within a week" should mean the exclusion of the date of the occurrence as otherwise we would be taking into consideration fractions of a day and calculate practically from the previous day. Then the spirit of this provision is that the Accommodation Controller must have a clear week for making up his mind whether he should allot the house to a tenant or he should not exercise his option. This period has now been increased to ten days. Then we have the extract from N. Mitra's "Limitation and Prescription" & the decision in — 'Lester v. Garland', (1808) 15 Ves Jun 248 (A), cited by the lower Court

which make it clear that in computing the period of within one week we must exclude the date of occurrence. There is also another reported case, — 'Williams v. Burgess', (1841) L J 10 (B) where the term "within 21 days" and the word "of" have been similarly construed and this decision followed — '(1808) 15 Ves Jun 248' (A). Therefore the construction placed by the Chief Presidency Magistrate is correct and on that the conviction which followed is also correct.

(5) But the learned advocate for the petitioner points out to me that really serious consequence of this conviction, namely, that if it is held that this petitioner deliberately disobeyed the order of the Accommodation Controller, then the Accommodation Controller would be in a position to reopen the matter and put in a tenant. To my mind this would not be an equitable thing to do having regard to the lapse of time as well as the fact that when we ourselves had to make legal research to find out what within a week means, namely, whether it should or should not include the day of occurrence, a lay man like the petitioner in this case cannot be expected to know better. On the other hand, he seems to have been under a genuine belief that "within a week" would mean that the Accommodation Controller must have exercised his option before the 14th. It is to be hoped that an inequitable course will not be taken and this owner be allowed to continue on his own property.

(6) In the circumstances of the case, where the infringement by this petitioner was more on account of legitimate ignorance of the law, the punishment of Rs. 200 seems to me excessive. On the other hand it seems to me that the ends of justice would be met if I reduce it to Rs. 75. Ordered accordingly. The excess amounts if collected will be refunded to the petitioner.

B/V.R.B. Order accordingly.

A. I. R. 1953 MADRAS 603 (Vol. 40, C. N. 235)

RAJAGOPALAN J.

Sriramulu Naidu, Appellant v. Jambulingam Pillai and another, Respondents.

A. A. O. No. 299 of 1951, D/- 25-11-1952.

Limitation Act (1908), Art. 83 — Suit by transferor against transferee of immovable property — (T. P. Act (1882), S. 58).

Usufructuary mortgagee agreeing to pay off, as part of purchase price, prior mortgage — Sale of property consequent upon failure of mortgagee to pay — Mortgagor sustains damage when sale is confirmed and there is final extinction of his right to redeem — Hence Art. 83 applies to his suit for damages for contract against the usufructuary mortgagee. 23 Mad 441, Disting. (Para 4)

Anno: Lim. Act, Art. 83 N. 7; T. P. Act, S. 58 N. 18 Pt. 9.

A. Balasubramania Iyer, for Appellant; K. V. Srinivasa Iyer, for Respondents.

CASE CITED:

(A) (1900) 23 Mad 441

JUDGMENT: The plaintiff executed a deed of simple mortgage in favour of one Kandaswami Pillai for Rs. 500 on 12-10-1922. The money due under that deed was payable at the end of three years. On 6-5-1925 the plaintiff executed Ex. A. 1, a deed of usufructuary mortgage, in favour of defendant 1. As part of the purchase price, the defendant was directed to pay off the money due to Kandaswami Pillai under the first mortgage. It was common ground that the defendant never paid this amount. Kandaswami filed a suit to enforce the mortgage and obtained a decree, Ex. A. 2 on 30-8-1938. In execution of that decree the hypotheca was brought to sale on 3-3-1943. The sale was confirmed on 10-4-1943. The plaintiff instituted the suit, out of which this civil miscellaneous appeal arose, on 1-4-1946, claiming damages for the breach of the contract between the plaintiff and defendant 1 evidenced by Ex. A. 1, under which defendant 1 had undertaken to redeem the mortgage effected by the plaintiff in favour of Kandaswami.

(2) The learned Munsif held that the plaintiff's claim was barred by limitation. Hence the plaintiff's suit was dismissed. On appeal, the learned Subordinate Judge held that Art. 83, Limitation Act applied, and that the period should be computed from 10-4-1943, on which date the sale was confirmed, thus finally extinguishing the right of the plaintiff as well as defendant 1 to redeem the mortgage which had been effected in favour of Kandaswami. The learned Subordinate Judge further held that, as the learned Munsif had not decided specifically either the liability of the defendant to pay the damages claimed by the plaintiff, or the quantum of those damages, the suit would have to be remanded for determination of those issues in accordance with the directions given in the appellate judgment. There was also the claim that defendant 1, as an agriculturist, was entitled to the benefits of Madras Act 4 of 1938.

(3) Defendant 2, one of the legal representatives of defendant 1, preferred this appeal against the order of remand by the learned Subordinate Judge.

(4) Learned counsel for the appellant urged that, since the liability of the defendant to pay the amount due to Kandaswami under the mortgage effected in his favour arose on 12-10-1925, that is three years after the date of mortgage in favour of Kandaswami, the present suit filed in 1946 was barred by limitation. Learned counsel relied on — 'Dorasinga Tevar v. Arunachalam Chetti', 23 Mad 441 (A). All that could be held on this basis of that case, is that in such a contingency the plaintiff could, at any time after 12-10-1925, have filed a suit claiming damages for breach of contract occasioned by the failure of the vendee to discharge his obligations to pay a portion or the whole of the purchase money to clear off a pre-existing encumbrance. 23 Mad 441 (A) is not an authority for the position, for which learned counsel for the appellant contends now, that the vendor i.e., the plaintiff in this case, had no other remedy open to him. The learned Subordinate Judge rightly came to the conclusion, that the damage sustained by the plaintiff in this case was on the final extinction of the right to redeem the mortgage in favour of Kandaswami, and that that extinction was on 10-4-1943. I see no reason to differ from the learned Subordinate Judge. On that finding the learned Judge was right in holding that Art. 83, Limitation Act applied and that the suit filed on 1-4-1946 was in time.

(5) The next contention of the learned counsel for the appellant was that there was no necessity for a remand at all. The plaintiff's claim was for an ascertained sum based

upon the amount which the defendant had failed to pay to Kandaswami with interest thereon. But the learned Subordinate Judge rightly pointed out that that may not be the only basis for ascertaining the damages which the plaintiff claimed he sustained by the breach of contract by the defendant. The market value of the property could give a fair basis for ascertaining the actual loss sustained by the plaintiff. As the learned Subordinate Judge pointed out, it may even eventually mean that the plaintiff suffered no damages at all. Since there was no evidence on the market value of the property and since the trial Court did not assess the quantum of damages on any basis, the learned Subordinate Judge had no option but to remand the suit for ascertaining the correct basis for assessing the damages to which the plaintiff would be entitled. There is also, as I have pointed out earlier, the question whether the defendant would be entitled to any relief under Act 4 of 1938.

(6) The order of the lower Court is confirmed and the appeal is dismissed with costs.

(7) Leave to appeal is refused.

B/M.K.S. Appeal dismissed.

A. I. R. 1953 MADRAS 604 (Vol. 40, C. N. 236)

RAJAMANNAR C. J. AND VENKATARAMA AIYAR J.

Buddu Satyanarayana and others, Appellants **v.** Dasari Butchayya and others, Respondents.

Appeal No. 709 of 1947, D/- 7-10-1952.

Madras Hindu Religious Endowments Act (2 of 1927), S. 78 — Lands in possession of archakas.

Hereditary archakas enjoying lands partly in lieu of remuneration and partly for defraying expenses of worship should, in the interests of the public and satisfactory continuance of worship, be allowed to remain in sufficient portion of those lands on condition of their satisfactorily performing the worship and defraying the expenses thereof and without any right of alienation. What portion of lands should be allotted depends on the facts of each case. App. No. 285 of 1945 (Mad.) and App. No. 218 of 1946 (Mad.), R l. on.

(Paras 4, 5)

N. C. Raghavachari, for Appellants; C. A. Vaidhyalingam, T. Venkatadri and K. Ramachandra Rao, for Respondents.

CASES CITED:

(A) ('45) Appeal No. 285 of 1945 (Mad)
(B) ('46) Appeal No. 218 of 1946 (Mad)

RAJAMANNAR C. J.: The appellants are the hereditary archakas of the temple of Sri Malleswaraswami Varu in the village of Chinnapuli Varu in the Guntur district. The Hindu Religious Endowments Board notified the said temple under Chap. VI-A, Madras Hindu Religious Endowments Act and appointed an Executive Officer. He applied under S. 78 of the Act for delivery of the lands in possession of the archakas which formed the subject-matter of the suit and the appeal on the ground that the lands belonged to the deity. The petition under S. 78, O. P. No. 40 of 1945 on the file of the District Court of Guntur was eventually ordered, and it is represented that in pursuance of the order in that petition, the Executive Officer has since taken possession of the lands. While the petition under S. 78 was still pending the appellants filed a suit for declaration that they were entitled to be in possession of the plaint lands and were not liable to be dispossessed by the Executive Officer. Subsequent to the institution of the suit, the District Court passed an order directing the petitioners to deliver possession of the lands. Therefore there was an amendment in the plaint adding an additional prayer, namely, to set aside the order of the District Court in O. P. No. 40 of 1945. The main case of the appellants in the trial Court was that the deity had no manner of right to the lands and the lands were attached to the office of archaka.

(2) The learned Subordinate Judge of Tenali held on a consideration of the entire evidence that the suit lands were granted to the deity and not to the archakas and the plaintiffs could not be permitted to set up a title adverse to the deity. As according to the learned Judge the plaintiffs were not entitled to be in possession of the lands, the suit was dismissed with costs. Hence this appeal.

(3) Learned counsel for the appellants very wisely did not challenge the correctness of the finding of the learned trial Judge as to the title to the properties. It must be therefore taken as established that the properties belong to the deity and not to the appellants.

(4) Ordinarily this finding must dispose of the case. But as pointed out in several recent decisions of this Court, in the interests of the general public and the satisfactory continuance of worship, it is not desirable that hereditary archakas who have been looking after the daily worship of the temple should be turned out of the lands which they had been enjoying partly in lieu of remuneration for their services and partly for defraying the expenses of the daily worship. In App. No. 285 of 1945 (A) a Division Bench of this Court observed as follows:

> "We consider that in the interests of the temple and the worshipping public and the archakas who for generations have been hereditarily looking after the worship of the temple and enjoying the temple properties in lieu of remuneration a proper arrangement would be to permit the archakas to remain in possession of roughly about two-thirds of the temple lands so long as they properly and faithfully perform the daily worship and defray the expenses thereof and on condition of their having no rights of alienation."

Similar observations were made in a later judgment by Satyanarayana Rao and Chandra Reddi JJ. in App. No. 218 of 1946 (B).

(5) It is obvious that while the principle is of general application the allotment of the properties must depend upon the facts of each case. In the present case, we find that the total extent of the plaint lands is 20 acres 42 cents. These lands lie in three demarcation numbers, namely, No. 55 of an extent of 6 acres 29 cents; No. 52 measuring 9 acres 32 cents, and No. 45 of an extent of 4 acres 81 cents. All the lands are wet lands. Taking all the circumstances into consideration, we consider that it would be a just and equitable arrangement to allow the archakas, the appellants, to be in possession of demarcation Nos. 55 and 45. The income from the lands comprised in demarcation No. 55 may be taken by the archakas as their remuneration and the expenses of the daily worship may be

met from the income from 4 acres 81 cents in demarcation No. 45. The appellants and their successors will be entitled to be in possession of the properties only so long as they perform their daily services properly and faithfully according to the usages of the temple, meeting the expenses of the daily worship themselves. If they fail to carry out these terms it will be open to the Executive Officer to take possession of the lands and make other arrangements for carrying on the worship in the temple. The archakas will of course not have any right to alienate the properties allotted to them. The extent of 9 acres 32 cents in demarcation No. 52 will be in possession of the Executive Officer or the trustee for the time being and the income therefrom shall be utilised for the general purposes of the temple including making provision for the other servants like Paricharakas. If the Executive Officer is convinced at any time that the income on 4 acres 81 cents of land in demarcation No. 45 is not sufficient to defray the expenses of the daily worship, he will be at liberty to give such further amounts as may be necessary for the same. The appeal is allowed to this extent. The decree of the Court below dismissing the suit is hereby set aside and there will be a decree in the above terms.

(6) Learned counsel for the appellants represented to us that as the Executive Officer had taken possession of the entire lands and we have now declared that the appellants would be entitled to be in possession of D. Nos. 55 and 45 they would be entitled to the profits of these lands for the period subsequent to such taking over. That is not a matter, however, with which we can deal in this appeal. This is a suit for a mere declaration that the appellants are not liable to be dispossessed by the Executive Officer. The appellants will of course be at liberty to take such steps as they are advised for obtaining such relief as they are entitled to on the basis of our judgment in this appeal.

(7) There will be no order as to costs in this appeal.

C/M.K.S. Order accordingly.

A. I. R. 1953 MADRAS 605 (Vol. 40, C. N. 237)

SATYANARAYANA RAO AND RAJAGOPALAN JJ.

Corporation of Madras by its Commissioner, Appellant v. T. Balakrishna Mehta, Respondent.

City Civil Court Appeals Nos. 50 of 1951 and 66 of 1950, D/- 28-11-1952.

Municipalities — Madras Town Planning Act (17 of 1920), Ss. 24, 25 (2) — Madras City Municipal Act (4 of 1919), Ss. 138, 387, Sch. IV, Part VI, Rr. 20, 21 — Recovery of betterment tax for 8 years by distress — Validity — (Interpretation of Statutes) — (Civil P. C. (1908), Pre.).

On a plain reading of the provisions of the Town Planning Act and the rules framed thereunder and the rules in Part VI of schedule IV to the City Municipal Act, it is clear that in each financial year, at its commencement, the Commissioner has to determine the betterment contribution payable for that financial year and that the amount should be paid in two half yearly instalments during that year. If no payment is made and if a demand is made in accordance with Rule 20 of Part VI of Schedule IV to the City Municipal Act, he can distrain moveables for the recovery of the betterment contribution payable in respect of that financial year and no more. But the Corporation is not entitled to enforce by distress proceedings the collection of the betterment tax due for eight previous financial years(Para 8)

The fact that it took nearly seven years to determine the betterment contribution for the eight financial years after the taking effect of the scheme under S. 14 would only make the charge due and payable on the date they are ascertained, but it cannot help the corporation to invoke the provisions of Rr. 20 and 21 for their collection. 27 Mad 143 (PC), Ref. (Para 8)

The inconvenience caused to the Corporation by requiring to file a suit for realising the betterment charges cannot be a reason for getting over the clear language of the Rule, as the function of the Court is only to interpret the rule as it stands and not to legislate. (Para 9)

Further, the language of S. 25 (2) excludes the applicability of S. 387 for the recovery of these charges as 'contributions payable under any other law', as the procedure to be applied under the former section is the procedure for the assessment and collection of the property tax and not the procedure prescribed under the City Municipal Act for the recovery of any other amount as compensation or contribution. (Para 10)

Anno: C. P. C., Pre. N. 7.

John and Row, for Appellant; G. Venkataseshiah, R. Rajeswara Rao and R. Punna Rao, for Respondent.

CASE CITED:

(A) ('04) 31 Ind App 17: 27 Mad 143 (PC)

SATYANARAYANA RAO J.: These two appeals were heard together as a common question of law arises in both the appeals. C.C. C. A. No. 66 of 1950 is against the decision of the City Civil Court in O. S. No. 239 of 1949 and the plaintiff who is the City Motor Service Ltd., is the appellant. C. C. C. A. No. 50 of 1951 is against the decision in O. S. No. 232 of 1949 of the City Civil Court, Madras, and the appellant is the Corporation of Madras. The two suits were heard by different Judges and they held opposite views on the common question of law, which arises for consideration. The suit O. S. No. 239 of 1949 was dismissed, but O. S. No. 232 of 1949 was decreed.

(2) It will be convenient to refer to the facts in C. C. C. A. No. 66 of 1950. The facts in the connected C. C. C. A. No. 50 of 1951 are similar though there is a slight difference in the material dates. In C.C.C.A. No. 66 of 1950, the defendant is the Corporation of Madras & the relief claimed was a declaration that the Corporation has no right to resort to distress proceedings for enforcing the collection of betterment contribution payable, if any, in respect of the bungalow and ground bearing R. S. No. 329/2 Thousand Lights Town Planning area and door No. 36 Whites Road, Mount Road, Madras, for the various financial years commencing from the date the scheme took effect and also for a permanent injunction restraining the defendant Corporation and its agents and servants from resorting to distress proceedings in any manner for enforcing the collection of betterment contribution or any portion thereof.

(3) The plaintiff is the owner of the bungalow and ground bearing R. S. No. 329/2 Thousand

Lights Town Planning area and bearing door No. 36 Whites Road, Mount Road, Madras. A notification under S. 12 of the Madras Town Planning Act (Act 7 of 1920), hereinafter called the "Act", was issued by the Government in 1934 requiring the Corporation to prepare, publish and submit for their sanction a draft scheme in respect of lands in the Thousand Lights area for applying the Town Planning Scheme. The scheme was finally sanctioned by the Government of Madras and published in the Fort St. George Gazette on 7-7-1941. Under S. 14, sub-clause (6) of the Act, the scheme, therefore, took effect from that date and the execution of the scheme commenced from that date. The Government appointed an arbitrator under S. 27 of the Act and before the arbitrator the defendant Corporation filed a claim against the plaintiff company for betterment contribution in respect of the aforesaid property. The arbitrator had to decide, among others, two important questions, (i) whether the property was liable to betterment contribution under S. 23 of the Act and (ii) the market value of the property on the date of the notification under S. 12 in accordance with the provisions of S. 24 (a) of the Act. On 26-8-1945, the arbitrator gave an award holding that the property of the plaintiff was liable for betterment contribution and he also fixed the market value of the property under S. 24 (a) of the Act. Thereupon an appeal was preferred by the plaintiff under S. 29 of the Act to the Chief Judge of the Court of Small Causes against the award of the Arbitrator. The appeal was dismissed by the Chief Judge, Small Cause Court on 2-12-1947.

(4) The next stage in the proceedings under the Act to determine the betterment contribution is to fix the market value of the property in each financial year commencing from the date when the scheme took effect under S. 14, in this case, 7-7-1941. Under S. 24 of the Act, the Commissioner fixed the market value for each of the financial years commencing from 1941-42 and ending with the financial year 1948-49 and served on the plaintiff in June 1948 sixteen notices for the 16 half years in respect of the 8 financial years beginning from 1941-42 as required by Rule 59 of the rules framed by the Madras Government under S. 44, sub-ss. (1) and (2) of the Act. The plaintiff preferred revision petitions Exs. A. 2 series on 8-7-1949 to the Commissioner of the Corporation of Madras objecting to the estimate of the market value made by the Commissioner during the financial years. These were finally disposed of by the Commissioner on 29-11-1948 confirming the estimate already made of the market value by him (vide Ex. A. 3) and after the disposal of the revision petitions, the plaintiff was called upon to pay the amount within the period fixed in accordance with Rule 62 but the plaintiff preferred an appeal under Rule 63 to the Council against the order of the Commissioner. While these appeals were pending, the Commissioner of the Corporation threatened distress proceedings to collect the betterment contribution from the plaintiff for the 8 financial years and he, therefore, filed the present suit on 8-3-1949 for the reliefs already mentioned. The appeals were subsequently dismissed on 9-8-1949.

(5) Though in the pleadings and in the issues framed in the lower Court, various other contentions were raised, the only substantial and outstanding question now debated in these appeals is whether the defendant-Corporation is entitled to enforce by distress proceedings the collection of the betterment contribution for all the eight years and the decision of the question lies in a narrow compass though the arguments before us covered a wider ground.

(6) It will be convenient at this stage to refer briefly to the relevant provisions of the Act and the rules framed thereunder for a better understanding of the respective contentions of the parties. The Town Planning Act applies to the City of Madras governed by the City Municipal Act and also to the Municipalities governed by the District Municipalities Act as is evident from the definition of "chairman" in S. 2(1) of the Act. Section 4 of the Act contains the provisions that may be made in the Town Planning Scheme. A proceeding for applying the Town Planning Scheme may be initiated by a resolution under S. 9 of the Act by the Municipalities or the Corporation as provided by S. 10 or may be initiated at the instance of the Provincial Government, which may require the Municipality to prepare and publish for the sanction of the Government a Town Planning Scheme under S. 12 of the Act. When all the preliminary steps are gone through, the scheme is published in the Official Gazette under sub-clause (5) of S. 14 and a notification so published is conclusive evidence that a scheme has been duly made and sanctioned and the scheme takes effect from the date of the publication of such notification. Thereafter, the execution of the scheme should be commenced (vide S. 14 (6)). The next stage for the determination of the betterment contribution, which the Municipalities are empowered to levy under S. 23 of the Act, is to make a claim for that purpose within the time prescribed before the Arbitrator, who is appointed under S. 27 of the Act. The functions of the Arbitrator in respect of the claim made by the Corporation or the Municipalities are enumerated in S. 27, the chief of which are to determine in the first instance whether the property is liable for betterment contribution under S. 23 and, if so, to record the market value on the date of the notification under S. 10 or S. 12 as the case may be. This power to determine the market value is contained in S. 24 (a) and the market value of the property on the date of the publication of the notification under S. 10 or S. 12 is treated as the basic value as they call it, which is the standard for comparison for arriving at the betterment contribution in each financial year.

The betterment contribution, which the Corporation or Municipality is entitled to levy is the annual betterment contribution and the term of years and the percentage of the increase in value not exceeding 10 per cent. are fixed by the scheme. There is however an upper limit fixed by the proviso to S. 23 for the betterment contribution as it states that the aggregate amount of the contributions so recovered shall not exceed one half of the maximum increase in value during the term of years fixed under the scheme. The mode of ascertaining and the time during which the ascertainment should be made are laid down in clauses (b) to (d) of S. 24. The Chairman, that is, in the case of the Corporation the Commissioner has to fix in each of the financial years following the date on which the scheme takes effect under S. 14 the market value of the property on the first day of April of that year. In other words, even in the beginning of the

financial year, he must proceed to estimate the market value of the property for the purpose of that financial year. If the market value so estimated by the Commissioner does not exceed the basic value, that is, the value fixed by the Arbitrator under clause (a) of S. 24, no betterment contribution shall be leviable in that year. If, on the other hand, the market value fixed by the Commissioner under Clause (b) exceeds the basic value, the Municipality is entitled to levy on the difference a betterment contribution according to the percentage fixed under the scheme. This annual betterment contribution is a first charge on the property (vide Sec. 25) but is subject to the prior payment of land revenue, if any, due to the Government and it shall be paid in half yearly instalments of one half of the amount fixed for the year; that means, that if the contribution is fixed for the financial year 1941-42, it must be paid in two half yearly instalments in that year and that amount to be paid is one half of the amount fixed for the whole year. Against the decision of the Arbitrator, an appeal is provided by S. 24 to the authority provided therein and the amount of contribution fixed by the Commissioner under clause (d) is also subject to revision by him under the rules and against his decision there is a further appeal to the Council. The mode of collecting the betterment contribution in respect of each financial year is provided by sub-s. (2) of S. 25 of the Act. The Provincial Government is authorised to make rules for the assessment and collection of betterment contribution by that sub-section, but subject to such rules however it is provided that the Chairman shall have the same powers and shall adopt the same procedure for the assessment and collection of betterment contribution as he has for the assessment and collection of property tax. Further, the persons affected shall have the same right to receive notice of assessment and to object to the assessment and to appeal in respect thereof as they have in respect of the property tax and the decision shall to the same extent be final and conclusive. If under the City Municipal Act or the District Municipalities Act, lands and buildings are exempt from property tax, they shall also be exempt from betterment contribution. The rules framed by the Government under the Act do not provide for the collection of betterment contribution.

(7) The language of S. 25(2) that "The Chairman shall have the same powers and shall adopt the same procedure for the assessment and collection of the betterment contribution as he has for the assessment and collection of the property tax" naturally, therefore, refers to and attracts the provisions of the City Municipal Act in this case and of the District Municipalities Act in the case of Municipalities. The provisions relating to property tax are contained in Ss. 98 to 109 of the City Municipal Act and S. 138 enacts that the rules and tables embodied in Schedule IV shall be read as part of the chapter. Schedule IV contains taxation rules and Part I deals with the assessment of property tax and Part VI provides for the collection of taxes. Rules 20 and 21 are the relevant rules so far as collection by distress is concerned. Under R. 20 sub-cl. (1) it is provided that, where any tax, not being a tax in respect of which a notice has to be served under S. 113 or S. 120-A or a direction has been given under Rule 6, is due from any person, the Commissioner shall cause to be served upon or sent to such person a bill for the sum due before proceeding to enforce the provisions of Rule 21. Sub-clause (3) of that rule states that where a notice, bill or direction referred to in sub-r. (1) has not been served or given either in the half year in which tax became due or in the succeeding half year, the tax for the half year first mentioned in this sub-rule shall not be demanded. Under R. 21,

> "If the amount due on account of any tax is not paid within 15 days from the service of the notice or bill or the giving of the direction referred to in S. 113 or S. 120-A or R. 6 or R. 20 and if the person from whom the tax is due has not shown cause to the satisfaction of the Commissioner why it should not be paid, the Commissioner may recover by distraint under his warrant and sale of the moveable property of the defaulter or if the defaulter is the occupier of any building or land in respect of which a tax is due, by distress and sale of any moveable property which may be found in or on such building or land the amount due on account of the tax together with the warrant fee and distraint fee and with such further sums as will satisfy the probable charges that will be incurred in connection with the detention and sale of the property so distrained,"

so that if within 15 days from the date of the service of the bill under R. 20 — we are not concerned in this case with S. 113 or S. 120-A or Rule 6 — the tax is not paid, the Commissioner is entitled to recover by distraint under a warrant for sale of the property of the defaulter the arrears due. The requirement of R. 20 (3) is that the bill referred to in sub-r. (1) of R. 20 has to be served or given either in the half year in which the tax became due or in the succeeding half year. If it is not so served, the tax for the half year first mentioned in the sub-rule cannot be demanded. On the interpretation of this clause, in our opinion, the decision of the question whether the distraint in this case for the sixteen half years is valid has to be determined. To illustrate the meaning of this clause, we may take a concrete example. Taking the last of the financial years in the present case 1948-49, the financial year commenced on the 1st of April 1948 and ended with the 31st of March 1949. The first half year ended with September 1948 and the second half year with March 1949. If the tax became due in the first half year ending with September 1948, a demand notice under sub-rule (1) may be issued for the amount due in respect of that half year or in the succeeding half year. If such a notice is given in either of the two half years then the distraint would be valid for the amount, which became due in the first half year. Otherwise, he cannot make a demand and distrain the property under R. 21. So far the meaning of the sub-clause seems to be unambiguous and does not admit of any serious doubt.

(8) It must be mentioned that the appellant does not dispute his liability to pay betterment contribution fixed for the 8 financial years and it is also clear from S. 25 that that amount is a first charge on the property, subject however to the revenue payable to Government. What is disputed is that the mode of enforcing that liability is not by distraint for all the half years by a demand made in the second half year of 1948-49 i.e., after November 1948. By the demand, the Corporation can recover

only the betterment contribution payable in respect of the financial year 1948-49 and no more. On a plain reading of the provisions of the Town Planning Act and the rules framed thereunder and the rules in Part VI of Schedule IV to the City Municipal Act, it is clear that in each financial year, at its commencement, the Commissioner has to determine the betterment contribution payable for that financial year and that that amount should be paid in two half yearly instalments during that year. If no payment is made and if a demand is made in accordance with Rule 20 of Part VI of Schedule IV to the City Municipal Act, he can distrain moveables for the recovery of the betterment contribution payable in respect of that financial year. But unfortunately for the Corporation, in the present case, the determination of the betterment contribution for the 8 financial years took a long time as the various stages for its fixation had to be gone through and no doubt those steps proceeded in a very leisurely manner. It took nearly seven years to determine the betterment contribution for the 8 financial years after the scheme took effect under S. 14. It is, therefore, contended on behalf of the Corporation by Dr. John, the learned Counsel, that it is unthinkable that the Legislature could have intended to make distraint available even long before the betterment contribution was ascertained and that before it was ascertained, it could not have become due. If the contribution was determined within the periods contemplated by S. 24 of the Act, the Commissioner could exercise the right of distraint by complying with the provisions of Rule 20. But it was impossible for him to have complied with those provisions because the amount was not ascertained finally.

It is no doubt true that an amount, which was not ascertained, cannot become payable before it is ascertained. Take for example the case of arrears of rent. If the rent had to be ascertained, it cannot be said that before ascertainment the rent became due and the period of limitation to recover rent under Art. 110 of the Limitation Act commences to run even before such ascertainment as held by the Privy Council in—'Rangayya Apparao v. Bobba Sriramulu', 27 Mad 143 (PC) (A). The provisions in such a case for recovery of rent would apply only to rent, which is ascertained and not to rent, which is in the process of ascertainment. Dr. John was, therefore, right in his contention that the betterment contribution did not become due until it was ascertained by the Commissioner on 29-11-1948. But that would only help him to contend that the cause of action for enforcing the charge under S. 25 of the Act accrued and arose only on that date even in respect of the contribution for the years commencing from 1941-42. When once it is ascertained, it became due and became payable. But that does not help him in invoking the provisions for distraint under Rules 20 and 21. The language of sub-cl. 3 of Rule 20 clearly refers to the tax, which not only became due in that half year but also which became due in respect of that half year. Therefore, a demand could be made either in the half year in which it became due or in the succeeding half year only for the amount due in respect of the first half year. It is no doubt true that the betterment contribution for all the half years became due in 1948-49 but the Commissioner has no right to demand under Rule 20 betterment contribution due in respect of any other half year or half years other than one half year in respect of which it became due in that half year. He may make, however the demand either in that half year or the succeeding half year. The language of the rule excludes the possibility of any such construction, which has been urged on behalf of the Corporation by Dr. John the learned counsel.

(9) Dr. John then referred to the inconvenience in realising the betterment contribution that may be caused by driving the Corporation to file a suit as the proceedings may take a very long time. That may be so, but we cannot get over the clear language of the rule as our function is only to interpret the rule as it stands and not to legislate. Further, he also contended that the demand referred to in Rule 62 after the disposal of the revision petition by the Commissioner complies with the demand contemplated by Rule 20. Rule 21 clearly contemplates a demand under Rule 20 and not any other demand outside it. Even if it be assumed that a demand under Rule 62 tantamounts to a demand under Rule 20, even then it would not help the Corporation as distress cannot be made for more than one half year in which the betterment contribution became due under sub-r. 3 of R. 20.

(10) Reference was made in the course of the arguments to S. 387 of the City Municipal Act and it was contended that without complying with the provisions of Rule 20, a demand could be made for betterment contribution as a contribution payable under any other law, i.e., the Town Planning Act in this case. The language of S. 25 (2) excludes the applicability of S. 387 as the procedure to be applied under the former section is the procedure for the assessment and collection of the property tax and not the procedure prescribed under the City Municipal Act for the recovery of any other amount as compensation or contribution. Section 387 does not therefore help the respondent. For these reasons we think that the respondent is not entitled to recover by distraint proceedings any amount in respect of the financial years beginning from 1941-42 except the betterment contribution due in respect of the financial year 1948-49. This the appellant is willing to pay and in fact in the connected appeal it is represented that the amount has been already paid, though in C. C. C. A. No. 66 of 1950 it was not paid in full. For these reasons we think that the decision of the learned City Civil Judge in O. S. No. 239 of 1949 is erroneous and must be reversed. C. C. C. A. No. 66 of 1950 is, therefore, allowed and the suit is decreed except in respect of the financial year 1948-49 with costs here and in the court below.

(11) C. C. C. A. No. 50 of 1951: The facts are similar though the dates are somewhat different and it is unnecessary to burden this judgment with details of those dates. The question raised is the same and for the reasons given in the connected appeal, the decision of the lower court in this case is correct and the decree must be confirmed. The amount due in respect of the financial year 1948-49 was already paid by the plaintiff. The appeal is dismissed with costs.

B/D.R.R. Order accordingly.

A.I.R. 1953 MADRAS 609 (Vol. 40, C.N. 238)

RAMASWAMI J.

Ganapathi Udayar, Petitioner v. T. A. Chinnayya Mudaliar, Respondent.

Cri. Revn. Case No. 650 and Cri. Revn. Petn. No. 538 of 1952, D/- 6-8-1952.

Penal Code (1860), S. 511 — Attempt — Preparation and attempt — Distinction.

Mere preparation is an indifferent act possessing no definite indication of criminality. An attempt is an act of such a nature that it is in itself evidence of the criminal intent with which it is done. A criminal attempt bears the criminal intent upon its face. The thing speaks for itself. 1 Cri LJ 124 (Cal), Disting; Case law Ref. (Paras 7 and 10)

Anno: Penal Code, S. 415 N. 10; S. 511 N. 2.

A. C. S. Chari, for Petitioner; Public Prosecutor, for the State.

CASES CITED:

(A) ('04) 1 Cri LJ 124: 8 Cal WN 278
(B) ('13) 1913 Pun Re 10: 20 Ind Cas 596: 14 Cri LJ 436
(C) ('17) AIR 1917 Pat 699: 1 Pat LJ 391: 34 Ind Cas 992: 17 Cri LJ 272
(D) ('24) AIR 1924 Cal 215: 50 Cal 849: 24 Cri LJ 684
(E) ('24) AIR 1924 All 205: 21 All LJ 865: 83 Ind Cas 993: 26 Cri LJ 209
(F) ('27) AIR 1927 Mad 199: 51 Mad LJ 800: 28 Cri LJ 70
(G) ('25) AIR 1925 Cal 100: 52 Cal 188: 26 Cri LJ 545
(H) ('89) 1 Weir 539: 12 Mad 114

ORDER: This is a criminal revision case sought to be filed against the conviction and sentence of the Additional First Class Magistrate of Vellore in C. C. No. 49 of 1951 and confirmed in C. A. No. 132 of 1951 by the Sessions Judge of North Arcot.

(2) The facts are: P. W. 1 Chinniah Mudaliar is a landowner and money-lender of Tiruppakkadal. The accused borrowed from this P. W. 1 a sum of Rs. 800 on 27-12-1948 and executed the promissory note Ex. P. 1. On 5-10-1949 a sum of Rs. 114 was paid towards interest and an endorsement to that effect Ex. P. 1(a) was made on Ex. P. 1 by the accused himself and Kuppuswami attested it. Two months prior to December 1950 the accused gave Rs. 36-8-0 in instalments and when asked to give more the accused is stated to have asked P. W. 1 to come to his village 2 or 3 days later. On 15-12-1950 P. W. 1 went to accused's village and asked the accused to come to the house of P. W. 2 Kuppuswami. P. Ws. 1 and 2 were waiting. As requested, the accused came to P. W. 2's house. The accused told P. Ws. 1 and 2 that he had brought Rs. 13-8-0 to make up Rs. 50 placed the money near P. W. 2 and asked for the promissory note to be given to him. P. W. 1 gave the promissory note to P. W. 2 who in turn gave it to the accused and the accused wrote an endorsement while P. W. 2 was counting the money.

When the promissory note was handed over to P. W. 2 it was found that the accused had made an endorsement of payment of Rs. 750 instead of Rs. 50. On being questioned the accused said "Come to my house. I will give the entire amount" and took the cash of Rs. 13-8-0 with him and went away on his bicycle. P. Ws. 1 and 2 gave chase to the accused. P. W. 3 Dhanakoti Pillai who knows P. W. 1 well saw P. Ws. 1 and 2 coming by his street at about 9-30 a. m. and the accused going at a distance on a bicycle. P. Ws. 1 and 2 sought the assistance of P. W. 3 to hail the accused to stop. P. W. 3 did so and the accused went away without heeding him. P. W. 3 learnt from P. Ws. 1 and 2 as to what had happened. Then these three persons chased the accused and met him on the road Kadai. On being questioned there by P. W. 3 the accused stated "what has been entered as payment has been entered as payment" and left the place.

Thereupon P. W. 1 went and reported to the Sub Inspector of Police who directed them to go to the Munsif's Court apparently thinking that it was a civil matter. P. W. 1 consulted the vakils, went to Vellore got a complaint prepared and filed it as a private complaint. In the course of the enquiry the version of P. Ws. 1 to 3 set out above was corroborated by two others P. Ws. 4 and 5, respectable inhabitants of the place. The testimony of P. W. 4 is that while he was sitting in his house at about 9-30 a. m. on the day in question he saw the accused who told him that he was going to P. W. 2's house to repay his dues to P. W. 1 and that a few minutes later he saw the accused going away followed by P. Ws. 1 and 2 and that from P. Ws. 1 and 2 he learnt all that had happened. P. W. 5 also spoke to a similar story.

(3) The case for the accused in the Court was that as a matter of fact he had paid Rs. 750 towards the note and that P. W. 2 Kuppuswami had concocted this false story of non-payment.

(4) Two witnesses were examined by the accused one to prove an alibi not for himself (accused) but for P. W. 1 to show that the transaction did not take place as alleged and the other D.W. 2 to show that a transaction took place between himself accused and D. W. 2 under which D. W. 2 paid the accused Rs. 700 and which the accused wants to imply went to furnish the amount for the payment of Rs. 750 alleged by him. This witness D. W. 2 also wanted to make out that P. W. 2 was cognizant of this transaction.

(5) On the facts both the lower Courts have found that the prosecution has established beyond reasonable doubt that what happened took place only as set out by P. Ws. 1 to 5 and that the alleged payment of Rs. 750 by the accused is false and that the witnesses D. Ws. 1 and 2 cannot be believed. In addition, the learned Magistrate has been impressed with the demeanour of the P. Ws. and in the case of the complainant he has remarked "P. W. 1 is a respectable old man and his demeanour in Court struck me as that of a truthful person." In regard to P. Ws. 2 and 3 he has stated "P. Ws. 2 and 3 stood the test of cross-examination well." Therefore, there are no grounds whatsoever to interfere with these findings of fact and I accept them.

(6) The only point of law taken is that the act attributed to the accused does not amount to an attempt to cheat and in support of it the learned advocate relies upon these decisions. The first decision relied upon is — 'Hurjee Mull v. Imam Ali Sircar', 8 Cal WN 278 (A). The facts of this case were: On 25th Jeshta a bill was presented to the accused in his shop by B, a servant of H, for payment of money due by accused to H. On the bill was printed a stipulation that any payment on account of the

bill unless endorsed on its back would not be admitted. The prosecution alleged that the accused took the bill from B and (in the presence of B, and several other persons) wrote on its back the endorsement "17th Jeshta-through B Rs. 501" whereupon B snatched away the bill from the accused and asked for payment of the amount thus entered on the bill, to which the accused answered "Go away, I have paid." Upon these allegations the accused was convicted on charges of forgery and attempt to cheat.

The defence was that Rs. 501 had in fact been paid to B on 17th Jeshta and had accordingly been entered in the books of the accused (which were produced) on 17th Jeshta but that the payment had not been endorsed on the bill on 17th Jeshta as B had not brought the bill with him on that date that the bill was endorsed by the accused in the manner mentioned on 25th Jeshta and that B took it away without protest or altercation of any kind. It was held on the facts generally that there was no evidence to go to the jury in respect of either of the charges and held as to the charge of forgery that the circumstances of the case did not justify the inference that the endorsement was made by the accused with the intention of causing it to be believed that it was made on the 17th and not on 25th Jeshta when in fact it was made; held as to the charge of attempt to cheat that the bill having been snatched away from the accused before he had given any indication of what he had meant to do with it, the acts of the accused did not constitute an attempt to cheat, supposing that it was cheating that the accused intended and was prepared to commit.

An attempt to deceive by a false representation of fact involves that the person charged should have taken some step towards communication of the representation to the person whom it was his intention to deceive and that in the instant case in the trial on a charge of attempting to cheat, it was a serious defect and one which placed the accused at a considerable disadvantage in the conduct of his defence, that the charge framed against him was silent as to the person upon whom the alleged attempt to cheat was made and also the manner in which it is intended by the accused to influence the conduct of that person. The contention of the advocate for the accused in that case Mr. Garth was that what took place amounted only to preparation and not an attempt. It will be seen that the facts of the instant case are entirely different, and this decision has no application whatsoever.

(7) The instant case is not a case of mere preparation which is an indifferent act possessing no definite indication of criminality. It is no doubt true that it is not unoften a question of nicety as to where does preparation end and attempt begins. The answer to this question is an attempt is an act of such a nature that it is in itself evidence of the criminal intent with which it is done. A criminal attempt bears the criminal intent upon its face. The thing speaks for itself. If this formula is applied to the instant case it will be seen from the facts set out above that what the accused intended and did and achieved went beyond the stage of preparation and constituted a criminal attempt at cheating.

(8) The learned advocate then relied upon several cases reported of fraud committed by post. The debtor advises his creditor of the remittance of a sum of money in currency notes by insured post. On opening it the creditor finds its contents worthless. What offence has the debtor committed? It has been held in some cases that his offence is an attempt to cheat: — 'Arura v. Emperor', 1913 Pun Re 10: 20 Ind Cas 596: 14 Cri LJ 436 (B); — 'Sadholal v. Emperor', AIR 1917 Pat 699 (C); while in others it is held to constitute no offence; — 'Raman Behari Roy v. Emperor', AIR 1924 Cal 215 (D); — 'Tularam v. Emperor', AIR 1924 All 205 (E); — 'Vaithanathasami Aiyar, In Re', AIR 1927 Mad 199 (F), though in two cases it was conceded that it might amount to fabrication of evidence: — 'AIR 1927 Mad 199 (F)' and — 'AIR 1924 All 205 (E). The act seems more in the nature of a preparation than an attempt, for which a closer relation to cheating would seem to be necessary. This appears to be the 'rationale' of the case in which the accused a broker had entered into a contract with the complainant for the sale of jute on behalf of the firm B which proved to be a fictitious one. The price of jute having risen the complainant prosecuted the broker but the prosecution was quashed on the ground that the prospective harm to the complainant was both uncertain and too remote: — 'Harendranath v. Jyotish Chandra', AIR 1925 Cal 100 (G).

(9) On the other hand, the facts of this case fall more appropriately within the ambit of the decision in — 'Queen Empress v. Kunja Nayar', 12 Mad 115 (H). In this case the prisoner was requested to make an entry in a book of account belonging to the complainant to the effect that he was indebted to the complainant in a certain sum found due on a settlement of accounts. Instead of making this entry as requested, the prisoner entered in a different language not known to the complainant that this sum had been paid to the complainant. Held that the offence committed by the accused was an attempt to cheat.

(10) The net result of the analysis of the evidence in this case is that the accused representing that he was going to pay a sum of Rs. 13-8-0 to make up Rs. 50 placed the money near P. W. 2 and wanted the promissory note to endorse on the back of it this payment of Rs. 50 and instead of that entered a payment of Rs. 750 and that when he was questioned asked P. Ws. 1 and 2 to come to his house to get the entire sum of money and went away on his bicycle and was chased in vain by P. Ws. 1 to 3 and that when he was finally cornered stated that what had been entered as payment had been entered as a payment and would not give any further satisfaction and obviously tried to swindle thereby this P. W. 1 of a sum of Rs. 750 minus Rs. 36-8-0. This is not a question of preparation but a barefaced criminal attempt to cheat P. W. 1.

(11) The point of law taken therefore fails and this criminal revision case is dismissed.

B/V.R.B. Revision dismissed.

A.I.R. 1953 MADRAS 610 (Vol. 40, C.N. 239)

SATYANARAYANA RAO J.

Thirunageswaram Janopakara **Saswatha** Nidhi Ltd., by its voluntary Liquidator, **K. N.** Rajaratna Chettiar, Appellant v. P. **K. Doraiswami** Mudaliar and another, **Respondents.**

Second Appeal No. 703 of 1949, D/- **9-12-52.**

Companies Act (1913), S. 229 — Set off — (Provincial Insolvency Act (1920), S. 46).

Amount becoming due from fund to mortgagor — Fund claiming an amount due to it under mortgage — Two amounts can be set off. AIR 1918 Mad 995, Foll. (Para 1)

Anno: Companies Act, S. 229 N. 12; Pro. Ins. Act, S. 46 N. 1.

S. V. Rama Iyengar and K. V. Rajagopalan, for Appellant; M. S. Venkatarama Iyer, for Respondents.

CASE CITED:
(A) ('18) AIR 1918 Mad 995: 40 Mad 1004

JUDGMENT: The amount due from the fund became payable long ago as all the instalments have been paid by the mortgagor. If, as pointed out in — 'Mylapore Permanent Benefit Fund Ltd. v. Arogiaswami Pillai', AIR 1918 Mad 995 (A), after the calls have matured at the end of the 84th month, the balance becomes due and there is a statement of account, there is nothing to prevent the adjustment of the two claims at the end of the 84th month. In that case what happened was that the period of maturity had not arrived and therefore the adjustment could not be availed of. In view of S. 229, Companies Act, which attracts the provision in S. 46, Provincial Insolvency Act, the mortgagor has got the right to claim a set-off of the amount due to him from the fund in respect of the matured claim as against the amount due from him under the mortgage. This is not like a case of a contributory in a limited company who, as a creditor of the company, cannot, in winding up, set off his debt against a call made on him by the liquidator, until the creditors have been paid in full. There is no question of the mortgagor being a contributory.

The amount due to him became payable under a contract with the fund by which he had to keep up the payment of the instalments for a period of 84 months at the end of which the fund in its turn promised to pay to the person who entered into the contract not only the amount he paid but also some bonus and this amount undoubtedly became payable at the end of the 84th month. That amount is a debt due to the mortgagor from the fund. The fund is now claiming an amount due to it under a mortgage. These two amounts can be set off and I see no objection for adjusting the one against the other as pointed out by the decision in — 'AIR 1918 Mad 995' (A) at p. 1006. The view taken therefore by the lower Court is correct and the second appeal is dismissed with costs.

(2) Leave to appeal is refused.

B/D.H. Appeal dismissed.

A.I.R. 1953 MADRAS 611 (Vol. 40, C.N. 240)

RAJAMANNAR C. J. AND
VENKATARAMA AIYAR J.

Appanna, Appellant v. Jami Venkatappadu and others, Respondents.

Appeal No. 115 of 1949, D/- 17-11-1952.

Limitation Act (1908), Arts. 91, 142, 144 — Scope and applicability to void documents — (Contract Act (1872), S. 19).

Article 91 presupposes that a suit is necessary under the law to set aside the instrument. But, where under the law there is no duty cast on the person to get an instrument set aside, the article does not impose any obligation on him to get it set aside. 35 Cal 551 (PC), Rel. on; Case law discussed. (Para 3)

When a deed of one character is executed on a representation that it is of a different character, then it is wholly void and inoperative. Such a deed does not require to be set aside under Art. 91 and a suit to recover possession of the properties comprised therein would be governed by Arts. 142 and 144 of the Limitation Act. (Para 7)

The fact that there is a prayer for a declaration that the deed is void or that it should be set aside does not affect the position. Such prayers being ancillary to the substantive prayer for possession may be regarded as mere surplusage. A. I. R. 1934 PC 130, Rel. on; AIR 1948 PC 111, Distinguished.

(Distinction between void and voidable documents and their effect on the transferor's title explained). (Para 3)

Anno: Lim. Act, Art. 91 N. 2, 3; Art. 142, 144 N. 2; Contract Act, S. 19 N. 2, 7.

C. V. Dikshitalu and N. Rajeswara Rao, for Appellant; B. V. Subramaniam, for Respondents.

CASES CITED:
(A) ('08) 35 Ind App 98: 35 Cal 551 (PC)
(B) ('27) AIR 1927 Mad 805: 53 Mad LJ 311
(C) ('29) AIR 1929 Mad 478: 30 Mad LW 796
(D) ('28) AIR 1928 All 267: 50 All 510
(E) ('24) AIR 1924 Bom 174: 48 Bom 166
(F) ('18) AIR 1918 Bom 188: 42 Bom 638 (FB)
(G) ('15) AIR 1915 Mad 1196: 39 Mad 456
(H) ('03) 30 Cal 433
(I) ('96) 23 Cal 460
(J) ('86) 12 Cal 69
(K) ('21) AIR 1921 Cal 786: 26 Cal WN 479
(L) (1869) 38 LJCP 310: (1869) 4 CP 704
(M) ('19) AIR 1919 Cal 728: 23 Cal WN 93
(N) ('29) AIR 1929 Cal 606: 121 Ind Cas 404
(O) ('40) AIR 1940 Pat 201: 185 Ind Cas 816
(P) (1907) 76 LJ Ch 346: 1907-1 Ch 537
(Q) ('50) AIR 1950 Pat 247
(R) ('48) AIR 1948 PC 111: 61 Mad LW 495
(S) ('34) AIR 1934 PC 130: 9 Luck 178: 40 Mad LW 5 (PC)

VENKATARAMA AIYAR J.: This is an appeal by the plaintiff against the judgment and decree in O. S. No. 2 of 1947 on the file of the Court of the Subordinate Judge, Chicacole. The properties which are comprised in this suit belonged to one Vaddi Varahalu, the mother of the plaintiff, as her stridhana and on the death of Vaddi Varahalu about the year 1914 the plaintiff became entitled to them as her stridhanam heir. She was then a minor aged about 8 years. It is stated in the plaint that as her father was a man of weak intellect, the first defendant and his brother Kamanna who are her maternal uncles took possession of her properties and entered into the management thereof on her behalf. The plaintiff was subsequently married to the first defendant. On 16-8-1925 she executed a deed of settlement Ex. B 3 whereby she transferred all the suit properties to the first defendant and his brother Kamanna by way of gift. It is this deed that is the subject-matter of attack by the plaintiff in this action. The plaintiff alleges that the first defendant and his brother represented to her that the deed was a general power of attorney authorising them to manage the estate, that she did not read it nor was it read to her and that she executed it in the thought and belief that it was only a power of attorney. She goes on to

state that she lived with her husband till 1939, that in that year he drove her and her children out of the house and that she became aware of the fraud practised on her only on 29-8-1944. In paragraph 10 of the plaint it is stated that the "settlement deed dated 16-8-1925 was vitiated by fraud and misrepresentation of the first respondent and his brother and as such it confers no title on them to the plaint properties" and that the suit is laid for recovery of possession with mesne profits. Conformably to these allegations, the plaintiff prays for a declaration that the settlement deed dated 16-8-1925 is vitiated by fraud and undue influence and misrepresentation and that it confers no title on the respondents; for an order that the suit settlement deed be set aside and for a decree for possession and mesne profits. The second defendant is the widow of Kamanna who is the brother of the first defendant and one of the donees under Ex. B 3. Both the defendants contest the suit on the merits and they also plead that it is barred by limitation. On these pleadings, the following issues were framed:

1. Whether the settlement deed dated 16-8-1925 was got executed by the plaintiff by the exercise of fraud, undue influence and misrepresentation?

2. Whether the plaintiff has been in possession of the suit properties within 12 years prior to suit?

3. Whether the suit is in time?

4. To what mesne profits, past and future, is the plaintiff entitled, if any?

5. What relief?

At the hearing of the suit, issue No. 3 was taken up first for trial. The notices that passed between the parties in 1944 were marked and arguments were addressed on the question of limitation. The learned Subordinate Judge held that the suit was governed by Art. 91 of the Limitation Act and that as the plaintiff had admitted in her notice dated 10-8-1944 that she had knowledge of the fraud in 1940, the suit which was instituted on 25-4-1946 was barred by limitation. On this finding, he dismissed the suit 'in limine'. Against this decision the plaintiff prefers this appeal.

(2) The only point for determination in this appeal is whether the suit is barred by limitation under Art. 91 of the Limitation Act. The answer to this question depends on the application of two principles both well settled, that Art. 91 does not apply when the instrument sought to be cancelled is void and inoperative and that when a person executes a deed of one character under a misrepresentation that it is of a different character, it is void.

(3) Article 91 of the Limitation Act provides for a period of three years for a suit to cancel or set aside an instrument, not otherwise provided for. This article presupposes that a suit is necessary under the law to set aside the instrument. But, where under the law there is no duty cast on the person to get an instrument set aside, this article does not impose any obligation on him to get it set aside. We must, therefore, have recourse to the substantive law to ascertain whether a party to an instrument should get that cancelled or not. Now the authorities have established that for this purpose there is a distinction between voidable and void transactions and that while the former class of transactions should be set aside, the latter need not be. The reason for this distinction is that in the case of a voidable transfer the title to the properties vests in the transferee on the execution of the deed and that it can revest in the transferor only by a decree of Court rescinding the transfer on grounds such as coercion, undue influence or fraud. To such a suit, Art. 91 prescribes the period of limitation and if no suit is filed within the time limited thereby the transferor loses his right to avoid the sale and the title of the transferee becomes unimpeachable. Thereafter, it is not open to the transferor to sue for possession of the properties ignoring the deed because the right to possession is an adjunct to the title to the properties and that had passed to the transferee and had become unimpeachable by the operation of Art. 91. But different considerations arise when the instrument of transfer is void and does not operate to vest the title in the transferee. In that case, the transferor continues to be the owner of the properties even after the execution of the instrument precisely as before. There is no need in such a case for the transferor to move the Court for setting aside the deed because there is no transfer which the Court has to rescind and if the transferor has to recover possession of the properties covered by the deed, he can ignore the deed and recover on the strength of his own title. To such a suit, the period of limitation applicable is under Art. 144 and not Art. 91. If in such a suit there is a prayer for cancellation of the instrument, it can only be regarded as ancillary to the substantive prayer for possession and can be treated as mere surplusage.

(4) Turning now to the authorities: In — 'Petheperumal Chetty v. Muniandi Servai', 35 Cal 551, (559-60) (PC) (A), the question for determination was whether a suit to recover properties which had been transferred by a person benami in the name of another was governed by Art. 91 of the Limitation Act. In holding that that article had no application, the Privy Council observed:

"As to the point raised on the Indian Limitation Act, 1877, their Lordships are of opinion that the conveyance of the 11th June 1895, being an inoperative instrument, as, in effect, it has been found to be, does not bar the plaintiff's right to recover possession of his land and that it is unnecessary for him to have it set aside as a preliminary to his obtaining the relief he claims. The 144th, and not the 91st article in the second schedule to the Act is therefore that which applies to the case and the suit has consequently been instituted in time."

In accordance with this decision, it has been held that where the transaction is sham and nominal, there is no need to get it set aside and Art. 91 has no application to such cases; Vide: — 'Subraya Chetti v. Nagappa Chetti', AIR 1927 Mad 805 (812) (B); — 'Krishnaswami Aiyangar v. Kuppu Ammal', AIR 1929 Mad 478 (479) (C); — 'Mohamed Nazir v. Mt. Zulaika', AIR 1928 All 267 (D) and — 'Sangawa v. Huchan Gowda', AIR 1924 Bom 174 (E). In — 'Narasa Gouda v. Chawa Gowda', AIR 1918 Bom 188 (FB) (F), it was held that a sale deed executed by a minor being void,

he was entitled to recover possession of the properties and that the suit was not governed by Art. 91 as he was not bound to have the deed set aside. In — 'Narayanan v. Lakshmanan', AIR 1915 Mad 1196 (G), certain trustees had transferred their right to manage a temple in favour of the defendants and put them in possession of the temple properties. In a suit to recover possession of the properties, the defendants pleaded that it was barred by limitation under Art. 91 as it was instituted more than three years after the date of the transfer. It was held by Wallis C. J. and Coutts-Trotter J. that as the deed of transfer was void, it did not require to be set aside and that Art. 91 had no application and they observed:

"The Limitation Act merely prescribes within what periods suits must be brought and cannot be construed as of itself creating an obligation to sue where none existed."

In — 'Banku Behari v. Krishto Govinda', 30 Cal 433 (H), Bannerjee and Geidt JJ. observed:

"That a document which was never intended by the executant to be operative does not require to be set aside or cancelled in order to entitle any person to the possession of the property covered by it as against the person in whose favour it stands, has been held by this Court in the cases of — 'Sham Lal v. Amarendra Nath', 23 Cal 460 (I) and — 'Raghubar Dayal v. Bhikya Lal', 12 Cal 69 (J)."

The position is thus stated by Richardson J. in — 'Saratchandra v. Kanailal', AIR 1921 Cal 786 at p. 789 (K):

"If a plaintiff comes into Court to have a particular written instrument set aside or cancelled then 'prima facie' the article of the schedule of the Limitation Act applicable is Art. 91, whether the ground on which the claim is made is fraud or some other ground.

The Courts, however, draw a distinction between void and voidable instruments and hold that Art. 91 does not apply to instruments which are void 'ab initio' so as not to require setting aside. When the instrument is voidable it is presumably void, and binding on the plaintiff until it is set aside, and any further relief which may be sought depends on the removal of the instrument from the plaintiff's path. In such a case, Art. 91 applies.

But if the facts alleged by the plaintiff raise a case that the instrument, whether executed by the plaintiff himself or by some third party through whom he claims is null and void 'ab initio', then, as I understand the matter, Art. 91 ceases to be applicable and the circumstances may entitle the plaintiff to the benefit of the longer period of limitation allowed by some other article, such as Art. 120 or Art. 144."

These observations are well supported by authority and it may now be taken as firmly established that where the instrument which is relied in bar of the plaintiff's claim is void and inoperative, there is no need for setting aside such an instrument and Art. 91 does not bar the plaintiff from claiming such relief as he might be entitled to on the basis that the instrument is void.

(5) The question next arises whether Ex. B. 3 is a deed under which title passed to the transferees, though it was liable to be displaced on proof of undue influence or fraud or whether it was a void instrument under which there was no transfer of title. If the complaint of the plaintiff had been that by the fraudulent representations of the donees she was induced to enter into the transaction of whose nature however she was aware or that there had been fraud with reference to the terms of the deed and its contents, there can be no doubt that title would pass to the transferees and that the only remedy of the plaintiff would be to sue to set aside the deed on the ground of fraud. But the complaint here is something different. The plaintiff states that it was represented to her that the deed which she was executing was a power of attorney, whereas in truth it was a deed of gift and that she signed Ex. B. 3 thinking and believing that it was only a power of attorney. That also is what she stated in the notice, Ex. B. 2. Now the authorities have made a distinction between misrepresentations as to the character of the deed and misrepresentations as to its contents. With reference to the former, it has been held that the transaction is void, while in the case of the latter, it is voidable. In — 'Foster v. Mackinnon', (1869) 4 CP 704 (711, 713) (L) the action was by the endorsee of a bill of exchange. The defendant pleaded that he endorsed the bill on a fraudulent representation by the acceptor that he was signing a guarantee. In holding that such a plea was admissible, the Court observed:

"It (signature) is invalid not merely on the ground of fraud, where fraud exists, but on the ground that the mind of the signer did not accompany the signature; in other words, that he never intended to sign, and therefore in contemplation of law never did sign, the contract to which his name is appended..... The defendant never intended to sign that contract or any such contract. He never intended to put his name to any instrument that then was or thereafter might become negotiable. He was deceived, not merely as to the legal effect, but as to the 'actual contents' of the instrument."

This decision has been followed in numerous authorities in the Indian Courts. In — 'Sanni Bibi v. Siddik Hossain', AIR 1919 Cal 728 (M) the suit was for recovery of possession of certain properties in respect of which the plaintiff had executed a deed of sale. The plaintiff also prayed for cancellation of the deed on the ground that it was represented to her that the deed was a 'jimbanama' for her maintenance and that she did not know or believe that she was executing a deed of sale. That was found as a fact by the District Munsif. Nevertheless, he held that the suit was barred by limitation under Art. 91 of the Limitation Act. Newbould and Panton JJ. held that on that finding, the principle of the decision in — '(1869) 4 CP 704' (L), would apply and that the deed would be void and that Art. 91 would be inapplicable to such a case. In — 'AIR 1921 Cal 786 (789) (K), already cited, the allegations in the plaint were that the defendant had taken a deed of gift and exchange from the plaintiff Rengamoni Devi on a representation that it was a power of attorney for the management of the estate and that she executed the document without the knowledge of its true character. The suit was dismissed by Buckland J. as barred by limitation under Art. 95. On appeal, Sanderson C. J. and Richardson J. held following the

decision in — '(1869) 4 CP 704' (L), that if the allegations in the plaint were established the transaction would be void and that neither Art. 95 nor Art. 91 would apply to that case. Richardson J. observed:

"In the present case, as I read the plaint, plaintiff raises the plea known to English lawyers as 'non est factum'.

If she should succeed in establishing that plea, then the instrument in question would be altogether void. It would not require setting aside and the prayer to set it aside would be therefore superfluous, so that Art. 91 would be inapplicable."

In — 'Brindaban v. Dhurba Charan', AIR 1929 Cal 606, 607 (N), the third defendant who had executed a deed of gift in favour of the second defendant sold the property subsequently to the plaintiff alleging that the gift deed was executed by her on a representation by the second defendant that it was a power of attorney and the suit was by the purchaser to recover possession. It was pleaded by the second defendant that it was barred under Art. 91 of the Limitation Act. In rejecting this contention, Cuming and Pearson JJ. observed:

"On the other hand in — 'AIR 1919 Cal 728' (M) a decision directly in point, it has been held that when it is established that the plaintiff by defendant's misrepresentation was induced to execute a deed of sale believing the same to have been a deed of a different kind the transaction is void and not voidable only and Art. 91, Limitation Act has no application to his suit to recover the property. It will be seen that that decision is directly in point, because in this case the plaintiff sues as the transferee of defendant 3 and stands in her shoes. Defendant 3 was induced by the misrepresentation of defendant 2 to execute a deed of a different kind to what she thought she was executing. It has been found that she thought that she was executing a power of attorney when she was really executing a deed of gift."

In the result, the decree for possession was affirmed. In — 'Rajah Singh v. Chaichoo Singh', AIR 1940 Pat 201, 203 (O) one Titai Singh sued to recover possession of the properties comprised in a deed of gift executed by him on 18-6-1931 on the ground that it was represented to him that the deed was an instrument of lease and that it was, therefore, void. The suit was instituted on 3-8-1935. The question was, whether it was barred by limitation under Art. 91. It was held by Fazl Ali and Meredith JJ. that if the facts pleaded in the plaint were established, Art. 91 would have no application as the deed would then be void and not merely voidable. Meredith J. observed:

"If Titai executed the document under the impression that it was a lease, when in fact it was a deed of gift, then I think there was no real execution since Titai's mind would have been directed to one thing whereas what he put his hand to was something of an altogether different character. The executant's mind was not with his hand. If there was no real execution the document was wholly void and not merely voidable..... .....The learned advocate for the appellants argued on the basis in — 'Howatson v. Webb', 1907-1-Ch. 537 (P) that — '(1869) 4 CP 704' (L) was no longer good law. But, in fact, what the later rulings really lay down is that a misrepresentation as to the contents of a document will make it voidable, and only a misrepresentation as to its character will make its execution absolutely void...It seems to me that a representation that a document was a lease when it was in fact a deed of gift, would be a misrepresentation as to the nature of the document and not merely as to its contents. Obviously, the line of distinction might sometimes be a fine line. I can conceive cases where it might be very difficult to say whether the document signed and the document fraudulently represented actually differed in nature or merely in contents; but I feel no doubt that as between a lease and a deed of gift, there is a difference of nature and not merely a difference of contents. Where the document is wholly void 'ab initio' any prayer to set it aside is unnecessary and redundant."

In — 'Bibi Saleha v. Md. Zakariya Khan', AIR 1950 Pat 247 (Q) the allegation was that a deed of gift was executed under the impression that it was a 'mukhtarnama' and that was found as a fact. With reference to a plea of limitation based on Art. 91 the Court observed:

"It is now well established that this article applies to suits in which it is sought to cancel or set aside an instrument which is voidable, and has no application where the instrument which is challenged is void 'ab initio'."

The plea of limitation was accordingly overruled.

(6) Mr. B. V. Subramaniam the learned advocate for the respdts. argued that the distinction made in the decisions quoted above between misrepresentation as to the character of a deed and misrepresentation as to its contents was untenable in view of the pronouncement of the Privy Council in — 'Atmaram Manekal v. Bai Hira', AIR 1948 PC 111 (R). There, a widowed daughter-in-law living with her father-in-law had executed on 12-6-1926 a deed relinquishing her rights over the properties inherited by her from her husband. On 14-10-1930 she instituted a suit for setting aside the deed on the ground that the defendant got her to execute the document while she was in distress and under his protection, influence and control and without allowing her an opportunity for independent advice or legal aid; that when she signed, she did not grasp the import of the document and that it was only when the document was explained to her that she understood that it purported to be a relinquishment of her rights over the property which she had inherited from her husband. There were concurrent findings of the Courts in India that at the time when the deed was executed the plaintiff was under the influence and protection of the defendant, that she had no independent advice, that owing to mental distress she was not fit to understand how adversely her rights were affected and that in fact she did not understand its meaning and legal consequences. Before the Board, it was argued that the suit was barred by Art. 91, as the plaintiff had been given a copy of the deed in 1926 and more than three years had elapsed from that date. In answer to this, the Privy Council observed:

"When ground for setting aside the instrument is that the plaintiff did not appreciate its true nature and legal consequences, it has been said by this Board and it was not disputed in this case, that the limitation

begins to run from the date when the plaintiff became aware of the true nature and legal consequences of the instrument."

And again,

"It is for him (the defendant) to prove the date at which she in fact came to understand the true nature of the transaction which ought to have been explained to her by him and it is not enough for him to show merely that she had an opportunity of reading the document and that its terms were not complex or obscure."

The respondent argues that this decision is an authority for the position that Art. 91 would apply even when the misrepresentation was as to the nature of the document. But the context clearly shows that their Lordships had in mind the effect of the deed on the rights of the parties and not about the character of the deed. On the other hand, the decision in — 'Someshar Dutt v. Tribuwandutt', AIR 1934 PC 130 (S) recognises that suits in which deeds are impugned on the ground that they were executed under a misrepresentation as to their character stand on a separate footing from suits to set aside deeds on the ground of undue influence. In that case, the plaintiff had on 15-5-1914 executed a deed of gift in favour of the defendant. He subsequently filed a suit to recover possession of the properties covered by the deed on the ground that the defendant represented to him that it was a deed of management, that he had signed it without knowing that it was a deed of gift and that the suit was not barred by limitation, as it was filed within twelve years of the transaction. It was found that there was no misrepresentation and that the plaintiff had executed the deed with full knowledge of its contents. The substantive case put forward by the plaintiff, therefore, failed. It was then sought to be argued on behalf of the plaintiff that a case of undue influence had also been raised in the plaint and that the suit was within time as one to set aside a deed under Art. 91. As to this, the Privy Council observed that the only substantive case put forward in the plaint was that the deed had been executed under a misrepresentation as to its character, that allegations as to undue influence were made only as ancillary to that case and that there was no independent and substantive plea of undue influence put forward in the suit. It was also remarked that a suit for relief based on undue influence would be governed by three years limitation whereas according to the allegations in the plaint, the suit would be governed by 12 years limitation.

(7) The authorities thus establish that when a deed of one character is executed on a representation that it is of a different character, then it is wholly void and inoperative. Such a deed does not require to be set aside under Art. 91 and a suit to recover possession of the properties comprised therein would be governed by Arts. 142 and 144 of the Limitation Act. The fact that there is a prayer for a declaration that the deed is void or that it should be set aside does not affect the position, such prayers being ancillary to the substantive prayer for possession. As observed in the decisions already cited. such prayers might be regarded as mere surplusage. We accordingly hold on issue No. 3 differing from the lower Court, that the suit is not barred by limitation under Art. 91.

(8) In the result this appeal is allowed and the suit is remanded for disposal on all the issues excepting issue No. 3. As the appeal has been filed in forma pauperis no order is necessary for refund of court-fee. The costs of this appeal will abide the result of the suit.

B/D.R.R. Appeal allowed.

A.I.R. 1953 MADRAS 615 (Vol. 40, C.N. 241)

BASHEER AHMED SAYEED J.

Vedantam Narasimhacharyulu, Petitioner v. Pothuri Kotayya, Trustee of Sri Venugopalaswami and Anjaneyaswami Temple, Valluru and others, Respondents.

Civil Revn. Petn. No. 1107 of 1948, D/- 1-2-1952.

(a) Madras Hindu Religious Endowments Act (2 of 1927 as amended by Act 10 of 1946), S. 78 — Application under — Only summary inquiry is intended — Persons in possession claiming to be in possession in their own right — District Judge cannot enter into elaborate inquiry into question of title — (Madras Hindu Religious and Charitable Endowments Act (19 of 1951), S. 87). AIR 1949 Mad 897, Rel. on. (Paras 5 and 6-7)

The spirit of S. 78 of Act 2 of 1927 as amended by Act 10 of 1946 is carried into S. 87 of the Madras Act 19 of 1951. The scope of S. 87 is not, in any way, different from the scope of S. 78 in so far as the remedy of summary procedure is provided for in order to get hold of properties, which are admitted to be trust properties by the trustees, who are appointed by the Board. (Para 8)

(b) Madras Hindu Religious Endowments Act (2 of 1927 as amended by Act 10 of 1946), S. 78 — Petition under — Valid certificate issued in prescribed manner should be produced along with petition — Certificate issued long prior to framing of rules by Government under S. 71 is not valid — Conclusiveness of certificate according to proviso to S. 78, comes in only when certificate is in accordance with law and procedure prescribed by rules. (Paras 9, 10)

G. Venkatarama Sastri, for Petitioner; B. S. Ramachandra Rao and V. Rangachari, for Respondents.

CASES CITED:

(A) ('49) AIR 1949 Mad 897: 1949-1 Mad LJ 200
(B) ('33) AIR 1933 Mad 689: 65 Mad LJ 315
(C) ('37) AIR 1937 Mad 852: 1937-2 Mad LJ 413
(D) ('48) AIR 1948 Mad 72: 1947-1 Mad LJ 287
(E) ('31) 1931 Mad WN 898

ORDER : This revision petition is against the order of the learned District Judge of Guntur made on an application by respondent 1, under S. 78, Hindu Religious Endowments Amendment Act (Act 10 of 1946).

(2) Respondent 1 herein claiming to be the trustee of the Sri Venugopalaswami and Anjaneyaswami temple situate at Vallur, filed the application under S. 78, Hindu Religious Endowments Act, to direct the petitioner and the other respondents to deliver possession of the petition-schedule properties described in schs. A and B to him and respondents 20 and 21, the latter also being trustees appointed along with respondent 1 petitioner in the lower Court.

(3) The petitioner before me raised objections as to the tenability of the petition before the District Court on the ground that the case was not one covered by S. 78, Hindu Religious Endowments Act and that the Court had no jurisdiction to direct delivery of possession of the properties to the trustees. A further ground was also alleged viz., that the certificate required under S. 78 was also not produced and that what was produced at a later stage was not the proper certificate required by that section. The learned District Judge held that, so far as the movable properties were concerned, the certificate issued by the Board did not comprise them, and therefore, he did not direct possession of the schedule-mentioned movable properties. But in regard to the immovable properties, which were claimed to be in the possession and enjoyment of the archakas, he directed, holding that the certificate was a valid certificate, that since the trustees have been appointed as such by the Board, they were entitled to recover possession and, therefore, the respondents were bound to deliver possession and allowed the petition. Against this order, this revision petition is preferred.

(4) The learned counsel appearing for the petitioner in this Court has raised various points as to the sustainability of the order of the learned District Judge. The first point that he has raised is that the provisions of S. 78, Hindu Religious Endowments Act do not warrant an enquiry by the learned District Judge into a case of this type, where the archakas claim to be in possession of the properties for over a long period covering more than a century and performing services to the temple deities, viz., Sri Venugopalaswami & Anjaneyaswami. His specific contention is that S. 78 would apply only to properties, which are admitted to be trust properties and in regard to which there could be no bona fide dispute but that where the parties, who are in possession claim to be bona fide in possession on their own account, the Court will have no jurisdiction to enquire into the matter on a petition. The section contemplates a summary procedure and in summary procedure, where there is a bona fide dispute with regard to title to the properties claimed by the temple or by the trustees on behalf of the temple, the jurisdiction of the Court is ousted.

(5) The learned counsel for the petitioner has relied on the decision in —'Rangacharyulu v. Venkatanarasimhayya', AIR 1949 Mad 897(A). On a careful consideration of the judgment of the Bench of this Court, consisting of Satyanarayana Rao and Panchapagesa Sastry JJ. in the said decision I am in agreement with the view that the policy underlying S. 78 and the scheme itself, as may be gathered from the various clauses of that section, is only to give summary jurisdiction for making a direction in regard to delivery of possession of properties, which admittedly belong to the trustees or to the temple, and not properties, which are not admittedly trust properties and, in respect of which there happens to be a genuine and bona fide dispute as to the title and possession. The language of the section appears to be clear as has been pointed out by the learned Judges in the decision cited above, particularly at page 203, where Satyanarayana Rao J. has stated that

> "the claim of a person in possession in good faith, on his own account or on account of a third person, who was not such a trustee, office-holder, or servant is excluded from the ambit of the section."

If this decision applies to the facts of this case as it does, the point that is next to be ascertained is whether the claim of the archakas in this case is one, which is based on a bona fide claim of title in respect of properties or whether they claim under any of the trustees or servants or office-holder of the temple.

(6-7) The evidence in this case, which is contained in two documents viz., Exs. A. 3 and A. 4 seem to indicate that the position of the petitioner is not that he held the property under any trustee or any office-holder or any servant but that he claimed the property in his own right and on his own account and at any rate these two documents point to the fact that it is a service inam granted for performing certain services to Sri Venugopalaswami and Sri Anjaneyaswami temple at Vallur. That is expressly stated in Col. 8 of Ex. A. 3. Col. 17 also sets out that the service was being, at that time, rendered by Vedantam Narasimhachari, who appears to be the ancestor of the present petitioner. No doubt, the title deed has been issued in the name of the deities. In all service inams, it cannot but be the title deed has to be issued in the name of the deities, whereas the holders happen to be persons, who enjoy the property and perform services in the temple. This is also no doubt a devadayam but devadayam in the sense that it is a service inam granted for the purpose of service to the God in the temple. Even so, Ex. A. 4 is to the effect that the inam is granted to Sri Swamivarlu's enjoyment as per col. 1 (extract of the inam statement) but col. 6 makes it clear that it was granted by the then zamindar of Vallur Rajah Manchayarao Bhavanarayana Rao garu for conducting Sri Swamivaru 'nitya naivedhya deeparadhana' and in col. 11 it is said that it was for "enjoyment for Sri Swamivarlu 'nitya naivedya deeparadhana". What have been set out in cols. 1, 6 and 11 of Ex. A. 4 do not leave any room for doubt that the inam has been only a service inam granted for the purpose of performing or conducting the 'nitya naivedya deeparadhana' in the temple. In such circumstances, if the archakas, who claim to be in possession and enjoyment of the property for over a century, put forward a claim that they are entitled to the property on their own account, certainly this cannot be said to be property belonging to the trustees admittedly. Therefore, S. 78 of the Act would not be attracted to a case like this, where there is a bona fide dispute as to the title. It may be a matter for elaborate enquiry and decision as to whether the properties actually belong to the temple and the archakas have no right or whether the property is burdened with service or whether the archakas could hold the properties in their possession on their own account or on account of a third person who was a trustee, office-holder or servant. But even if such be the case, it cannot be the intention underlying S. 78, Hindu Religious Endowments Act that

such questions of title, which involve an elaborate enquiry, should be gone into in a summary manner in a petition of the kind under consideration.

(8) The learned counsel for the respondents relies upon the new S. 87 of Act 19 of 1951, and he would contend that S. 87 supports his view that a case like this can be summarily enquired into or an order for delivery of possession could be issued by the District Court. I do not think I can agree with this contention of the learned counsel for the respondents. The language, in essence, of Ss. 78 and 87 do not differ materially in regard to the nature of the property or the nature of the claim that has to be enquired into nor has the new S. 87 taken away the character of the enquiry, viz., that it should be a summary enquiry in regard to properties that are admitted to be trust properties. The spirit of S. 78 is carried into S. 87 without any alteration. That seems to be the position on a careful consideration of the language of that section. Therefore, even if S. 87 applies to the present case, though it is not conceded by the learned counsel for the petitioner for the reason that according to him a Bench of this Court has already held that the repealing S. 5 of the Act 19 of 1951 has been held to be ultra vires, still I am of the opinion that the scope of S. 87 is not, in any way, different from the scope of S. 87 in so far as the remedy of summary procedure is provided for in order to get hold of properties, which are admitted to be trust properties by the trustees, who are appointed by the Board. Therefore, on the facts of this case, I do not think that the learned District Judge had any jurisdiction to issue an order that the petitioner before me should be directed to deliver possession of the properties under the O. P. that was filed for the purpose by the trustees.

(9) There is a further point that has been raised with regard to the validity of the very proceedings taken out by the trustees, and that while S. 78 provides that a valid certificate issued in the prescribed manner should have been produced along with the petition and that the certificate actually produced during the course of the enquiry after the petition was filed was not one issued in accordance with law in that while the section required that it should be issued in the manner prescribed by the rules, it was issued long prior to the actual framing of the rules by the Government under the powers vested in the Government to frame rules under S. 71 of the said Act. Prima facie, there is some force, on the contention that the certificate, which enabled the trustees to claim a right to the property, was not one, which was issued in accordance with law as it then stood, but the learned counsel for the respondents invites my attention again to S. 87 and the proviso thereto which states that "for the purpose of proceedings under this section (S. 87), the certificate shall be conclusive evidence that the properties to which it relates belong to the religious institution." This proviso can come into operation only if and when the certificate has been issued in accordance with the law and the procedure prescribed and the manner in which it should have been issued as per the rules framed, but if actually a certificate has been issued when the rules had not been framed, and when there was, therefore, no valid certificate in the possession of the trustees, who proceeded to the Court for a direction for delivery of the properties, it cannot be said that this proviso would be applicable to the certificate. Nevertheless, the learned counsel for the respondents would invite further my attention to S. 103 of Act 19 of 1951. While under sub-clause (a)

> "all rules made, notifications or certificates issued, orders passed, decisions made, proceedings or action taken, schemes settled and things done by the Government, the Board or its President or by an Assistant Commissioner under the said Act, shall, in so far as they are not inconsistent with this Act, be deemed to have been made, issued, passed, taken, settled or done by the appropriate authority under the corresponding provisions of this Act & shall, subject to the provisions of clause (b), have effect accordingly"

it must be pointed out that the section provides that the certificate must not be inconsistent with the provisions of the present Act. The proviso to S. 87 provides that

> "before issuing any such certificate in respect of any property, the Commissioner shall give notice to the trustee, office-holder or servant of the religious institution, as the case may be, of his intention to issue the certificate and consider the objections, if any, of such trustee, office-holder or servant",

but, in this case, this proviso cannot be said to have been satisfied and, therefore, the issue of the certificate, even though it might have been issued under the previous provisions of law and even if sub-clause (a) to S. 103 may be said to apply to that certificate, still it cannot be said to be a valid certificate to be operative in the proceedings.

(10) The explanation to sub-cl. (a) of S. 103 is also relied upon by the learned counsel for the respondents wherein it is stated that

> "certificates issued by the Board under S. 78 of the said Act shall be deemed to have been validly issued under that section, notwithstanding that the certificates were issued before the making of rules prescribing the manner of their issue."

Even this explanation, in my opinion, is not of much avail to the learned counsel for the respondents. The learned counsel has again invited my attention to sub-clause (j) of S. 103 whereby it has been provided that

> "all suits, applications or proceedings taken by, or on behalf of, or against the Board under the provisions of the said Act and pending at the commencement of this Act, may be continued by, or on behalf of or against the Commissioner subject to the provisions of and in so far as they are not inconsistent with this Act."

I do not think that this clause, which gives power for the continuation of pending proceedings would apply to the facts of the present case. Even so, sub-cl. (k) of the same S. 103 of the new Act, whereby

> "any remedy by way of application, suit or appeal, which is provided by this Act shall be available in respect of proceedings under the said Act pending at the commencement of this Act as if the proceedings in respect of which the remedy is sought had been instituted under this Act"

does not seem to be of much help in regard to the points that have been raised in this petition.

(11) The learned counsel for the respondents has also relied upon a decision in — 'Narayana Iyengar v. Desika Chariar', AIR 1933 Mad 689 ((B), and also two other decisions of this Court, viz., — 'Hindu R. E. Board v. Koteeswara Rao', AIR 1937 Mad 852 (C) and — 'Venkatadri v. Seshacharyulu', AIR 1948 Mad 72 (D). I do not think the facts of those cases are on a par with the facts of the present case. I am unable to agree that the rulings in those decisions apply to the facts of the present case. On the other hand, I think the decision in — 'Venkatasubbarao v. Narayana Venkatacharyulu', 1931 Mad WN 898 (E), seems to apply to the facts of the present case in so far as the character and the nature of the holding is concerned. There are also two other unreported decisions of this Court which are in connection with claims in regard to properties, which were alleged to belong to a temple, and which may be referred to here, as they go to show as to what exactly the right of the archakas would be in respect of properties granted to a temple for performing 'nitya naivedya deeparadhana', In the judgment delivered by Satyanarayana Rao and Chandra Reddi JJ. in App. No. 218 of 1946, they have followed the earlier decision of this Court in — 'App. No. 285 of 1945', wherein the interest of the archakas in the case of a similar nature has been directed to be settled at 2/3 of the temple lands. This has been again followed in another decision made by this Court in C. M. A. No. 8 of 1949, to which I have myself been a party, and there it has been held that the archakas, similarly situated as in the present case, would be entitled to 2/3 of the net income for performing services to the temple. If such be the trend of decisions viz., that the archakas have a right in the lands, although the lands might have been originally granted to the temple, it cannot be said that such rights could be summarily disposed of in an application filed under S. 78, Hindu Religious Endowments Act. It could not have been the intention of the Legislature that where the archakas claim right bona fide in the property said to belong to the deity of the temple, such rights should be disposed of without any proper inquiry in a summary manner.

(11a) On a consideration of all these facts, I am inclined to hold that the order of the learned District Judge is not one that could be supported and it has to be set aside and it is set aside accordingly. The petitioner will be entitled to his costs in this petition.

(12) If the archakas have been dispossessed of their lands in execution of any order passed by the learned District Judge, it follows that they will be entitled to restoration of the property. In so far as the petitioner is only one of the archakas and the other archakas are appearing by Mr. V. Rangachari, the benefit of this order will be available not merely to the petitioner but also to the clients of Mr. V. Rangachari who has himself argued the appeal on their behalf as well.

B/R.G.D. Order accordingly.

A.I.R. 1953 MADRAS 618 (Vol. 40, C.N. 242)

BASHEER AHMED SAYEED J.

Paramasivam Pillai, Petitioner v. Adilakshmi Ammal and others, Respondents.

Civil Revn. Petn. No. 576 of 1951, D/- 13-12-1951.

Civil P. C. (1908), O. 1, R. 10 (2) — Proper party.

In interpreting O. 1, R. 10 (2), Civil P. C. the construction of the language of the section should be as liberal and as wide as possible and should not be restricted merely to the parties involved in the suit but the attempt should be always to make parties all persons who may be necessary in order that there might be a final and complete adjudication of the points involved in the suit. AIR 1929 Mad 268, AIR 1931 Mad 357; AIR 1935 Mad 353, AIR 1940 Mad 69, Rel. on. (Para 3)

Anno: C.P.C., O. 1 R. 10 N. 14, 16.

K. V. Ramachandra Iyer, for Petitioner; G. R. Jagadeesan, for Respondents.

CASES CITED:

(A) ('49) AIR 1949 Mad 410: 1948-2 Mad LJ 504
(B) ('27) AIR 1927 Mad 834: 53 Mad LJ 269
(C) ('50) AIR 1950 Mad 91: 1949-2 Mad LJ 568
(D) ('29) AIR 1929 Mad 268: 115 Ind Cas 340
(E) ('31) AIR 1931 Mad 357: 60 Mad LJ 229
(F) ('35) AIR 1935 Mad 353: 159 Ind Cas 899
(G) ('40) AIR 1940 Mad 69: 188 Ind Cas 379

ORDER: This is a petition against the order of the learned Subordinate Judge, Vellore, impleading a third party who wanted to come on record as the real owner of some of the properties involved in the suit.

(2) The suit was for partition of the joint family properties. Among the suit properties items 9 to 18 are said to be properties owned in his absolute right by defendant 6, the son-in-law of the joint family . These properties are claimed by the third party who wanted to be impleaded as a party-defendant as belonging to her. The learned Subordinate Judge held that it was necessary under O. 1, R. 10, Civil P. C., to completely and effectively adjudicate the questions involved in the suit that the third party should be added as a party-defendant. Against that order is the present revision petition.

(3) Mr. Ramachandra Aiyar appearing for defendant 6, who is the petitioner herein, contends that the petitioner defendant 1 (sic) cannot be a proper or necessary party to the suit. He also points out to the fact that defendant 6 has himself filed another suit against the respondent herein in another Court for declaring his title to the properties and also for an injunction restraining respondent 1 from interfering with his possession. That suit is still pending, though an interim injunction was ordered against the present respondent 1. The claim of respondent 1 is that she is the real owner of the properties which have been purchased benami in the name of defendant 6, and that since she is the real and legal owner of the properties and since the partition suit involves an adjudication as to whether these properties themselves are part of the joint family properties or not, she should be present in Court before any final adjudication takes place affecting her rights to the said properties.

Mr. Ramachandra Aiyar has invited my attention, in support of his contention that respondent 1 cannot be a necessary or proper party to the suit, to the decisions in — 'Nilakanta Iyer v. Ramanarayana Iyer', AIR 1949 Mad 410 (A), — 'Chidambaram Chettiar v. Subramaniam Chettiar', AIR 1927 Mad 834 (B) and — 'Palanisami Chettiar v. Komara Chettiar', AIR 1950 Mad 91 (C). In my view the facts in the cases relied on by the learned counsel for the petitioner are easily distinguishable from the facts that obtain in the present civil revision petition. In this civil revision petition the question involved is as to whether items 9 to 18 do or do not belong to the joint family and whether they are available or not for the purpose of division among the members of the joint family, who are entitled to the same. In order to decide whether these properties do or do not form part of the joint family assets and available for division among the heirs or claimants, whoever they are, it will be necessary to decide as to what exactly is the claim and title to the properties of the joint family. If the properties are claimed by third parties to belong to them, then the question involved in the suit for decision would also comprehend as to whether the properties are really that of the joint family or that they belong to third parties, in which case the claimants, who may be third parties and who claim the properties in their own absolute right, will have to be before Court in order that a decision may be arrived as to whether those properties are or are not to be included in the properties available for partition. In that view, I do not think that the right of this respondent 1, who is claiming an absolute title to items 9 to 18 and who is disputing the title of defendant 6 to claim the said properties on the ground that he is only a benamidar, to be brought on record, could be resisted. It may be that defendant 6 claims these properties in his own right, but in so far as the decision whether these properties will or will not be available for partition is concerned, the question involved will not be between the parties to the suit alone but also the stranger and other parties.

In interpreting O. 1, R. 10(2), Civil P. C., it has been held that the construction of the language of the section should be as liberal and as wide as possible and should not be restricted merely to the parties involved in the suit but that the attempt should be always to make parties all persons who may be necessary in order that there might be a final and complete adjudication of the points involved in the suit. In that view I think the decisions relied upon by the learned counsel for respondent 1 have a bearing on the point involved in this civil revision petition. 'Pitchayya v. Rattamma', AIR 1929 Mad 268 (D), — 'Ramaswami Chettiar v. Vellappa Chettiar', AIR 1931 Mad 357 (E), and — 'Sivarama Pillai v. Ganesaratnam Pillai', AIR 1935 Mad 353 (F) certainly make it clear that it will be necessary, to effectively and completely adjudicate and settle all questions involved in the suit, that all parties who claim any title to the properties in suit should be before the Court. Even so, the decision of Patanjali Sastri J. in — 'Vanjiappa v. Annamalai', AIR 1940 Mad 69 (G) holding that a liberal interpretation should be put upon the language of O. 1, R. 10 (2), Civil P. C. will apply to the facts of the present case. I, therefore, hold that what the learned Subordinate Judge has done is not in any way an error of law or a wrong exercise of his jurisdiction in having allowed the petition of the respondent and added her as a defendant in the suit. This petition is, therefore, dismissed and the order of the learned Subordinate Judge is upheld. The petitioner will pay the costs of respondent 1 in this civil revision petition.

B/K.S. Revision dismissed.

A.I.R. 1953 MADRAS 619 (Vol. 40, C.N. 243)

GOVINDA MENON J.

S. Duraiswami Nadar, Petitioner v. V. M. Nataraja Nadar and another, Respondents.

Civil Revn. Petns. Nos. 1225 and 1226 of 1952, D/- 12-12-1952.

Civil P. C. (1908), O. 1, R. 8 and O. 21, R. 63 — Suit to set aside fraudulent transfers — (T. P. Act (1882), S. 53).

When a suit is originally laid under O. 21, R. 63, C. P. C., an application by the plaintiff for amending the plaint so as to bring it in conformity with the requirements of S. 53, T. P. Act, should be allowed. AIR 1943 Mad 531, Foll. (Para 1)

Anno: C. P. C.. O. 1 R. 8 N. 5; O. 21 R. 63 N. 8; T. P. Act, S. 53 N. 24.

C. S. Rajappa, for Petitioner; Y. Balakrishna Iyer, for Respondents.

CASES CITED:

(A) ('43) AIR 1943 Mad 531: 1943-2 Mad LJ 1
(B) ('40) AIR 1940 Mad 789:
ILR (1940) Mad 808

JUDGMENT: The order of the lower Court refusing the plaintiff's application for amendment of the plaint by the addition of a prayer to the effect that he sues not only on his own behalf but also on behalf of the entire body of creditors of the defendant is unsustainable. In — 'Nandaramdass Atmaram v. Zulika Bibi', AIR 1943 Mad 531 (A) this Court has laid down that when a suit is originally laid under O. 21, R. 63, C. P. C., an application by the plaintiff for amending the plaint so as to bring it in conformity with the requirements of S. 53, T. P. Act, should be allowed. The learned Judges discussed the entire case law on the point and came to that conclusion. That decision is binding on me and it is unnecessary to discuss this aspect of the case any further. It is interesting to note that in — 'Madina Bibi v. Ismail Durga Association', AIR 1940 Mad 789 (B) the learned Judges refused to allow an amendment in the High Court on the ground that the request was not made at the earliest possible opportunity.

When the defendant in that case raised the question that the suit was not filed in a representative capacity the plaintiff resisted that contention and having failed in that attempt requested the High Court at the very last stage to allow the amendment. It was under those exceptional circumstances that this Court held that the amendment should not be allowed. In my opinion this is eminently a fit case in which the lower Court should have allowed the amendment. The order of the lower Court is, therefore, set aside and the plaint is directed to be amended as prayed for. If by making the amendment it becomes necessary to add other averments in the plaint to make it clear that

the suit is on behalf of the entire body of creditors the plaintiff will be allowed to add such further averments in the plaint. The respondent will pay the costs of the revision petition. One set only.

C/V.R.B. Order set aside.

A.I.R. 1953 MADRAS 620 (Vol. 40, C.N. 244)

GOVINDA MENON AND MACK JJ.

Mohammad Hussain Sahib and others, Appellants v. Karutha Syed Mohammad Rowther and others, Respondents.

Appeal No. 187 of 1947, D/- 29-7-1952.

Provincial Insolvency Act (1920), S. 37 — Alienations before insolvency declared not binding on Official Receiver — Subsequent annulment of adjudication does not improve the position of insolvent or his heirs. Case law discussed. (Para 7)

Anno: Provi. Insol. Act, S. 37 N. 8.

A. Srirangachari and V. V. Ramadurai, for Appellants; A. C. Sampath Iyengar, N. S. Raghavan, V. Seshadri, K. S. Ramamurthi, R. Ramamurthi, R. Gopalaswamy Iyengar and S. Rajaraman, for Respondents.

CASES CITED:

(A) ('34) AIR 1934 PC 157: 56 All 468 (PC)
(B) ('37) AIR 1937 Mad 32: 1936 Mad WN 852
(C) ('43) AIR 1943 Mad 453: 1943-1 Mad LJ 166
(D) ('45) AIR 1945 Mad 388: 58 Mad LW 289
(E) ('32) AIR 1932 Mad 311: 55 Mad 507
(F) (1835) 3 Clark & Finnelly 479: 6 ER 1517

JUDGMENT: This is an appeal by the plaintiffs in O. S. No. 53 of 1945 on the file of the Court of the Subordinate Judge of Coimbatore against the dismissal of the suit on the ground that the plaintiffs have no right to institute the suit. Though as many as 12 issues were framed by the learned Subordinate Judge, the decision depended on the preliminary question regarding the right of the plaintiffs to institute the suit on the ground that they had a cause of action. The learned Subordinate Judge found that the plaint did not show that the plaintiffs had an existing cause of action and therefore dismissed the suit.

(2) The plaintiffs are the sons and daughters of one Muhammad Ismail Sahib who died on 25-2-1943 and the present suit is brought for the recovery of possession of the properties mentioned in the plaint from defendant 1 who was an alienee of those properties as well as from other defendants who claimed to be the subsequent transferees for consideration from defendant 1. There are no less than 30 defendants to the suit and most of them contest the plaintiffs' claim to any relief. This Muhammad Ismail Sahib was at one time a man of means. On 17-7-1926, a sale deed was executed by him in favour of defendant 1 of some properties belonging to him for a sum of Rs. 22,000. On the very same day he executed a usufructuary mortgage deed with regard to the rest of his properties in favour of the same defendant 1 for a sum of Rs. 4000. Though the properties were situated within the registration subdistrict of Erode, it so happened that those two documents were registered by the Sub-Registrar of Aravakurichi in Trichinopoly district. How the documents got registered in that district was that an item of property, over which Muhammad Ismail Sahib had no title but admittedly situated within the jurisdiction of Aravakurichi Sub-Registrar's office, was added to the schedule of each of the documents and therefore that Sub-Registrar was clothed with jurisdiction to register those documents. It is common ground that the vendor or the mortgagor in the case had no title to those properties.

(3) While matters were in that stage, nearly a year later on 24-8-1927 a creditor of Muhammad Ismail Sahib filed I. P. No. 215 of 1927 on the file of the Sub-Court, Coimbatore, to adjudicate Muhammad Ismail Sahib an insolvent. This petition was enquired into by the insolvency Court and on 8-12-1927 Muhammad Ismail Sahib was adjudged an insolvent and whatever properties that he possessed at that time vested in the Official Receiver who took charge of the estate. Whether the properties covered by the sale deed and the mortgage deed vested in the Official Receiver or not we cannot say because there is no definite evidence as to what exactly vested in him. After this, the Official Receiver filed I. A. No. 440 of 1930 before the Subordinate Judge, Coimbatore, under Ss. 4 and 53, Insolvency Act to annul the sale deed executed by the insolvent in favour of defendant 1 as well as to declare that the usufructuary mortgage executed by the insolvent in favour of defendant 1 was not valid and binding on him. The vendee and the mortgagee contested this application and the matter was enquired into at some length by the learned Subordinate Judge. The first point which came up before him for consideration was whether the sale and the mortgage deeds executed by the insolvent without receiving consideration and the second point that was considered was whether the said deeds were void under the Registration law; the third point was whether the said deeds were liable to be annulled for the reason alleged by the petitioning creditor. The learned Subordinate Judge was of the opinion that the two documents were supported by consideration and were real and genuine documents not intended to defeat or delay the creditors. His finding is contained at the end of Para. 13 of his judgment marked in this case as Ex. D-1 to the effect that the alienations evidenced by Exs. II and III were for valuable consideration and that they had taken effect. On the question as to whether there was a fraud upon the registration law the learned Subordinate Judge held that there was no fraud. In Para. 16 of his judgment the learned Subordinate Judge found that the sale deed and the mortgage deed were executed in good faith and for valuable consideration and that the insolvent had no idea at the time of the execution to defraud or defeat any of the creditors of the insolvent. This was taken up in appeal to the District Court where the learned District Judge held that since the documents were registered by the Sub-Registrar of Aravakurichi by the inclusion of a property which was not intended to be transferred and upon which no title was intended to be impressed, it cannot be held that the documents were valid in view of the Privy Council decision in — 'Collector of Gorakhpur v. Ramsundar Mal', AIR 1934 P. C. 157 (A). On this ground the decision of the Subordinate Judge was reversed and it was held that the sale and mortgage deeds were not valid and binding on the Official Receiver. The alienees took up the matter in second appeal to this Court and in the decision reported in — 'Syed Muhammad Rowther v. Official Receiver, Coimbatore', AIR 1937 Mad 32 (B), Pandrang Row J. followed the Privy Council decision in — AIR 1934 P. C. 157 (A), agreed with the District Judge and held that the alienations would not bind the Official Receiver at all.

(4) Subsequent to this I. A. No. 858 of 1937 was filed by the purchaser of two items of property from defendant 1, the vendee, for annulling the adjudication. This was enquired into at great length and the learned Subordinate Judge passed an order dated 14-3-1941 and marked in this case as Ex. D-2. He came to the conclusion that the original petitioning creditor Kadirsa Rowther had no right to present the insolvent petition I. P. No. 215 of 1927 as the debt in his favour was not true; nor did the insolvent commit any act of insolvency by trying to defeat or delay the creditors. The Subordinate Judge was of the opinion that the insolvency application was the result of collusion and that the adjudication was practically by consent made with ulterior purposes. The gist of the learned Judge's order was that both the insolvent and the petitioning creditor colluding together brought forward the insolvency application to get the debtor adjudicated insolvent and by practising fraud upon the Court the adjudication order was obtained. Upon this, the application by the purchaser was allowed and the collusive adjudication was annulled on 14-3-1941. It may be mentioned that the insolvent resisted the annulment of the adjudication order. There was an appeal against the order of the Subordinate Judge which was confirmed and in the second appeal the orders of both the Courts were confirmed.

It is after this that the alleged insolvent died on 25-2-1943. The present suit was filed in 1945 two years after the death of Muhammad Ismail Sahib by his own sons and daughters for the recovery of possession of the properties sold and mortgaged from the original as well as subsequent alienees on the ground that after the annulment of the adjudication evidenced by Ex. D-2 the properties reverted back to the insolvent and therefore the alienees were bound to restore the property to the insolvent. The learned Subordinate Judge found that the finding contained in Ex. D-1 that these documents were executed in good faith and for valuable consideration must be deemed to have become conclusive and final. In addition, he referred to two decisions of this Court in — 'Dharma Samarajayya v. Sankamma', AIR 1943 Mad 453 (C) and — 'Ratnavelu Chettiar v. Francis Udayar', AIR 1945 Mad 388 (D) to the effect that when an insolvency is annulled by an order of Court under S. 37, Provincial Insolvency Act all proceedings taken as a result of that insolvency get wiped off and the situation is as if there had been no insolvency at all and the parties are relegated back to the position which they would have occupied but for the insolvency. On these grounds, the Subordinate Judge found in the present suit that the plaintiffs are not entitled to institute the suit and dismissed the same. This appeal is against that decree.

(5) The question for consideration which has been elaborately argued by Mr. Srirangachariar for the appellants is whether as a result of the annulment of the insolvency by Ex. D-2 the two deeds namely the sale deed and the mortgage have also got annulled with the result that the properties became revested in Muhammad Ismail Rowther. Mr. Srirangachariar argues that by the decisions of the High Court declaring that the sale and mortgage deeds are not binding on the Official Receiver, the alienations should be deemed to have been held to be non-existent and therefore the title has got revested in the insolvent by the annulment of the insolvency. If that is so, the question regarding the binding nature of the transactions on the ground that they were not supported by consideration cannot now be gone into because the judgment of the learned Subordinate Judge has been reversed in appeal. It may be that the lower Court in the present case has stated in rather wide terms what the effect of the finding of the Subordinate Judge was in dismissing the application to declare the two documents not binding on the official Receiver. But, in our opinion, the fact that the finding of the Subordinate Judge would not now become conclusive cannot help the appellants for this reason that if as a result of the annulment of the insolvency on the ground that it is a collusive transaction, it would be as if there is no insolvency, the situation would be the same as if no steps had been taken to get the mortgage and the sale deeds set aside. In — 'Venkateswami v. Venkatasubbayya', AIR 1932 Mad 311 (E) this Court has held that a vendor of immoveable property cannot be allowed to plead or to take advantage of the invalidity of the registration on his sale deed on the ground that by the inclusion of a particular item of property in the document and getting the document so registered in an office where otherwise it could not have been registered a fraud on the registration law was committed in which he participated. It was also held that as a general rule a plaintiff cannot plead his own fraud or illegal act as a basis of his claim or as a necessary step towards the success of his claim; his position in that matter is not made better by showing that the defendant has joined him in the fraud or illegal act or by the fraud or illegal act not being pleaded but coming to light in the course of the trial of the suit or even in the hearing of an appeal.

(6) What then is the effect of the order Ex. D-2 by which the insolvency was annulled on the ground that there was collusion between the alleged creditor and the insolvent? There can be no doubt that fraud vitiates all transactions and when once fraudulent decree has been set aside, it is as if there has been no decree at all. In — 'Bandon v. Becher', (1835) 6 E. R. 1517 at p. 1529 (F), the following are the observations:

> "A sentence is a judicial determination of a cause agitated between real parties, upon which a real interest has been settled; in order to make a sentence there must be a real interest, a real argument, a real prosecution, a real defence, a real decision. Of all these requisites not one takes place in the case of a fraudulent and collusive suit; there is no Judge but a person invested with the ensigns of a judicial office is misemployed in listening to a fictitious cause proposed to him; there is no party litigation, there is no party defendant, no real interest brought into question".

Following these observations it seems to us that in the collusive proceedings which culminated in the adjudication of Muhammad Ismail Sahib there is no real controversy between the parties and there was nothing which the Court decided. The proceedings before the Court were a make-believe and a sham fight. Such being the case the annulment of the adjudication would result in this, namely, that all transactions that have taken place and all proceedings that would have been gone through during the pendency of the insolvency would be completely wiped off. If that is so, then the decision by which the sale and the mortgage deeds were declared invalid also became null and void, with the result that the documents remain in the same position as they had been but for the insolvency. We may also refer to the Black's judgment page 1031 with regard to the effect of fraud and collusiveness.

(7) In our opinion by the circumstance that the insolvency proceedings have been annulled all ac-

tions done and all proceedings taken during such period also get annulled and the proceedings by which the deeds have been declared void have also been got annulled.

Another way of looking at the question is that even if it cannot be said that the entire proceedings have been wiped off, still the plaintiffs who claim under the insolvent cannot take advantage of a decision obtained by the Official Receiver declaring the sale and the mortgage deeds not valid and binding. The plaintiffs are not the persons who have succeeded to the rights of the official Receiver, because the Official Receiver represents not only the insolvent but also the creditors. We may also refer in this connection to the observations of the learned Subordinate Judge in annulling the insolvency that no creditor seems to have proved his debts in the insolvency from the beginning; and that the insolvent admitted after executing these documents that his debts had already been discharged. In this view also it has to be held that the entire proceedings were make-believe transactions. In our opinion, the learned Subordinate Judge was right in holding that the plaintiffs have no subsisting cause of action against the defendants. The transactions took place more than 20 years ago and the properties have passed from one party to the another; and third parties have acquired title in them. Though we do not want to rest our decision on the ground that the suit is barred by limitation we think that it cannot be said that the plaintiffs have proved that they have a right to institute the suit.

(8) The appeal fails and is dismissed with costs (one set).

B/H.G.P. Appeal dismissed.

A.I.R. 1953 MADRAS 622 (Vol. 40, C.N. 245)

SATYANARAYANA RAO J.

J. Natesa Sastri and another, Appellants v. K. S. Sundaram Chettiar (died) and others, Respondents.

Second Appeal No. 614 of 1948, D/- 24-11-52.

(a) Civil P. C. (1908), S. 50 — Execution against property in hands of legatees.

Where a decree is passed against a testator and in execution proceedings, upon his death, his widow is properly impleaded as a legal representative and the property is attached, the mere fact that subsequently the property comes into the possession of the legatees unauthorisedly, would not affect the rights of the execution creditor to seize the property in execution of the decree so as to bind even the legatees and no suit is necessary for the purpose: AIR 1930 Cal 762, Distinguished. (Para 5)

Anno: C.P.C., S. 50 N. 15.

(b) Civil P. C. (1908), Ss. 2 (11) and 50 and O. 22 R. 3—Legatees unauthorisedly taking possession — Execution against — (Succession Act (1925), S. 303).

Where the legatees help themselves to the legacies by unauthorisedly taking possession, they will be executors 'de son tort' within the meaning of S. 303, Succession Act, and are liable to be proceeded in execution as the legal representatives of the deceased judgment-debtor testator. The definition in S. 2 (11), Civil P. C., will apply to such a case. AIR 1950 Mad 541, Criticised. (Para 8)

Anno: C.P.C., S. 50 N. 15 O. 22 R. 3 N. 10; Succession Act, S. 303 N. 1.

G. R. Jagadisan, for Appellants; T. R. Srinivasan, for Respondents.

CASES CITED:

(A) ('50) AIR 1950 Mad 541: 1950-1 Mad LJ 476
(B) ('38) AIR 1938 Mad 157: ILR (1938) Mad 533
(C) ('22) AIR 1922 Mad 457: 46 Mad 190
(D) ('25) AIR 1925 PC 105: 48 Mad 312 (PC)
(E) ('30) AIR 1930 Cal 762: 58 Cal 170
(F) (1912) 81 LJCh 529: (1912) 1 Ch 561

JUDGMENT: This second appeal is by defendants 1 and 2 against the decison of the Subordinate Judge of Kumbakonam affirming the decree granted in favour of the plaintiff by the District Munsif setting aside a claim order. The dispute concerns the estate of one late Sivaramakrishna Aiyar and he became liable to pay costs to one Sivagangai Achi as per the decree in O. S. No. 40 of 1928, Sub-Court, Mayavaram. The present plaintiff obtained an assignment of that decree on 22-10-1931. Thereafter, the plaintiff applied to the Sub Court, Mayavaram, for recognising the assignment in his favour and to transmit the decree for execution to the District Munsif's court, Kumbakonam. By that time, the judgment-debtor died and his widow, Dharmambal, was impleaded as the legal representative. The decree was transmitted to the District Munsif's court, Kumbakonam, and the suit house was attached on 2-4-1942.

Thereafter, in E. A. No. 750 of 1942 the present defendants who are the sons of one Kuppalu Ammal, the sister-in-law of Sivaramakrishna Aiyar claimed that the property could not be attached as they obtained the property as a legacy under the will of the late Sivaramakrishna Aiyar dated 1-12-1918 (Ex. D. 1). Under this Will, Dharmambal was given a life interest and it was alleged by the defendants that she had surrendered the property to Kuppalu Ammal in 1933. The District Munsif who heard the claim petition held that the surrender was not proved and valid and that the decree-holder could proceed only against the life-interest of Dharmambal in execution of the decree. There was an appeal against the order of the Sub Court, Kumbakonam. Treating the order as one under S. 47, Civil P. C., the appeal was allowed and the matter was remanded to the District Munsif's court on 16-8-1943 for proper inquiry under S. 47.

Against the order of the remand, the defendants preferred an appeal to the High Court and the High Court held on 25-8-1944 that the matter does not fall under S. 47. The plaintiff therefore instituted the suit to set aside the claim order and claiming that he was entitled to attach not only the life interest but the property itself. It might be mentioned that Kuppalu Ammal died in 1940 during the pendency of the proceedings and the sons were sought to be impleaded as legal representatives. But it was held by the Court that they were mere legatees. The execution however, was proceeded with on the basis of the prior attachment during the lifetime of Dharmambal, the heir-at-law of Sivaramakrishna Aiyar who would have taken the estate in the absence of a will.

(2) In the suit, the defendants raised various pleas; but the principal and the only question which is now outstanding is whether the suit properties could be proceeded against in execu-

tion of the decree in O. S. No. 40 of 1926, without filing a separate suit against the defendants. Both the courts held that execution could proceed against the house in the hands of the defendants.

(3) In this second appeal, the sole question for decision therefore is whether the remedy of the decree-holder to realise his decree amount is only by way of a suit against the defendants or the execution could be proceeded with against the property in their hands.

(4) In a connected proceeding between the same parties, the question whether legatees of part of the estate who have taken possession of the property could be deemed to be legal representatives within the definition of S. 2(11) Civil P. C., came up before a Bench consisting of Horwill and Balakrishna Aiyar JJ. in — 'Natesa Sastrigal v. Alamelu Achi', AIR 1950 Mad 541 (A). That was a Letters Patent Appeal against the judgment of Govindarajachari J. and the learned Judges, reversing the decision of Govindarajachari J. held that they could not be deemed to be legal representatives within the meaning of S. 2(11) Civil P. C. It is on this decision that strong reliance was placed on behalf of the appellants (defendants 1 and 2) by Mr. Jagadisa Aiyar, their learned advocate, the contention being that as the defendants are not the legal representatives of the judgment-debtor, execution could not be levied against the properties in their hands which they held as heirs of the legatee of a portion of the estate of Sivaramakrishna Aiyar.

He does not, however, dispute and indeed he could not dispute, that the legatees are liable to pay the debts of the testators, since before the estate is distributed between 12 legatees by the executor or administrator the debts must be paid first. Even if the executor or administrator overlooking the claim of a creditor, distributes the estates to the legatees, there is the right of the creditor recognised under S. 361, Succession Act, to call upon a legatee who has received payment of the legacy to refund, whether the assets of the testator's estate were or were not sufficient at the time of his death to pay both debts and legacies; and this is irrespective of the question whether the payment of the legacy by the executor or administrator was voluntary or not. But this claim can be enforced only by a suit and cannot be enforced in execution of a decree, as such a legatee who had received payment of the legacy cannot be treated as a legal representative of the deceased testator. So much is not in dispute. But the question in this case is whether in view of the peculiar facts of this case the assets could not be seized in execution.

(5) Apart from the question whether the legatees who have helped themselves into possession could be treated as legal representatives or not, in this case there is a complete answer to the contention of appellants, as the decree itself was obtained against the testator and by the time of the attachment the person who lawfully represents the estate in the absence of a testament, namely, the widow, Dharmambal, was impleaded as legal representative in the execution proceedings, and the property was attached. The rights of the attaching creditor therefore have to be determined, it is not disputed and it is established law, as on the date of the attachment. If the assets come into possession of the legatees unauthorisedly, it would not affect the rights of the execution creditor to seize the property in execution of the decree.

Courts, at any rate in this Presidency, have gone to the length of holding that a true legal representative will be bound by a decree passed against the wrong legal representative, if the plaintiff decree-holder acted bona fide without fraud or collusion and the wrong legal representative was impleaded as representing the estate in ignorance of the true facts. An heir-at-law is undoubtedly a legal representative within the meaning of the definition in S. 2(11) Civil P. C., as he in law represents the estate of the deceased person. It has been held in this court in — 'Sivasankara v. Amaravathi Ammal', AIR 1938 Mad 157 (B), that the entire estate, both movable and immovable of a deceased person vests in the heir-at-law until an administrator is duly constituted and that such an heir-at-law is even competent to maintain a suit on behalf of the estate to recover possession.

It was held in that case that a widow, the heir of the deceased was competent to maintain a suit to recover possession of the estate left by the husband including properties not specifically bequeathed to her. The attachment therefore was validly made in the present case at a time when the estate was fully represented by Dharmambal and the rights of the execution creditor should be worked out as on the date of attachment by bringing the properties to sale in pursuance of that attachment. The mere fact that subsequently the property vested under the Will upon other persons is, in my opinion, of no consequence. Whatever may be the position, therefore, in other cases in which the legatees alone who have not received the legacy from the executor or administrator who is charged with duty of distributing the estate after discharging the liabilities on it may be, in the present case, in my opinion, the execution is valid and the property could be validly seized in execution of the decree so as to bind even the defendants; this is enough to dispose of the appeal.

(6) It has, however, been urged on behalf of the respondent that the decision of the Bench in — 'AIR 1950 Mad 541 (A)', overlooks the important circumstance that a legatee under a Will who helps himself by taking possession of the estate of the deceased in satisfaction of his own legacy is an executor de son tort within the meaning of S. 303 of the Succession Act, as the illustration to the section clearly shows. In the said decision the learned Judges while referring to S. 303 containing the definition of an executor de son tort overlooked the illustration to that section. It is established law that until the executor or administrator assents to a legacy, the legatee's title is not perfected. It is an inchoate title heritable and transmissible and also vests from the moment indicated by the Will as interpreted in accordance with the sections of the Succession Act. But the executor's assent is necessary to perfect the title of the legatee. The assent, however, does not create a new title. If there is no executor or administrator, it has been held in this court that it is open to a legatee to sue for recovery of his legacy, — 'Vide Rajah Parthasarathi Apparao v. Rajah Venkatadri Apparao', AIR 1922 Mad 457 (C). The actual decision was reversed by the Privy Council in — 'Venkatadri Apparao v. Parthasarathi Apparao', AIR 1925 P. C. 105 (D), but this point was not touched by it.

The executor or the administrator, before delivering the legacies, has to pay the funeral and testamentary charges and discharge the debts and then only pay the legacies. After distribution, as stated above, if there is a debt which was not discharged, the creditor has a right to follow the assets in the hands of the legatee under S. 361, Succession Act, by calling upon him to refund an

amount to satisfy the debt. If, however, the legatee unauthorisedly lays his hands and takes possession of the estate of the deceased testator to satisfy his legacy, such an act is treated as an act of intermeddling, which act in law pertains to the office of an executor, as the distribution of the legacy is the function of the executor and belongs to that office. It is for that reason the illustration to S. 303 says that if 'A' uses or gives away or sells some of the goods of the deceased to satisfy his own debt or legacy, he is an executor of his own wrong.

Though the learned Judges in — 'AIR 1950 Mad. 541 (A)', correctly defined an executor de son tort as a person who takes upon him an office of executor by intrusion, not being so constituted by the testator, overlooked the fact that in the case these very defendants took unauthorised possession of the estate of the deceased to satisfy the legacy and therefore were persons who intermeddled with the estate and therefore, became executors de son tort as provided in the illustration. Out of curiosity, I have called for the judgment of Govindarajachari J. in order to find out whether that learned Judge noticed the illustration. I find that he based his judgment on the illustration and quoted it in his judgment; but somehow, the learned Judges on appeal did not consider the illustration at all and did not even refer to the fact that Govindarajachari J. relied upon the illustration to establish that the legatees were executors de son tort, as they intermeddled with the estate.

(7) In Williams on Executors, 12th Edn. Vol. I, at page 155, the learned author enumerates the acts which constitute an executor de son tort:

> "A very slight act of intermeddling with the goods of the deceased will make a person executor de son tort. Thus it is said, that milking the cows, even by the widow of the deceased, or taking a dog will constitute an executorship de son tort. So, in one case the taking a Bible and in another a bedstead, were held sufficient in as much as they were the indicia of the person so interfering being the representative of the deceased. So, if a man kills the cattle, or uses or gives away, or sells any of the goods or if he takes the goods to satisfy his own debt or legacy; or if the wife of the deceased takes more apparel than she is entitled to, she will become executrix de son tort. And there may be a tort executor of land, as where a man enters upon the land leased to the deceased, and takes possession, claiming the particular estate".

So that in that respect, the nature of the property whether it is moveable or immoveable does not matter, so long as there are acts of intermeddling which make the person an executor de son tort. These acts are really functions belonging to the office of an executor, and if the possessor usurps the functions unauthorisedly, he is within the definition of executor de son tort. Had it been necessary to rely upon the decision of the Bench in — 'A. I. R. 1950 Mad 541 (A)', I would have been inclined to refer the matter to a Fuller Bench for further consideration, but in view I take of the case, it is unnecessary to do so.

(8) Reliance was placed for the position that the remedy of the creditor is only to institute a suit, on the decision of the Calcutta High Court in — 'Joychandra v. Satischandra', A. I. R. 1930 Cal 762 (E). But that case it must be noticed is a case in which the administrator of the estate of the testator with the Will annexed had put the legatees in possession of the property. Therefore, the administrator assented to the legacy and the legatee's title was perfected. Of course, in such a case the only remedy of the creditor to follow the assets into the hands of the legatee can only be by a suit. He cannot in execution of the decree seize the property which was delivered to the legatee by the duly constituted representative of the estate, as he is in no sense the legal representative of the deceased. The decisions of the English Courts, relied on in that case support this view. At page 172 the learned Judges were considering the right under S. 361, Succession Act, for they observed,

> "It is a right to call upon the legatee to refund. That right may be exercised by a creditor who remains unpaid".

The English authorities referred to, on an examination it will be found, were cases in which the legacy was duly delivered by the legal personal representative of the testator. They were really claims for refund and not attempts to seize the property in execution. The legatee's title became perfected. It is unnecessary to subject those decisions to a detailed examination. The decision in 'Re Eustace, (1912) 1-Ch. 561 (F)' decided by Swinfen Eady J. was also a case where the estate was distributed and afterwards the creditor put forward the claim. Notwithstanding the considerable delay in the claim that is put forward by the creditor, it was held that he was entitled to follow the assets of the deceased into the hands of the legatees who have been fully paid.

Those classes of cases stand altogether apart, and have nothing to do with cases in which the legatees did not receive the payment in due course of administration of the estate either by the executor or administrator or even in a properly constituted administration suit, but helped themselves to the legacies by unauthorisedly taking possession. In such a case undoubtedly they will be executors de son tort within the meaning of S. 303 as they intermeddled with the estate and are liable to be proceeded in execution as the legal representatives of the deceased judgment-debtor. The definition in S. 2 (11), Civil P. C. will apply to such a case, as it is a case of intermeddling by a person claiming title to the property.

(9) For these reasons, the second appeal must be dismissed with costs. No leave.

B/V.R.B. Appeal dismissed.

A.I.R. 1953 MADRAS 624 (Vol. 40, C.N. 246)

CHANDRA REDDI J.

Muppidari and Moonru Ugamkonda, Amman Temple in Vadakku Veeravanallur, Ambasamudram Taluk, through its managing trustee, E. Dasia Pillai and another, Appellants v. Pattamuthu Mudaliar and others, Respondents.

Second Appeal No. 947 of 1948, D/- 30-11-51.

(a) Hindu Law — Religious Endowment — Debts — Legal necessity — Onus.

In execution of decree on promissory note executed by trustee of a temple, trust property purchased by defendant, the assignee of the decree — Suit by succeeding trustee for recovery of property on ground that promissory note was executed without legal necessity and that decree was obtained by collusion — Onus held on defendant to urge and prove legal necessity. Case law Ref. **(Paras 8, 9)**

(b) Hindu Law — Religious Endowment — Debts — Trustee incurring debt on promissory note without indicating that he did not intend to incur personal liability — Decree against trust property cannot be passed — Trust is not bound by such decree — (Trusts Act (1882), S. 36): Case Law Ref. (Paras 13, 15)

Anno: Trusts Act, S. 36 N. 2.

(c) Civil P. C. (1908), S. 11 — Decree against limited owner.

A decree obtained against a limited owner or a shebait of a mutt or a manager or a trustee of a temple or charity, without the necessary and appropriate issues raised, tried and decided, cannot bind the reversioner or the succeeding shebait or manager or trustee and can be reopened in a subsequent suit. Case Law Ref. (Para 20)

Anno: C.P.C., S. 11 N. 5, 98.

(d) Limitation Act (1908), Arts. 12, 95, 142 and 144 — Suit by trustee for possession of trust property sold in execution of decree improperly obtained against trust property by fraud of the then trustee for a debt incurred for purposes found to be not for legal necessity, can be brought within 12 years of sale without asking for setting aside the sale — Arts. 12 and 95 have no application — The plaintiffs held should return the amount actually used for the benefit of the trust by setting off against mesne profits. Case Law Ref. (Para 23)

Anno: Lim. Act, Art. 12 N. 1; Art. 95 N. 2; Arts. 142 to 144 N. 60 and 80.

V. Seshadri, for Appellants; K. S. Ramamurthi and C. Natarajan, for Respondents.

CASES CITED:

(A) ('54-57) 1 Sar 552: 6 Moo Ind App 393 (P C)
(B) ('22) AIR 1922 Mad 131: 45 Mad 504 (FB)
(C) ('24) AIR 1924 PC 65: 47 Mad 337 (PC)
(D) ('30) AIR 1930 Mad 1009: 60 Mad LJ 90
(E) ('49) AIR 1949 FC 218: (1949) 12 FLJ 288
(F) ('18) AIR 1918 Mad 533: 32 Mad LJ 259
(G) ('19) AIR 1919 Mad 616: 41 Mad 815
(H) ('42) AIR 1942 Mad 198: 1941-2 Mad LJ 568
(I) ('51) AIR 1951 Mad 423: 1950-2 Mad LJ 636
(J) ('70) 2 Ind App 145: 4 Beng LR 450 (PC)
(K) (1899) 86 LJPC 25: (1899) AC 114
(L) ('19) AIR 1919 Mad 429: 37 Mad LJ 65
(M) ('20) AIR 1920 Mad 489: 10 Mad LW 594
(N) ('40) AIR 1940 All 433: 191 Ind Cas 786
(O) ('07) 17 Mad LJ 288: 30 Mad 402
(P) ('07) 34 Ind App 87: 34 Cal 329 (PC)
(Q) ('85) 9 Bom 169
(R) ('50) AIR 1950 PC 44: 1950-1 Mad LJ 243 (PC)
(S) ('23) AIR 1923 PC 175: 46 Mad 751 (PC)

JUDGMENT: The plaintiffs in O. S. No. 250 of 1945 are the appellants. The suit which has given rise to this second appeal was instituted by them for the recovery of 1 acre and 34 cents of wet lands comprised in S. No. 347 of Vaddaku Viravanallur, Tirunelveli District, and for past and future mesne profits. The first plaintiff is the muppidari and Moonnu Ugamkonda Amman Temple situated in the village of Vadakku Viravanallur and plaintiffs 2 to 4 are the trustees thereof. The facts leading upto this appeal may be briefly stated.

(2) The first plaintiff is a communal temple and owned the suit property. This temple was being managed by three trustees of Illathu Pillaimar community by name Pichandia Pillai, Ramaswami Pillai and Sankaralingam Pillai. A promissory note was executed by them in favour of one Kandaswami Pillai who was no other than the sister's husband of one of the executants, Ramaswami Pillai. Kandaswami Pillai assigned this promissory note to one Shanmughasundaram Pillai who was another brother-in-law of Ramaswami Pillai. This Shanmughasundaram Pillai filed a suit in the Court of the District Munsif of Ambasamudram in S. C. No. 116 of 1932 on the foot of this promissory note and obtained an ex parte decree. Sometime thereafter, the decree-holder assigned the decree to the first defendant who brought the suit property to sale in execution of the decree and purchased it himself. Having obtained the usual sale certificate he took delivery of the property on 25-2-1937. Subsequently he settled a portion of the property on the 2nd defendant temple and retained the other portion to himself. It is to recover possession of this property that the plaintiffs have filed the suit.

(3) The suit was contested on several grounds, the chief of them being that as the debt was incurred by the then trustees for purposes binding upon the temple and had ended in a decree, it was not open to the present trustees to challenge the validity of the decree or of the sale proceedings and that in any event, the suit as framed was not competent as a suit to recover possession of the property without having the decree and the consequent sale being set aside and lastly that it was also barred by limitation.

(4) The trial Court decreed the suit holding that though the three trustees may be assumed to be 'de jure' trustees and therefore competent both to borrow money on behalf of the institution for purposes binding upon the temple and to represent the temple in various proceedings referred to above, the debt borrowed under the promissory note was not for purposes binding upon the trust, and that the then trustees were guilty of fraud and collusion in allowing a decree to be passed ex parte and in allowing the suit properties to be sold for a grossly inadequate price of Rs. 1200. In the opinion of the trial Court, there was no necessity to borrow any money at the time when the suit promissory note was executed as the temple was deriving annually an income of Rs. 600 and the expenditure did not exceed Rs. 250 and that even if there was such a necessity and the promissory note executed was binding upon the temple there was no justification to allow the properties to be sold when the trustees could have easily satisfied it out of the income of the temple and that further the property which was worth at least Rs. 2500 was allowed to be sold for a very low price.

(5) On appeal, the lower appellate Court disagreed with all the findings of the trial Court except on the question of the capacity of the then trustees either to borrow moneys or to represent the temple in the various proceedings referred to above and dismissed the suit. The appellate Judge thought that the plaintiffs were not able to establish that there was no justifying necessity for the borrowing and that at any rate, as the suit was not brought for setting aside the decree and the sale within the time prescribed either under Art. 12 or under Art. 95, Limitation Act, the suit should fail.

(6) In this second appeal filed by the aggrieved plaintiffs the reasoning of the lower appellate Court in support of its conclusions is canvassed. Several contentions have been raised by Mr. Ramamurthi on behalf of the appellants in support of the appeal and I shall now deal with them seriatim.

(7) The first point raised is that the decree is not valid and binding upon the trust as there was no legal necessity for the then trustees to have borrowed any money under the promissory note and that this defence was not raised by the defendants in that suit. He also argued that the defendants trustees were guilty of fraud and collusion in allowing an ex parte decree to be passed. The evidence in this case which is uncontradicted is that the temple was in enjoyment of an annual income of Rs. 600, while its expenditure amounted only to about Rs. 250. This evidence has been accepted by both the Courts and this concurrent finding is not shown to be in any way wrong. The point therefore, for consideration, is whether on this material it can be said that there was any justifying necessity for the trustees to borrow money under the promissory note.

(8) It was maintained by the learned counsel for the respondents that the plaintiffs who attacked the validity of the decree have to establish that there was no legal necessity for the borrowing and it is not for the defendants to show that there was legal necessity for the borrowing. I do not think I can agree with this contention. It is now settled that when the validity of a transaction with a limited owner is in question, on the ground of want of justifying necessity it is for the person relying on the transaction to allege that there was an actually special and unavoidable necessity and prove it. This proposition has been well established by series of decisions. The leading case on this subject is — 'Hanuman Persaud v. Mst. Baboee', 6 Moo Ind App 393 (PC) (A). In this context I may extract a passage from the "Principles of Hindu law" by Mulla at p. 188 (10th Edn.):

> "Those who deal with a person who has only a limited interest in the property and who propose to dispose of a larger interest, are prima facie bound to make out the facts which authorise such a disposition. The power of a widow or other limited heir to sell or mortgage the estate inherited by her is a limited and qualified power. If the sale or mortgage is impeached, the burden lies on him to prove (a) either that there was legal necessity in fact; or (b) that he made proper and bona fide inquiry as to the existence of the necessity, and did all that was reasonable to satisfy himself as to the existence of the necessity."

(9) In — 'Tirupathi Raju v. Venkayya', AIR 1922 Mad 131 (B), a Full Bench of this Court took the view that the burden of proving that the compromise with a widow was valid and binding upon the reversioners, was on the person who wanted to rely on the compromise and that the interposition of a compromise decree would not make any difference as to the onus of proof in such cases. The principle stated above governs equally the case of a person who deals with trustees of charitable or religious institutions.

(10) In this connection the observations of Sir John Edge in dealing with the position of a shebait and the manager or a trustee of a temple in — 'Nainapillai Marakayar v. Ramanathan Chettiar', AIR 1924 PC 65 at p. 72 (C) are apposite:

> "They can doubtless sell or mortgage the endowed lands of the temple, if there is an actual, special and unavoidable necessity of the temple to do so, but that necessity would have to be proved by those who alleged that it existed."

It follows that it is for a person in the position of the defendant to urge and establish that the promissory note was supported by consideration which was utilised for a justifying necessity.

(11) But even otherwise, there is ample material on which a Court could come to a conclusion that there was absolutely no necessity for the then trustees to borrow any money for any of the purposes of the temple. The established facts in this case are that the temple was in enjoyment of a large income far in excess of its requirements and that there was no necessity to borrow any money for the purpose of the temple. Therefore the trial Court was justified in finding that there was no necessity for the borrowing and that the then trustees were guilty of fraud and collusion in allowing a decree to be passed.

(12) The lower appellate Court, while agreeing with the trial Court, with regard to the income and the expenditure of the temple, took a different view as regards the necessity, on the erroneous view that the plaintiffs had to prove that at the time when the promissory note was executed the trustees had ready money in their hand which obviated the necessity to incur liability for the purpose of the temple. As supporting this view, it relied upon a decision of this Court in —'Venkata Balagurumurthi Chettiar v. Balakrishna Odayar', AIR 1930 Mad 1009 (D). I do not think that that ruling lends any support to the view taken by the lower appellate Court. In that case, it was found that large sums of money had come into the hands of the trustees in the normal course of events. However, on account of misunderstandings amongst the trustees one of them withheld money of the temple without making it available for the purpose connected with the worship of the temple. Therefore other trustees, in order to carry on the daily routine had to borrow the money. That has no analogy to the facts of this case. There is nothing on record to show that any portion of the income was not available for spending on the temple. In those circumstances, I must give effect to the contention of Mr. Ramamurthi that the debt or the decree based thereon, and the resulting sale are not valid and binding upon the temple.

(13) There is another ground on which the validity of the decree and the resultant sale are assailed. It is argued that even if money was really borrowed for the purpose binding upon the temple no decree could be passed against the temple. In support of this contention Mr. Ramamurthi cited to me a number of decisions. It is not necessary for me to refer to all of them. Suffice it to refer to a few of them. In — 'Sriramulu v. Pundarikakshayya', AIR 1949 FC 218 (E) it is remarked at p. 226 as follows:

> "It has been held in a series of cases that an executor or a trustee cannot by borrowing money from a person make him creditor of the estate in his hands, even though the money was applied for the purposes of the estate."

Their Lordships pointed out in the same paragraph that the general rule is subject to certain exceptions & in proper case the executor or trustee could indemnify himself out of the estate in his hands.

In — 'Swaminatha Aiyar v. Srinivasa Aiyar', AIR 1918 Mad 533 (F), it was decided that a creditor from whom money was borrowed by the trustees for purposes of trust by executing a promissory note is not entitled to a decree against trust property. To a similar effect is the ruling of this court in — 'Palaniappa Chettiar v. Shanmugham Chettiar', AIR 1919 Mad 616 (G). In that case

it was laid down that unless there was any indication in the hundi that the executant, who was the trustee of a charity, did not intend to incur personal liability, the executant was personally liable.

(14) Different considerations will arise if it was specifically stipulated that the creditor should be paid out of the trust funds. The distinction between such a case and a case where the document does not show the personal liability of the executants is excluded and the creditor is made to look to the trust funds for repayments, is well drawn in — 'Sri Ekambareswaraswami and Dhandayuthapaniswami Temples v. Veerappa Goundar', AIR 1942 Mad 198 (H). The question that arose there was whether, in a suit on a promissory note executed by the manager of the temple for money borrowed for the expenses connected with the temple and which did not contain any stipulation that the creditor should look to the temple property for the repayment, a decree could be legally passed against the temple. While dealing with that point the learned Judge referred to cases which laid down that a decree could be passed against the estates of the temple and pointed out that they were all cases where the trustees had stipulated with the creditors that the repayments would be paid out of the temple funds. Then the learned Judge stated that, having regard to the fact that there was no such stipulation in that case and the personal liability of the executants of the promissory note was not excluded, a decree against the temple could not be validly granted.

(15) This aspect of the matter is discussed elaborately by Viswanatha Sastri J. in — 'Rama Variar v. Anantha Narayana Pattar', AIR 1951 Mad 423 (I). The learned Judge laid down that when there was no indication in the promissory note that the trustees intended not to incur any personal liability but to pay it out of the funds of the temple, a decree could not be passed against dewaswom. In this state of law it is clear that the decree passed by the Court in S. C. No. 116 of 1932 is not valid and binding upon the trust. As I have already pointed out, the trustees in suffering a decree against the temple, were acting fraudulently and in collusion with the creditor.

(16) This leads me to the next question namely whether the present suit is barred by res judicata by reason of the decree in S. C. No. 116 of 1932 which ultimately resulted in the sale of the suit properties and whether it is open to the present plaintiffs to show that the decree is not binding upon the trust without having the decree set aside by appropriate proceedings. In considering this point it has to be borne in mind that either the question of justifying necessity or the question whether a decree could be passed against the assets of the estate were not put in issue in S. C. No. 116 of 1932. In fact the trustees allowed the suit to be decreed ex parte; so necessary issues were not raised and determined by the Court.

(17) In — 'Prosunna Kumari v. Golab Chand', 4 Beng. L. R. 450 (P. C.) (J), it was laid down that the decree against the shebait of the temple would be binding upon the succeeding shebaits if the necessary and proper issues were raised, tried and decided in the suits which resulted in the decrees and was not tainted by fraud and collusion. In — 'Great North West Central Railway Co. v. Charlebois', (1899) A. C. 114 (K), the view taken by the House of Lords was that a consent judgment declaring plaintiff's lien on a company railway and other property and obtained on a contract entered into between the company and the plaintiff was not of a higher value than the contract, if the question as to the competency of the company to enter into the contract to incur such a liability, was not raised in the suit either in the pleadings or on the facts stated.

(18) In — 'Ramachandra v. Venkatalakshminarayana', AIR 1919 Mad 429 (L), a suit on a mortgage against the Zamindar of Tarla, an impartible Zamindari was compromised on the basis of the mortgage debt being a valid and binding one. Under the compromise decree the Zamindar had to pay the agreed sums in instalments. On default being committed, an application under O. 34, R. 5, C. P. C., for a final decree and for sale of mortgaged property was filed. The question arose whether by reason of the Zamindar being a party to the suit and the Razinama decree and of his admission that the debt was for a proper purpose, the succeeding Zamindar was precluded from raising the question as to the validity and binding nature of the mortgage. The Bench that heard the case answered it in the negative. It is stated therein that, apart from the compromise decree, the mortgagee had to establish the necessity and binding character of the mortgage, in order to obtain a mortgage decree directing the sale of the property in an impartible estate and if there is no enquiry and a decision about the binding character of the debt, the compromise or the statements therein are not entitled to a higher value than the mortgage and the succeeding Zamindar can show that the mortgage is not such as would bind an impartible estate.

(19) In — 'Srinivasa Aiyar v. Thiruvengada Maistry', AIR 1920 Mad 489 (M), another Bench expressed the opinion that a compromise decree between a Hindu widow and an alienee of her husband's property from her, did not stand on a higher footing than a private alienation by the widow and, therefore, the reversioner could show that the decree was not binding on the reversioner.

(20) Mr. Veeraraghavan, for the respondents, urged that, as in this case the decree was not a consent decree or the result of a compromise, but was an ex parte decree, it was on a better footing and could not be ignored and unless it was set aside the trust was not entitled to any relief. I do not think it makes any difference in principle, even if the decree obtained against the trust is an ex parte decree. See — 'Tej Singh v. Hannuprasad', AIR 1940 All 433 (N). The priniciple deduced from the decisions referred to above is that a decree obtained against a limited owner or a shebait of a mutt or a manager or a trustee of a temple or charity, without the necessary and appropriate issues raised, tried and decided, could not bind the reversioner or the succeeding shebait or manager or trustee and it could be reopened in a subsequent suit. It follows that the plaintiffs could establish in this suit that the decree in S. C. No. 116 of 1932 is not valid and binding on the temple for the reasons already stated.

(21) There remains the point for consideration, whether this suit for recovering possession of the property sold in execution of a decree is maintainable without instituting a suit to set aside a sale either under Art. 12 or 95, Limitation Act. In my opinion, this question does not present much difficulty. It was laid down in — 'Tallapragada Sundarappa v. Boorugapalli Sriramulu', 30 Mad 402 (O), that Art. 95, Limitation Act, applies to a case where fraud is practised upon a party to the decree and does not give a case where a reversioner impeaches the decree brought about by fraud of a qualified owner. In — 'Bijoy Gopal Mukerjee v. Krishna Mahishi Debi', 34 Cal 329 (P), the Privy Council expressed the view that a rever-

sioner can file a suit to recover immoveable property within 12 years, ignoring the alienation made by the widow. It was also pointed by their Lordships that in such a case, the reversioner need not have to set aside the alienation and the intervention of the Court was unnecessary. He could elect to treat it a nullity and very fact that the suit was filed indicated that he exercised such an election. In — 'Rupa Jagashet v. Krishnaji Govind', 9 Bom 169 (Q), it was laid down that a suit to recover trust property which was sold in execution of a decree not properly obtained could be filed within 12 years.

(22) In this context, I may refer to a decision of the Judicial Committee in — 'Sundarasan Das v. Ram Kirpal Das', AIR 1950 P. C. 44 (R), where the point that arose for decision was whether a suit for declaration by the succeeding Mahanth of a mutt, that the sale of mutt properties in execution of a decree which was not binding upon the mutt for the reason that the debt was not incurred for purposes binding upon it, was governed either under Art. 134-B or Art. 144, Limitation Act. How the question arose in that case was this. The head of a mutt called Pokrauni asthal borrowed some grain from the Mahanth of neighbouring mutt called Birpur asthal. As it was not repaid by the borrower, the head of the Birpur asthal instituted a suit for recovery of money equivalent of the grain borrowed, obtained a decree and in execution thereof purchased a portion of the property belonging to the Pokrauni asthal and obtained the necessary court-certificates. Sometime thereafter, he instituted a suit for partition and separate possession of the property purchased by him alleging that his possession was disturbed by the Pokrauni mutt, while the Pokrauni mutt filed a suit for declaration of the title of that mutt to the property purchased by the head of the Birpur asthal on the ground that the debt incurred by the head of the Pokrauni mutt was not for justifying necessity. It must be mentioned here that the title suit by the Pokrauni mutt was instituted 12 years after possession was taken by the Birpur mutt, the Courts in India dismissed the suit for partition on the ground that the decree and the sale resulting therefrom were not binding upon the Pokrauni mutt, as the grain borrowed by the head of the mutt was not for a purpose binding upon the mutt. They decreed the title suit brought by the Pokrauni mutt, despite the defence of the Birpur mutt that the suit was barred by limitation not having been brought within 12 years of the Court sale as in their view the Article of the Limitation Act applicable was 134-B. On appeal by the head of the Birpur mutt, the Privy Council held that the title suit though filed within 12 years of the death of Damodar Das, the head of the Pokrauni mutt, was barred by limitation, since it was beyond 12 years of the date of the sale. In the opinion of their Lordships, it was Art. 144, Limitation Act that governed execution sales of the trust properties, and not Art. 134B, which applies only to private alienations. Though the question did not arise for consideration in the form in which it is now raised this decision may, by implication be taken as laying down that a succeeding trustee need not set aside an invalid decree but seek to recover possession of the property affected thereby by an appropriate suit.

(23) In — 'Subbayya Pandaram v. Muhamad Mustapha Maracayar', AIR 1923 P. C. 175 (S), the Judicial Committee of the Privy Council held that a suit for possession of immoveable property dedicated to charitable endowments and which was sold at a Court sale in execution of a decree against the trustee for his personal debts, should be instituted within 12 years of the execution of sale. Here again the defence was not raised that the suit for mere recovery of possession was not competent without asking for the sale to be set aside. These two decisions may be taken as authorities for the proposition that a suit to recover possession of trust properties could be maintained without a specific prayer for avoiding either the decree or the consequent sales that followed them. In these circumstances, I hold that the suit was properly brought for recovering possession of the property and it was unnecessary for the plaintiffs to ask for setting aside the sale, and that the suit is not barred by limitation either by virtue of Art. 12 or Art. 95, Limitation Act.

(24) It follows that the appeal should be allowed and the judgment of the lower appellate Court should be set aside.

(25) Though in this case the first defendant purchased the property for Rs. 1200 in view of my finding that the debt was not incurred by the then trustees for a binding purpose, the temple is not liable to pay up this amount. But, so far as the balance is concerned as the temple had the use and benefit of it, the first defendant is entitled to the return of the same. But, in view of the fact that he is to pay mesne profits to the plaintiffs at least from 1942, and the plaintiffs are entitled to have the mesne profits set off against the amount payable to the first defendant, I think the ends of justice will be met by directing the first defendant to deliver possession of the property without liability on either side to pay each other. If the defendant defaults delivery of property forthwith he will be liable to pay future mesne profits at the rate claimed in the plaint.

(26) This is a fit case in which I should direct each party to bear its own costs throughout. No leave.

B/R.G.D. Appeal allowed.

A.I.R. 1953 MADRAS 628 (Vol. 40, C.N. 247)

GOVINDA MENON
AND KRISHNASWAMI NAYUDU JJ.

S. Ahmed Hussain Sahib, Appellant v. K. K. Gani Veeri Chettiar and others, Respondents.

Appeals Nos. 359 and 360 of 1948, D/- 8-2-1952.

(a) Madras Town Planning Act (7 of 1920), Ss. 17 and 20 — Scope of.

The prohibition in S. 17 is not a prohibition against the transfer of the property but a prohibition against the use to which the property is put to, the use being subject to such restrictions as may be prescribed under the scheme. Sections 17 and 20 do not extend so as to prohibit owners of lands from selling their properties and the sales therefore cannot be void.

(Para 4)

(b) Transfer of Property Act (1882), S. 55 (1) (a) — Disclosure of defects.

It cannot be said that the mere fact that a particular area is included in the Town Planning Scheme would justify holding that the owner of such property is incompetent to sell the same or that his title to deal with it is in any way affected. Assuming that the scheme is a material defect in the seller's title, he can discover it with ordinary care. Section 55 (1) (a), T. P. Act, could not therefore be invoked.

(1927) 2 Ch 379, Rel. on; AIR 1923 Cal 641; AIR 1935 Bom 16, Disting. (Paras 8, 9)
Anno: T. P. Act, S. 55 N. 2.

K. Umamaheswaram and A. Kuppuswami, for Appellant; K. S. Ramamurthy, for Respondents.

CASES CITED:
(A) (1927) 97 LJCh 4: (1927) 2 Ch 379
(B) ('23) AIR 1923 Cal 641: 50 Cal 615
(C) ('35) AIR 1935 Bom 16: 59 Bom 83
(D) (1834) 1 Bing (NC) 370: 131 ER 1160

KRISHNASWAMI NAYUDU J.: The plaintiff who is the appellant in both these appeals purchased two plots of land situated within the Salem Municipality from the defendants under two different sale deeds of the same date, namely, 26-1-1946. Two suits, O. S. Nos. 81 and 82 of 1946 against which these appeals are filed, were instituted by the plaintiff for setting aside the sale deeds and for recovery of the amounts paid as the sale price. The plaintiff claims to have learnt some time after the completion of the sale deeds that the lands purchased were comprised in a town planning scheme notified by the Salem Municipality in May 1941 which the defendants knew but did not disclose to the plaintiff and that there was therefore such a material defect in the title to the property that the omission on the part of the defendants to disclose the above defect was fraudulent entitling the plaintiff to set aside the sale and claim refund of the sale price. The defendants' contention is that the plaintiff knew about the Town Planning scheme and that no portion of the property purchased was reserved under the scheme and it was not subject to any acquisition by the municipality or the Government. He also contended that the existence of a scheme relating to the property was not in any event a material defect in title entitling the plaintiff to avoid the sale. The lower Court dismissed the suits. Hence these appeals.

(2) The sales are sought to be avoided on two grounds, namely, (1) that the sale of a property which is the subject-matter of a town planning scheme is prohibited under the provisions of the Madras Town Planning Act (7 of 1920) and therefore void, and (2) that the fact that a scheme under the Madras Town Planning Act is in force relating to the property is a material defect in the seller's title which the defendants were aware of, and which they were bound to disclose to the buyer and the omission to make such disclosure is fraudulent under S. 55 (1) (a), T. P. Act. It was also sought to be contended on behalf of the appellant that he is also entitled to avoid the sale as both parties to the contract were under a mistake as to a matter of fact essential to the agreement and therefore the agreement is void under S. 20, Contract Act. In view of the evidence in this case, it cannot be said, at any rate that the defendants at least were not aware of the fact that these properties were included in the Town Planning scheme and it is therefore futile to contend that the sale is void on the ground of mutual mistake.

(3) It is however necessary to examine the provisions of the Madras Town Planning Act with reference to the facts of this case in order to consider the other contentions of the appellant. On 24-4-1941 the Salem Municipal Council acting under section 9 (1), Madras Town Planning Act, passed a resolution and had the same published in the prescribed manner on 9-5-1941 under S. 10 of the Act deciding to prepare a scheme in respect if a certain area within which the properties in question were included. The Council also prepared and published a draft scheme under S. 11 on 6-5-1943. There were no objections to the scheme and the scheme was submitted to the Government for its sanction under S. 14. But the Government does not appear to have sanctioned it, and nothing appears to have happened after the submission of the scheme to the Government. Under S. 9, a Municipal Council may, by resolution, decide to prepare a scheme in respect of any land within the municipal area and the Chairman shall then have a plan prepared showing the land proposed to be included in the scheme, the surrounding lands and any existing streets. Such a resolution shall, under S. 10, be published by notification in the prescribed manner by the chairman and the notification shall state that a copy of the plan is kept for the inspection of the public.

If the resolution is to make a scheme, as in this case, the municipal council shall, under S. 11, within 12 months from the date of the notification under S. 10, or within such further period not exceeding 12 months as the Provincial Government may allow, and after consulting, in the prescribed manner, the owners of the lands and buildings in the area affected, prepare and publish a draft scheme. Such a draft scheme shall contain the particulars enumerated in S. 13, and under S. 14, if within sixty days from the date of the publication of a draft scheme any person affected by such a scheme communicates in writing any objection or suggestion relating thereto, the council shall consider such objection or suggestion and may modify the scheme as it thinks fit, and the scheme together with such objections and suggestions, if any, shall be submitted to the Provincial Government for sanction and the Provincial Government may after considering the objections and suggestions, if any, sanction the scheme with or without modification or may refuse to sanction the scheme. Section 17 provides that after the publication of the notification under S. 10 or S. 12 no person shall erect or proceed with any building or work or enter into or carry out a contract in respect of the land within the area included in the scheme unless he has applied for and obtained permission in cases where a scheme has not been sanctioned from the municipal council and in other cases from a responsible authority. Section 21 lays down that a person shall not be entitled to obtain compensation under S. 20 on account of any building erected on, or contract made, or other thing done, with respect to land included in a scheme, after the date of the publication of the notification under S. 10 or S. 12 except as to buildings erected, contract made or other thing done in accordance with a permission granted under S. 17.

(4) Section 17 is relied upon by the appellant in support of his contention that there is express prohibition against any sale of land comprised within the area included in the scheme, reliance being placed on the words "no person shall enter into or carry out a contract in respect of land within the area included in the scheme". It is therefore for consideration whether the Act prohibits transfers of properties comprised in the area included in the scheme or whether the prohibition as to entering into or carrying out a contract does not relate to transfers of land but only refers to contracts with reference to enjoyment or to the use to which the land is to be put by virtue of any arrangement that may be entered into by the owner with third parties. Apart from the fact that if it was intended to prohibit alienations or transfers of properties included in

the scheme more express terms could have been employed in the Act, it is clear that when reference to entering into or carrying out the contract is made, it is in relation to something that has to be done in the land and which should not be done contrary to the purpose for which the scheme was intended.

This is evident from S. 21 which relates to compensation, the penalty for the construction of any building or work done or any contract entered into or carried out in respect of the land without the sanction of the municipal council or responsible authority would be to deprive the person from compensation. It does not make such a contract void even assuming a contract of sale or the sale itself is intended, which however we have no doubt has not been intended to be included in the contract referred to in S. 17. The purpose of the Town Planning Act is to vest municipalities with power to control the erection of buildings or such works and the use to which the lands situated within the Municipality may be put to in order to secure the object of laying out a well planned town or city. Far from any transfers being prohibited, it is clear from the Act and the rules that such transfers are contemplated and provisions made to define the rights and liabilities of the transferor and the transferee of land covered within the area under the scheme. A reference may be made to R. 66 framed under the Town Planning Act where with reference to payment of betterment contribution payable in respect of any premises it is laid down that where the title of any person primarily liable to the payment is transferred, the person whose title is transferred and the person to whom the same shall be transferred shall, within three months after the execution of the instrument of transfer or after its registration if it be registered or after the transfer is effected, if no instrument be executed, give notice of such transfer to the municipality of such transfer and if a person makes a transfer without giving such notice, the transferor continues liable for payment of the betterment contribution. The prohibition therefore in S. 17 is not a prohibition against the transfer of the property but a prohibition against the use to which the property is put to, the use being subject to such restrictions that may be prescribed under the scheme. The need for such a provision as S. 17 was apparently felt necessary to prevent the owners of lands who are likely to enter into contracts with respect to the lands with a view to bolster up their claims for compensation by virtue of anything done on the land in pursuance of a contract entered into. We have therefore no hesitation in holding that Ss. 17 and 20 do not extend so as to prohibit owners of lands from selling their properties and the sales therefore cannot be void.

(5) The question whether the existence of a scheme is a material defect in the seller's title requires consideration. This question was considered in 'Forsey and Hollebon's Contract, In re', (1927) 2 Ch 379 (A), with reference to the Town Planning Act of 1925 (15 Geo. V, c. 16). In that case the purchaser agreed to purchase certain premises "for an estate in fee simple absolute, free from incumbrance". Before the date fixed for completion he discovered that the property was included in the area proposed to be dealt with by local authority by its resolution under S. 2, Town Planning Act, 1925. On an application by the purchaser that the vendor had not shown good title to the property sold in accordance with the contract and for payment of the deposit, it was held by Eve J. that the mere passing and registration of the resolution by the local authority did not operate to impose on the land any subsisting incumbrance within the meaning of cl. 1 of the contract, that the sections of the Act of 1925 showed that the purpose of the registered resolution was not so much to impose restrictions on the land as to prevent unreasonable claims being made by persons who bought up land subject to the scheme; and that there was nothing like an interference with the property which made it different from that which was contracted to be sold.

Lord Hanworth M. R. observes at p. 391 as follows:

"A draft statement in relation to the scheme has been prepared. But even then the scheme has to be passed by the Minister. There may be restrictions imposed by the scheme on the purchaser, but I reject the view that the scheme operates as an existing incumbrance on the land. The resolution has only a certain effect as to compensation. I have gone through the various sections of the Town Planning Act, 1925, in order to show that the resolution is passed not so much for the purpose of imposing restrictions as of preventing unreasonable claims for compensation being made by persons buying up land subject to the proposed scheme. I think that Eve J. was right in saying that there was nothing like an interference with the property which made it different from that which was contracted to be sold.

I do not think that the purchaser can say that the vendor has failed to make a good title."

(6) The provisions of the English Act are not far different from the provisions of the Madras Act. There are provisions in the English Act correspondinig to Ss. 9, 10, 11 and 14. There is no provision corresponding to S. 17. The disability under S. 21 to obtain compensation in respect of buildings erected, contract made or thing done without the permission of the authority is provided under S. 10 of the English Act. The facts in this case appear almost identical with the facts of the case which the Court of Appeal was considering. Here as well, excepting the publication of the draft scheme and its submission to the Government nothing further has been done and it cannot therefore be stated that there is any interference with the property which would justify the plaintiff contending that the defendants had no title to convey. Reliance was placed on — 'Nursing Dass Kothari v. Chuttoo Lal Misser', AIR 1923 Cal 641 (B) and —'Lallubhai Rupchand v. Mohanlal Sakarchand', AIR 1935 Bom 16 (C). In the former case, it was a case of sale by public auction where the purchaser was declared the highest bidder and he made a deposit as per the conditions of the sale. Subsequently he discovered that at the time when the auction was held there had been already published in the Calcutta Gazette a notice under S. 63(2), Calcutta Improvement Acts 1911-1915 which showed that the Trust had prepared a plan of the proposed public street and that among other buildings through which the street would pass were the premises which were the subject-matter of the auction. It was held in that case that neither the receiver who sold the property, nor the purchaser was aware of the notice issued under S. 63(2), Calcutta Improvement Acts and that the case fell within the provisions of S. 20, Contract Act and that the purchaser was therefore entitled to avoid it as the parties were not aware as to a matter of fact essential to the agreement before the auction.

That decision therefore is not very helpful to the appellant in that it did not proceed to consider it with reference to S. 55(1)(a), T. P. Act.

In 'AIR 1935 Bom 16 (C)' after the agreement was entered into between the parties for sale of the property and before its completion, it was brought to the notice of the purchaser that the Government at the instance of the municipality decided to acquire the property agreed to be sold under the Land Acquisition Act and a notification to that effect had been published in the Gazette. The purchaser wanted to avoid the sale and recover the advance paid by him as earnest money and it was held that he was entitled to it since he was not bound to complete the same when there were defects in the property or in the title to the property which are material and also latent and not discoverable by due care. It was held that the liability of the property to be compulsorily acquired may fairly be said to amount to a material defect which was not discoverable by due care and that the vendor was not in a position to show title free from reasonable doubt and therefore the purchaser was held entitled to avoid the contract. But it must be mentioned that in both these cases there was a direction to acquire the lands, one under the provisions of the Calcutta Improvement Acts and the other under the Land Acquisition Act. In the present case, there is nothing to show that the suit lands were directed to be acquired under the scheme. There is no direction since the Government have not yet sanctioned the scheme or issued instructions to the municipality to acquire any portion of the lands comprised in this scheme. It is not even shown whether the lands which are the subject-matter of these suits were set apart in the draft scheme for any public purpose to be used for providing for a street, park, school, or otherwise when it may be contended with some force that if the Government makes up its mind even at this late stage to sanction the scheme there is the likelihood of the plaintiff losing the property and getting only compensation for the property and that if he had known before he entered into the transaction it can be reasonably supposed that he would not have entered into the contract at all.

That stage had not come up in this case. It is only in the stage of proposal pending acceptance by the Government ever since 1944 when the notice of the submission of the draft scheme was published. It will, therefore, in the words of Eve J. in (1927) 2Ch 379 (A) when he considered the resolution of the municipal council as to whether it was a restriction which affected the property so that the property which was to be conveyed was different from the property contracted to be sold "a potential interference with its enjoyment", and he goes on to observe "but until that potentiality has ripened into an actual interference I cannot bring myself to hold that the property is affected in the sense that there is an incumbrance imposed on it by the mere passing of the resolution, and on those grounds I am prepared to hold and do hold, that the mere passing and registration of the resolution of this nature does not operate to impose on the land included in the area any subsisting incumbrance."

(7) The learned counsel for the appellant referred to the principle laid down by Tindal C. J. in — 'Flight v. Booth', (1834) 131 E R 1160 (D). In that case, the contract of sale was sought to be avoided by reason of misdescription in the printed particulars of the sale of the premises to be sold by reason of which the purchaser wanted to rescind the contract altogether. The learned Chief Justice after discussing the decided cases observed:

> "We think it is, at all events, a safe rule to adopt that where the misdescription, although not proceeding from fraud, is in a material and substantial point, so far affecting the subject-matter of the contract that it may reasonably be supposed, that, but for such mis-description the purchaser might never have entered into the contract at all, in such case the contract is avoided altogether, and the purchaser is not bound to resort to the clause of compensation. Under such state of facts, the purchaser may be considered as not having purchased the thing which was really the subject of the sale."

(8) The purchaser in that case was held entitled to avoid the contract since by reason of his being compelled to purchase it he would be getting something different from what he contracted to buy. It was urged that this principle should be applied to this case as by reason of the scheme the plaintiff would be getting something different from what he contracted to buy, namely compensation instead of land. There is no doubt force in this contention. But it has not been shown that these lands were directly sought to be acquired under the scheme and that the plaintiff would therefore be entitled only to compensation and not the land, even assuming that the Government would approve the scheme and put it into effect. In any event, we are satisfied that there is no material defect in the seller's title soiely on the ground that the property sold is comprised in an area in respect of which a draft scheme under the Madras Town Planning Act has been prepared and submitted to the Government does not amount to any interference in the rights of the owners of the properties and does not impose restrictions in the right to transfer the same, nor affect their title to deal with them. It must be borne in mind that these lands are situated within the Municipality and should always be held subject to such restrictions as to their use and enjoyment that may be imposed by the Municipality by virtue of the powers vested in it under not only the Municipal Acts but also other enactments empowering the municipalities to have control over the properties within their limits in the interests of the public to enable them to discharge their duties of providing proper housing accommodation and other civic amenities. Therefore, a person holding property situated in a municipality must hold it subject to these limitations and restrictions imposed on such owners. It cannot therefore be said that the mere fact that a particular area is included in the Town Planning Scheme would justify holding that the owner of such property is incompetent to sell the same or that his title to deal with it is in any way affected.

(9) Section 55(1)(a), T. P. Act, provided that the seller is bound to disclose to the buyer any material defect in the property or in the seller's title thereto of which the seller is, and the buyer is not aware, and which the buyer could not with ordinary care discover; and omission to make such disclosure is fraudulent under the section and the purchaser is therefore entitled to avoid the sale on the ground of fraud. In this case, the lower Court found that the plaintiff must have been vaguely aware of the existence of the Town Planning Scheme. The learned Judge however declined to accept the evidence of D. Ws. 1 and 2 who stated that they told the plaintiff's broker and clerk, P. Ws. 2 and 3,

about the Town Planning Scheme and that they stated that they made enquiries and with the knowledge they purchased the property. After examining the evidence of these witnesses and taking into consideration that P. Ws. 2 and 3 were not cross-examined as to whether they were not informed of the existence of the scheme, we agreed with the learned Judge that much reliance could not be placed on the evidence of these witnesses. We however agree with the finding of the lower Court that the plaintiff must have learnt about the scheme earlier than the sales and not after.

The plaintiff states that he agreed to purchase these lands for the purpose of putting up buildings and being within the municipal limits it is difficult to belive, as observed by the lower Court, that the lands would have been purchased without examining the title to the property and finding out whether the area was not the subject of any town planning scheme. The suit plots were potential building sites and it could not have been assumed by the plaintiff that the municipality would not take steps to lay the necessary roads and put up drainage and other facilities calling upon the owners to pay betterment contribution. The object admittedly of the plaintiff was to put up houses and he must have made enquiries about the existence of the scheme and should have gone through the transaction with such knowledge. In any event, it cannot be said that the plaintiff could not have discovered this with ordinary care. The person purchasing lands for building sites within a municipality should examine the situation with reference to public road, the existence or otherwise of such access, the provision of drainage and the title of the vendor with reference to the municipal registers which enquiries would have led him to the knowledge of the Town Planning Scheme for the area. Apart from agreeing with the lower Court that the plaintiff must have been aware of the scheme, we are of opinion that assuming that it is a material defect in the seller's title, he could have discovered it with ordinary care. Section 55(1)(a), T. P. Act, could not therefore be invoked by the plaintiff. In the result, these appeals are dismissed with costs in A. S. No. 359 of 1948.

B/D.H. Appeals dismissed.

A.I.R. 1953 MADRAS 632 (Vol. 40, C.N. 248)

SATYANARAYANA RAO AND RAJAGOPALAN JJ.

M. Subbiah Nadar, Applicant v. The Commr. of Income-tax and Excess Profits Tax, Madras, Respondent.

Case Referred No. 46 of 1950, D/- 20-3-52.

(a) Income-tax Act (1922), S. 10 (2) (i) and (XV) — Lessee of salt pans undertaking to spend money for constructing railway siding — No obligation cast on him to effect that improvement — Effect of failure to effect improvement being to cut down term of lease — Expenditure held was neither rent nor premium nor debitable to revenue, but was capital expenditure. (1938) 4 All ER 487 and A I R 1952 Cal 145, Distinguished — (Transfer of Property Act (1882), S. 105). (Para 6)

Anno: Income-tax Act, S. 10 N. 4 and 15; T. P. Act, S. 105 N. 58 and 60.

(b) Income-tax Act (1922), S. 10 (2) (i) and (xv) — Lessee of salt pans expending money in bringing into existence new pans for getting more income — Expenditure is neither rent nor revenue expenditure — (Transfer of Property Act (1882), S. 105). (Para 6)

Anno: Income-tax Act, S. 10 N. 4 and 15; T. P. Act, S. 105 N. 58 and 60.

(c) Income-tax Act (1922), S. 10 (2) (xv) — Assessee and his undivided brother separately taking leases of salt pans — One R advancing loan to brothers — Suit by R for unpaid money — Under compromise decree assessee paying sum of money on his brother's behalf — Sum paid held was not admissible expenditure under S. 10 (2) (XV) — AIR 1946 Mad 508, Distinguished. (Para 13)

Anno: Income-tax Act, S. 10 N. 15.

P. N. Somasundaram, for K. Srinivasan, for Applicant; C. S. Ramarao Sahib, for Respondent.

CASES CITED:
(A) (1938) 4 All ER 487
(B) ('52) AIR 1952 Cal 145: 1950-18 ITR 403
(C) (1942) 2 KB 184: 24 Tax Cas 453
(D) (1926) 95 LJKB 336: (1926) AC 205
(E) (1939) 22 Tax Cas 97
(F) ('46) AIR 1946 Mad 508 (1946) 14 ITR 236
(G) ('50) AIR 1950 Mad 626: (1950) 18 ITR 85
(H) ('52) 1952-21 ITR 142 (Cal)

SATYANARAYANA RAO J. : The three questions that were referred to us for decision under S. 66(1), Income-tax Act, by the Income-tax Appellate Tribunal are :

(1) Whether the payment of Rs. 23,894 cost of Railway siding, paid by the assessee to the M. L. M. Estates was revenue expenditure which the assessee was entitled to deduct under S. 10(2) of the Act.
(2) Whether the sum of Rs. 7000 spent in connection with the new salt pans was capital expenditure and not allowable as a deduction under s. 10(2) of the Act.
(3) Whether the sum of Rs. 36,680 paid to Messrs A. R. Ramier & Co., under the compromise decree was an admissible expenditure under S. 10(2) (xv) of the Act.

(2) The three questions may be considered under two groups as questions Nos. (1) and (2) are closely connected and raise the same questions of law. The third question will be dealt with separately.

(3) The facts relevant for consideration of the first two questions are as follows as appear from the statement of the case : The assesee is a manufacturer of salt in Livingipuram in Tuticorin. The salt pans originally belonged to one M. L. M. Ramanathan Chettiar. He died and was succeeded by his son Mahalingam Chettiar who was then a minor. In O. P. No. 30 of 1932, District Court, Ramnad, one Rao Sahib R. Krishna Aiyar was appointed interim property guardian by the District Court and he was in management of the M. L. M. estate. Under the orders of the District Court and with its sanction, the pans were sub-leased under a document dated 28-3-1934 to the assessee, Subbiah Nadar, for a period of seven years commencing from 1-1-1934 and ending with 31-12-1940. Under the sub-lease the assessee had to pay a sum of Rs. 36,969 to the Government on behalf of his lessor in three instalments.

One instalment on 12-3-1933 was paid even before the lease was executed on 2-11-1933 under an agreement. The other instalment had to be paid on 1-4-1934 and 1-10-1934. This amount represents the amount payable by the

lessor to the Government under the lease granted by the Government to the estate of M. L. M. Besides this, he had also to pay a sum of Rs. 500 per annum or Rs. 35,00 for seven years as rent. These two amounts namely Rs. 36,969 payable to the Government on behalf of the lessor and the total rent for the seven years, namely Rs. 3500, in all Rs. 40,469 was treated under the lease as a consolidated lease amount for seven years. There were also further obligations imposed upon the lessee under this document.

The lessee undertook to spend a sum of Rs. 18,000 for constructing a railway siding, though in the sub-lease it was stated that it would include also repair of the pans then in existence but it was assumed throughout and was conceded before us that that sum really represented the estimated cost of constructing the railway siding. The railway siding had to be constructed according to the terms of the lease, before the month of Decembr 1935, in default it was provided that the lessee should forfeit the lease in respect of the seventh year and shall put the lessor in possession of the pans. On 31-12-1939, there was yet another form in the lease that the lessee was at liberty to spend a sum of Rs. 4000 in putting up new beds and for carrying out other works in connection with new beds but he was allowed to enjoy the income from such new beds until the expiry of the period of the lease without any addition to the rents stipulated.

(4) Before the expiry of the term of this lease, on 13-12-1937 the period of the lease was further extended under a document for a period of three years from 1-1-1941 to 31-12-1943. The assessee did not carry out the construction of the railway as stipulated in the previous lease and, therefore, when the extension of the term was granted under this document, time for constructing the railway siding was extended till December 1942 failing which it was provided that the assessee should deliver possession of the salt pans in good condition on 30-12-1942. The rent payable was increased from Rs. 500 to Rs. 3000 payable in two instalments of Rs. 1500 each on 30th April and 31st August of each year. There was a second extension under a document dated 10-7-1942 of the term for a further period of two years from 1-1-1944 to 31-12-1945. This document also makes reference to the construction of a railway siding.

As this came into existence before the expiry of the period fixed under the earlier document, namely 31-12-1942, it is stated in the document that by that time the assessee had already applied to the railway department for constructing the railway siding and even submitted plan. If, however, there should be delay on the part of the railway department in constructing the railway siding by 31-12-1942 the assessee should pay on or before 31-12-1942 the amount required for the construction of the siding. It is found that, in fact, by 31-12-1942, the assessee deposited a sum of Rs. 23,894 for the construction of the railway siding as per the revised estimate. It is also found that a sum of Rs. 7000 was paid by the assessee in constructing new salt pans. These two amounts, it was claimed on behalf of the assessee, should be deducted from the income during the assessment year 1944-45 either as rent under S. 10 (2) (i) or as revenue expenditure under S. 10 (2) (xv). This claim was rejected by the department and also by the appellate Tribunal. Hence this reference.

(5) It was argued on behalf of the assessee that these two amounts really formed part of the rents that were stipulated under the lease though it is not so expressly stated or in any event these amounts must be treated as expenditure wholly or exclusively incurred for the purpose of the assessee's business in the manufacture of salt. The appellate Tribunal was of opinion that the sum of Rs. 23,894, the amount deposited by the assessee for the construction of the railway siding, was in the nature of a premium as it was paid in order to obtain renewal of the term under the lease.

(6) Under the provisions of the Transfer of Property Act S. 105 the consideration for a lease may be a price paid or promised, or of money, a share of crops, service, or any other thing of value, to be rendered periodically or on specified occasions to the transferor by the transferee, who accepts the transfer on such terms. Normally the amount paid for the purchase of the term is a premium. The periodical payment paid if it is in money, for the use and occupation of the premises demised is called rent. This definition of course is not exhaustive for the rent may be something other than money and need not necessarily always be a periodical payment as it may even be received in advance.

What distinguishes rent from premium is the latter represents money paid as price for the purchase of the term secured by the lease and is not part of the rent. If, on the other hand, the consideration paid is a return for the use and occupation of the land or premises demised it generally is known as rent. Taking all the three documents into consideration can it be said that the amount deposited for the construction of the railway siding is rent or even premium? The most important feature that emerges from a reading of the document is that this is not amount which the assessee was under an obligation to pay to the lessor. It is an amount which is intended to bring into the business for the quick transport of the manufactured product. If the assessee does not fulfil the obligation, there is no means of enforcing that obligation by the lessor against the lessee and all that the lessor is entitled to is that the lessee should deliver possession of the land before the lapse of the full period of the term that was fixed in the document; it is cut down by one year.

Further, the result of constructing a railway siding is to add to the premises demised something in the nature of more or less of a permanent advantage. There is no covenant to pay, there is no means of enforcing such payment, the only obligation cast being to effect an improvement to the property leased. To describe an expenditure of that description as 'rent' as understood in the Property Law seems to us would be a misnomer. It has none of the elements of 'rent' nor even of 'premium'. It is an obligation cast upon the assessee to effect an improvement, of course to the advantage of both himself and his lessor and to enjoy that improvement during the term of the lease and if there was failure to carry out that improvement the only effect is

to cut down the term of the lease. As the improvement is in the nature of an enduring advantage to the business, it can only be treated as capital expenditure and not as expenditure debitable to revenue.

The sum of Rs. 7000 expended in bringing into existence new pans for getting more income in the light of the foregoing can never be treated either as rent or as revenue expenditure. So long as the period of the lease continues. the lessee alone is entitled to the advantage of the new pans and their yield with no further obligation to pay any additional rent to his lessor. It is, in other words an income-producing asset which at the expense of the lessee was brought into being the profits of which he is entitled to enjoy so long as the lease lasts. The advantage no doubt goes to the benefit of the lessor after the termination of the lease as an accretion to the property. There is of course no obligation cast upon the lessor to pay any compensation to the lessee for the improvement effected by the latter on the premises.

(7) Mr. P Somasundaram the learned advocate for the assessee relied on two decisions in support of his contention. The first is the decision —'In Race-Course Betting Control Board v. Wild', (1938) 4 All ER 487(A). The Race Course Betting Control Board obtained a license from the owner of certain buildings erected on the Manchester Race Course under a deed whereby the Board bound itself to pay 12½ per cent. of the cost of construction of the building annually and the deed also contained a declaration that this annual sum was payable not only in respect of the enjoyment and exercise of the right of user but also by way of repayment by yearly instalments of the capital value of the cost of construction. The question that came up for consideration was whether such an annual payment was a revenue payment either in whole or in part or was capital payment.

Notwithstanding the express declaration contained in the deed, it was held by Macnaghten J. that it was a revenue payment and not capital payment and therefore deductible from the income. But for the complication introduced by the declaration in the deed one would have thought that the question would not present any difficulty in the matter. As the payment of 12½ per cent of the cost price was really rent, though rent was fixed at a certain proportion of the cost price, it was fixing it in a different manner. Macnaghten J. considered that the form in the deed should not be given any preference to substance and that looked at from that point of view there can be no doubt that the payment was a revenue payment. At page 490 the learned Judge observed :

"Except for that declaration (referring to the declaration in the deed) it seems clear that the annual sum must, for the purpose of income-tax assessment, be regarded as a revenue payment. Mr. Latter, arguing for the Board said that but for the insertion of the declaration in the deed the Crown would not have a leg on which to stand. The Solicitor-General would not go quite so far as that but he did say that it would be a crutch rather than a leg upon which he would have to support himself."

And lower down in the same page it was pointed out that one has to look at the legal obligations between the parties created under the document. That is, in other words, one must look at the substance of the document and should not be influenced by the form of it. The learned Judge went on to observe :

"It is said, and truly said, that whether a payment is a revenue payment or a capital payment may depend upon the angle from a revenue payment from the point of view of the receiver, and vice versa. It may be a revenue payment from the point of view of the receiver and a capital payment from the point of view of the payer. The fact that the sum payable by the Board is a sum which, over a period of years, will recoup to the Race Course Co., nearly the whole of the cost of the erection of the buildings and at the same time give a reasonable return on the money that they have invested, is, I think, immaterial.

The question is whether or not under this document you can spell out any obligation on the part of the Board to make a capital payment to Race Course Co. I think that it is clear as I have said not only from the declaration, but also from the method in which the annual payment is calculated namely 12½ per cent on cost that the payment is of such an amount as to recoup to the Race Course Co. their expenditure on the buildings. However, I do not think that that is a matter which touches the issue to be determined here."

(8) The next case relied on was — 'Commr. of Income tax v. Globe Theatres Ltd.', AIR 1952 Cal 145 (B) a decision of the Calcutta High Court. The assessee in that case carried on business as exhibitor of cinema pictures. He owned some cinema houses and also took others on lease. A sum of Rs. 10,000 was advanced by the assessee to a company, which was at that time proposing to build a cinema house with stipulation that after the construction of the buildings, the cinema house would be leased to the assessee. The building was not constructed and the company which undertook to construct the cinema house fell into financial difficulties with the result that the assessee was obliged to write off a sum of Rs. 10,000 which was bad debt; and claimed it as an allowable deduction under S. 10(2), Income-tax Act.

The payment was treated as advance payment of rent under the lease and as an allowable deduction under S. 10(2)(XV) of the Act. It was pointed out that the sum was not paid either as premium or as 'Salami' for the lease, that is, as purchase money for getting a lease. On the contrary it was an advance payment of rent. The facts of that case do not present any difficulty and bear no analogy to the case now before us. The decision, in our opinion, if we may say so with respect was perfectly justified to the facts and does not support at all the contention urged on behalf of the assessee.

(9) The decision in — 'Henriksen v. Grafton Hotel Ltd.', (1942) 24 Tax Cas 453 (C) to which our attention was drawn by Mr. Rama Rao Sahib the learned Counsel for the Commissioner, in our opinion, is a case on the other line, where the sum paid was treated as capital expenditure. The assessee in that case was a

company which was running a licensed hotel in a building which was obtained on lease. The lease provided that the tenant should pay all the charges that will be imposed under the Licensing Consolidation Act, 1910. His license was renewed in 1934 and 1937, but the assessee was obliged to pay in respect of the license monopoly value which was imposed and which was payable in instalments. It was claimed on behalf of the assessee that it was a debitable expenditure and not capital expenditure. This contention was rejected by the Court of Appeal.

The matter was in the first instance heard before Lawrence J. and in the Court of Appeal it was disposed of by Lord Greene, M. R. and Du Parcq L. J. and Singleton J. The extreme contention urged on behalf of the assessee in that case was that as the assessee was under a contractual liability to pay all the charges which could be imposed under the Licensing Act, the monopoly value which he paid was in the nature of revenue expenditure. In other words, every liability which accrues and arises out of a contract must be treated as debitable expenditure and not as capital expenditure. This contention was not accepted as Lawrence J. pointed out in the Court of first instance at page 456:

"It is perfectly clear upon all the authorities that no sum which is paid by a trader of a capital nature is deductible for income-tax purposes, and, therefore, it is necessary to see whether the sum which the respondent paid is of a capital nature or not. If it were rent, no doubt it would not be a payment of a capital nature, but it is not rent and the company and its landlord have not agreed that it shall simply pay the rent for these premises, but what they have agreed is that it shall bear the charges imposed in respect of the Licensing Act. It is clear, I think, from the authorities to which I alluded in the 'Albertoli case' and from the fact that the monopoly value is imposed as a lump sum, though payable by instalments, and as a condition of the grant of the license, that the quality and nature of the monopoly value is capital quality in nature; and it seems to me impossible to hold that when the tenant undertakes to pay thosc charges they alter their quality & nature & become income charges."

This decision was affirmed by the Court of Appeal. Lord Greene M. R. saw no difference in principle between a payment out and out for monopoly value and payment in respect of a term which is in the nature of a premium. To the contention repeated before the Court of appeal that a payment under a covenant would alter the quality of the payment it was observed at p. 460 by Lord Greene M. R.

"If a payment is of such a nature as to preclude its deduction when made spontaneously, I cannot see that its nature is affected by reason of the fact that it is made under a covenant with a third party. Capital improvements are often made under a covenant in a lease. I have never heard it suggested that the cost of making them can be deducted by the lessee in computing his profits for income-tax purposes."

The observations in our opinion are apposite and answer effectively the contention urged on behalf of the assessee. Du Parcq L. J. referred to the Lord Chancellor's decision in — 'British Insulated and Helsby Cables Ltd.. v. Atherton'. (1926) A C 205 at p. 213 (D) where the nature of capital expenditure was defined; and explained that the expression 'enduring benefit' occurring in the passage in that case was not meant to have benefit of a permanent character and the word 'permanent' does not mean everlasting. The duration must always be considered with reference to the period for which the premises were leased and as long as the lease lasts and not permanent or everlasting and continuing even after the termination of the interest of the lèssee.

(10) The decision of Lawrence J. again in — 'Henderson v. Meade-King Robinson & Co. Ltd.', (1939) 22 Tax Cas 97 (E) particularly his observations at page 105 are of considerable assistance in distinguishing capital expenditure from revenue expenditure.

(11) For the foregoing reason we have no hesitation in answering the first two questions in the negative and against the assessee.

(12) There remains the last of the questions that were referred to us. The sum of Rs. 36,680 consists of a sum of Rs. 26,326 which represented the principal paid to satisfy the compromise decree in O. S. No. 9 of 1942 to the plaintiff in that action, one, Messrs. A. R. Ramier & Co., and Rs. 10,324 the cost incurred by the assessee in connection with that suit. This amount is claimed as permissible deduction under S. 10 (2) (XV) of the Act. The assessee Subbiah Nadar had a divided brother Theri Nadar. Both of them were under pressure for money in 1939 and executed an agreement in favour of Ramier & Co. on 28-12-1939. Under this document it was recited that the two brothers took separately leases of salt pans at Tuticorin and other piaces and that financial help was needed, and that Ramier & Co. were ready and willing to give the necessary help.

It was, therefore, provided that Ramier should advance if necessary funds to the two brothers on their joint responsibility and there were certain stipulations for the benefit of Ramier for the financial help rendered by him. Besides the interest payable on the sum by way of commission on the sales provision was made also to secure repayment to Ramier & Co., by practically putting the management of the business under his supervision and control. The entire amounts borrowed were not, however, repaid and Ramier & Co., were obliged to institute a suit, O. S. No. 9 of 1942. We do not krow what exactly the defence in that suit was but, finally on 26-7-1943, the matter was compromised between the brothers and Ramier; and the compromise of that date recites that Subbiah Nadar the assessee paid on behalf of Theri Nadar his brother a sum of Rs. 25,000 in full quit of all the obligations in favour of Ramier and the suit was dismissed on condition that each party should bear his own costs of the suit.

The assessee had no definite basis on which this amount was claimed as permissible deduction under S. 10(2) (XV) of the Act. When called upon to state the legal position in the first instance he said that he was a surety for his brother, and that the losses which had incurred should be lawfully deducted. Perhaps realising that this position was somewhat untenable and shaky he filed an affidavit in which he shifted his ground and claimed there was a joint venture of himself and his brother and that this amount represented the amount which

he became liable to pay to Ramier. In the argument before us, yet a third case was put forward by the learned counsel for the assessee and it was claimed that really it was money borrowed by both of them jointly for their respective businesses and that each was surety for the other and, therefore, this is a legitimate deduction which should have been permitted by the department.

The claim that it is a joint venture was negatived finally by the Appellate Tribunal though the Appellate Assistant Commissioner took a different view because the partition deed entered into between the brothers negatived such a case. Even if he was surety for his brother as there is no connection between their business and the business which is the subject-matter of the assessment, the expenditure could not be deducted. Assuming that the position taken up by the assessee now before us that each was surety for the other there is no justification for treating this as a loss in respect of this business. The counsel for the assessee relied upon the decision in — 'Commr. of Income-tax, Madras v. Ramaswami Chettiar', AIR 1946 Mad 508 (F) in support of his contention but that case proceeded upon the peculiar custom or usage which obtained among the Nattukottai Nagarathars and is not a justification for extending that principle to other cases.

This point was considered in — 'Commr. of Income-tax, Madras v. Subramanya Pillai', AIR 1950 Mad 626 (G) by this Court and the case in — 'Commr. of Income-tax, Madras v. Ramaswami Chettiar', (F) was distinguished. The loss in such a case is totally outside the scope and purpose of the business of the assessee and the claim cannot be sustained. This decision was followed by the Calcutta High Court in — 'Commr. of Income-tax v. Madan Gopal Bagla', (1952) 21 ITR 142 (H).

(13) We think, therefore, that the view taken by the Appellate Tribunal even as regards this question was correct. This question also must be answered in the negative and against the assessee. As the assessee has failed on all the questions he must pay the costs of the respondent which we fix at Rs. 250.

B/V.R.B. Answer accordingly.

A.I.R. 1953 MADRAS 636 (Vol. 40, C.N. 249)

SUBBA RAO J.

Bhupalan Venkatasubbayya, Appellant v. G. L. Mallappa (deceased) and others, Respondents.

Appeals Nos. 317 and 318 of 1945, D/- 8-2-52.

Debt Laws — Madras Agriculturists' Relief Act (4 of 1938), S. 4 (d) — "House property" does not include vacant site suitable for building. AIR 1939 Mad 789, Foll.; AIR 1919 Low Bur 30, Ref. (Para 4)

Kasturi Sivaprasada Rao, for Appellant; T. S. Narasinga Rao, for Respondents.

CASES CITED:

(A) ('39) AIR 1939 Mad 789:
ILR (1939) Mad 943

(B) ('19) AIR 1919 Low Bur 30: 67 Ind Cas 781

JUDGMENT: App. No. 317 of 1945: This appeal arises out of O. S. No. 27 of 1943 on the file of the District Judge, Anantapur, a suit filed by the appellant for recovery of a sum of money due on a mortgage deed dated 26-5-1936 executed by defendants 1 to 3, in favour of the plaintiff. Among other contentions, the defendants raised the plea that the debt was liable to be scaled down under the Madras Agriculturists' Relief Act (Act 4 of 1938). The plaintiff contended that the debt was exempted from the operation of the provisions of the Madras Agriculturists' Relief Act, as the debt was contracted on the security of "house property" alone in the Hindupur Municipality. The mortgage was effected on two items, more particularly described in the plaint schedule.

(2) The learned District Judge held that the first item was a "house property", but the second item was not "house property", that the mortgage was not executed on the security of "house property" alone and that the debt was liable to be scaled down. The plaintiff preferred the above appeal.

(3) The only question in this appeal is, whether item 2 of the mortgaged property was "house property" at the time, when the mortgage deed Ex. P. 1 was executed, that is, on 26-5-1936. The description of item 2 reads as follows:

"Item II.
Part III. Ward V, Block IV, T. S. No. 260, out of which (the site) measuring 55 (fifty-five) feet from east to west and 82 (eighty-two) feet from north to south, the boundaries of which are as follows:
East—your "Mandi" shop, and the shops of Madaluru Sidda Veerappa and Shaikh Hussain Sahib.
West—The vacant site of Minakana Gurki Gangadharappa.
South—Road.
North—The house of Kuruka Hanumantu.
The vacant site having the above measurements and situate within these boundaries together with the brick walls surrounding the said-site whole."

This site is, therefore, situated in Hindupur Municipality, surrounded by houses and abutting a road. There was also a brick-wall surrounding the site. The site, therefore, was suitable for building purposes. But the question is, whether it is "house property". The words "house property" have not been described in the Act. Wadsworth J. in — 'Ponnambalam Chetti v. Raman Chetti', AIR 1939 Mad 789 at p. 790 (A) had an occasion to consider the scope of this exemption. The learned Judge observed at pp. 789-790:

"It is contended that the term 'house property' is a wider term than the term 'house' and that it will include not only land appurtenant to a house which is in existence, but also land ear-marked for house building purposes. I doubt very much whether this contention is in accordance with ordinary English usage. When we speak of house property, we certainly include buildings of all kinds and the sites thereof. We should probably also include the gardens, compounds and yards attached thereto. But I doubt whether the ordinary connotations of the term 'house property' in every day language would include land ear-marked for building purposes, but unoccupied by any buildings.....Granted that the land is suitable for building houses and that there is an intention to build houses upon it, I do not think that it would be considered to be 'house property' until building operations had, at any rate, started."

I respectfully agree with the above observations.

(4) In — 'Messrs. Rowe and Co. v. Secy. of State', AIR 1919 Low Bur 30 (B) the learned Judges considered, whether buildings constructed for carrying on business is "house property". In defining the words "house property" the learned Judges made the following relevant observations.

> "To my mind, the expression 'house property' would convey to the ordinary person the idea of buildings used for residential purposes. It is for the Crown to show that Messrs. Rowe and Co.'s premises are 'house property', and that can only be done by saying that property is the general word, while the expression 'house' preceding it describes the kind of property referred to."

I agree with the observations, but it is not necessary to express my view on the question, whether a site with a building constructed for carrying on a business is "house property" or not. The word property has a wide connotation; it takes in not only houses but other kinds of property. The Act exempts the debt secured on houses alone in a Municipality. To put in other words, to give the exemption, the property must be a house. The intention to build on the site or its suitability for building purposes cannot convert a vacant site into a house property. The existence of a house, therefore, is essential before we can call a property "house property". I, therefore, hold that in the present case, on the date when the debt was incurred the second item was not a "house property", and therefore, the debt was not exempted from the operation of the provisions of the Madras Agriculturists' Relief Act. If so, the Act applies, and the debt has rightly been scaled down. The appeal, therefore, fails and is dismissed with costs.

(5) App. No. 318 of 1945: The only question in this first appeal is, whether the mortgage, Ex. D. 1 dated 22-2-1939 executed by defendants 1 and 2 in favour of defendant 5 was a nominal transaction intended to defraud the creditors. (His Lordship considered the evidence and concluded). The appeal fails, and is dismissed with costs.

B/V.S.B. Appeal dismissed.

A.I.R. 1953 MADRAS 637 (Vol. 40, C.N. 250)

FULL BENCH

SATYANARAYANA RAO, SUBBA RAO AND RAMASWAMI JJ.

The Jumma Musjid Mercara by its Muthavalli Khan Saheb A. Abdul Rahaman Khan, Mercara, Appellant v. Kodimani Andra Devaiah and others, Respondents.

Appeal No. 852 of 1948, D/- 5-11-1952.

† (a) T. P. Act (1882), Ss. 43 and 6 — Applicability of S. 43 — Transfer of spes successionis: 65 Mad LJ 588: AIR 1933 Mad 795: 145 Ind Cas 965, Overruled.

Where the transferor in fact purports to transfer an expectancy or property which he had no right to transfer without making any representation that he had authority to transfer, S. 43 will not help. Similarly if both the transferor and transferee knew the truth, the section cannot be invoked by the transferee. The section proceeds on the fundamental assumption that the erroneous or fraudulent representation induced the transferee to part with the consideration without knowing the true facts. A transfer which was made on an erroneous representation may, in fact and in effect, be a transfer of an expectancy, which is prohibited by the statute. That does not prevent the section from operating. It is not concerned with the ultimate effect of the transfer when it was made. It is concerned only with an erroneous representation by the transferor of his authority to transfer when in fact he had none. (Para 9)

If it was the intention of the Legislature that in all cases of transfer whether the transfer was made disclosing the true facts or was made with an erroneous representation regarding the authority, no effect should be given to the transfer, where the transfer is prohibited under S. 6 (a) it would have stated so and created an exception to S. 43. On the other hand, the illustration to the section indicates a contrary intention. (Para 9)

Where therefore the transferee from a reversioner was not aware of the truth at the time of the transfer that which was being transferred was only a spes successionis, S. 43 would apply. AIR 1915 Mad 972, Approved; Case law reviewed. (Para 10)

Anno: T. P. Act, S. 43 N. 2, 7; S. 6 N. 7.

(b) Interpretation of statutes — Illustrations — (Civil P. C. (1908), Preamble).

Illustrations to sections should be accepted as being of relevance and value in construction of section and should not be rejected as being irrelevant or on assumed grounds of repugnancy, unless absolutely warranted. AIR 1916 PC 242, Rel. on. (Paras 9, 24)

Anno: C.P.C., Preamble N. 9.

T. Krishna Rao, for Appellant; K. Rajah Aiyar and V. Seshadri, for Respondents.

CASES CITED:

(A) ('15) AIR 1915 Mad 972: 29 Mad LJ 733
(B) ('33) AIR 1933 Mad 856: 65 Mad LJ 772
(C) ('33) AIR 1933 Mad 795: 65 Mad LJ 588
(D) ('30) 1930 Mad WN 1054
(E) ('37) 1937 Mad WN 416
(F) ('16) AIR 1916 PC 242: (1916) 2 AC 575
(G) ('16) AIR 1916 Mad 579: 39 Mad 554
(H) ('23) AIR 1923 PC 189: 50 Cal 929 (PC)
(I) ('07) 17 Mad LJ 201: 30 Mad 255
(J) ('27) AIR 1927 Mad 649: 53 Mad LJ 218
(K) ('35) AIR 1935 All 244: 57 All 474
(L) ('38) AIR 1938 Bom 228: ILR (1938) Bom 155
(M) ('39) AIR 1939 Pat 116: 182 Ind Cas 829
(N) ('31) AIR 1931 Nag 51: 27 Nag LR 199
(O) ('18) AIR 1918 Mad 123: 41 Mad 418 (FB)
(P) ('21) AIR 1921 PC 112: 48 Cal 1 (PC)
(Q) ('08) 3 Mad LT 243: 18 Mad LJ 247
(R) ('13) 19 Ind Cas 881: 24 Mad LJ 462

ORDER OF REFERENCE

SATYANARAYANA RAO J.: This appeal raises a question under S. 43, Transfer of Property Act, on which there is conflict of opinion in this Court. Two decisions of this Court, —'Alamanaya Kunigeri v. Murukuti Papiah', AIR 1915 Mad 972(A) and —'Vellayyammal v. Palaniandi Ambalam', AIR 1933 Mad 856(B), have taken a view favourable to the respondents. But a different view was taken in — 'Official assignee Madras v. Sampath Naidu', AIR 1933 Mad 795(C), by a Bench, Madhavan Nair J. in —'Sreeramulu v. Somaraju', 1930 Mad WN 1054(D), followed the earlier deci-

sions and the Allahabad High Court has also accepted the earlier decisions of this Court as laying down the law correctly. There is also a decision of a single Judge Wadsworth J. in —'Akkamma v. Ramalinga Reddi', 1937 Mad WN 416(E). In view of these conflicting decisions I think it is but proper that this appeal should be heard by a Bench and the papers will be placed before the Honourable the Chief Justice so that he may decide whether this case should be posted before a Bench or even at the outset before a Full Bench as it is essential that the conflict should be resolved once for all.

JUDGMENT

(2) SATYANARAYANA RAO J.: This appeal was referred to a Full Bench as there were conflicting decisions regarding the interpretation of S. 43, Transfer of Property Act.

(3) The plaintiff who was unsuccessful in the lower Court preferred this appeal against the judgment and decree of the District Court of Coorg in O. S. No. 1 of 1945. The plaintiff is the Jumma Masjid, Mercara, represented by its Mutavalli, Khan Sahib Abdul Rahman Khan. The suit is for recovery of possession of a half share in the immoveable properties described in the schedule attached to the plaint. According to the case of the plaintiff, the properties in suit originally belonged to one Sh. Basappa, and after his death in 1901, they devolved on his widow, Gangamma, who became a convert to Islam, and made a gift of these properties on 5-9-1932 to the Masjid. The properties continued in the possession of the plaintiff till the death of Gangamma which occurred on 17-2-1933. But on her death, Santappa and Basappa (this Basappa is a different person from Basappa the husband of Gangamma) the sister's son's sons of Gangamma's husband Basappa, became entitled to the properties as tne reversioners to the estate. On 3-3-1933, under Ex. A. Santappa sold his half interest in the properties to the Mosque and therefore, it is claimed that under this document, the plaintiff will be entitled at least to a half share in the suit properties.

The father of defendants 1 to 3 one Rao Bahadur Subbayya, claimed on the death of Gangamma that the properties belonged to him and his joint family, as they were purchased on 18-11-1920 under Ex. III from Santhappa Basappa, and another in the name of his son, Ganapathi, who subsequently died leaving his widow the 4th defendant. He applied for transfer of patta and the Revenue authorities effected the transfer, and in pursuance of the order of the Revenue authorities, Rao Bahadur Subbayya took possession of the properties from the plaintiff. It is claimed by the plaintiff that the defendants had no title at all to the properties and that the plaintiff is entitled to a half share. It may be mentioned, even at the outset, that the title put forward by the plaintiff under the gift deed of Gangamma was not established in the trial Court. No deed of gift was produced and that title is now abandoned in the appeal. The title, therefore, of the plaintiff is now confined to the title acquired under the sale deed, Ex. A. executed by Santhappa,

(4) The defendants' case was that the suit properties belonged originally to three brothers, Nanjundappa, Santhappa and Basappa, who constituted members of a joint family. Basappa died first in 1901, Santhappa died in 1903, and the properties survived thereafter to Nanjundappa, the last of the coparceners. He died in 1907 leaving behind him his widow, Ammakka. She died in 1910. After her death, the reversioners to the estate, namely, Basappa, Mallappa and Santhappa the sister's sons' sons of the last holder, sold under Ex. III dated 18-11-1920 the properties to Ganapathi, the husband of defendant 4 and the son of Rao Bahadur Subbayya, for the benefit of their joint family. This was followed by a rectification deed, Ex. IV, dated 12-3-1921, by which the omission in Ex. III of certain properties was made good. Ganapathi instituted O. S. No. 11 of 1921 on the file of the Subordinate Judge's Court of Coorg on the strength of Exs. III and IV to recover possession of the properties. The suit was contested by Gangamma, the widow of Basappa, on the ground that they were the self-acquired properties of Basappa. Her contentions were upheld by the trial Court and also on appeal by the District Judge and the Judicial Commissioner. When the appeal was pending before the Judicial Commissioner, the suit was remanded for a finding on the question whether Ammakka's marriage with Nanjundappa was in an approved form or not. But before the appeal could be disposed of, Gangamma died, and the matter was not proceeded with further by the appellant, viz., Ganapati, and the appeal was dismissed.

The upshot of this litigation was that except two survey numbers which are not now in suit, the rest of the properties, the subject-matter of the present suit, were held to be the self-acquired properties of Basappa. The family was undoubtedly a joint family, there being no division. This finding is clearly binding on the parties to this litigation and the appeal was argued on the footing that the properties now in the suit were the self-acquired properties of Basappa. On that basis, it will be seen that at the time Ganapati purchased the properties from the three reversioners on the footing that the properties were joint family properties which survived to Nanjundappa, and after his death passed to Ammakka that in fact, they had no title and their right to succeed to Basappa's estate on the footing that they were the self-acquisitions of Basappa, was only an expectancy and a 'spes successionis'. The title however was sought to be supported in the trial Court under S. 43, Transfer of Property Act, which embodies the well known principle of feeding the grant by estoppel. As the reversioners, the vendors of Ganapati, succeeded after the death of Gangamma to the estate of Basappa. If this contention is well founded, Santhappa's conveyance to the plaintiff on his share in the reversion, after it had opened cannot take effect and the title of the defendants would prevail.

(5) The trial Court accepted the contentions of the defendants and upheld their title dismissing the plaintiff's suit.

(6) In the lower Court, as many as 8 issues were framed, leaving the formal issue relating to relief. But in the appeal now before us, the argument was restricted and confined only to the correctness of the view taken by the trial Court that S. 43, Transfer of Property Act, would avail the defendants to defeat the

title of the plaintiff to half the properties under the sale deed of Santhappa.

(7) The main argument on behalf of the appellant was that the transfer by the reversioners in favour of Ganapati when it was made, was in fact and in effect, though not in form, the transfer of a chance of an heir apparent to succeed to an estate, which was prohibited by S. 6(a), Transfer of Property Act, and S. 43 cannot be invoked to defeat the provision in S. 6(a). There can be, it was contended, no estoppel against a statute.

(8) The sale deed, Ex. III, definitely proceeds to state that Nanjundappa and Basappa were members of an undivided family, that the properties were joint family properties, and survived to Nanjundappa after the death of Basappa, that after Nanjundappa's death, they devolved on Ammakka, and after her death, they became the absolute owners of the property. Some of the properties, it is alleged in this deed, were in the possession of Gangamma for purposes of maintenance, and that as she was keeping a Mussalman and behaving herself contrary to caste, custom and law, she had not even the right of maintenance from the said property. This was the representation made to the purchaser by the reversioners who executed the deed in favour of Ganapati in 1920. There is nothing on record to show that at that time the purchaser was aware that the property was in fact either wholly or in part the self-acquired property of Basappa, to which they had no immediate right to succeed. In fact, in the judgment in O. S. No. 11 of 1921 it was found that some of the items, at least two, were joint family properties. The point, therefore, for consideration is whether S. 43, Transfer of Property Act, would help the defendants in securing the title to the properties, notwithstanding the fact that at the moment of the transfer which they obtained, their vendors had in fact only an expectancy which could not be transferred under S. 6(a) of the Act.

(9) Before referring to the conflicting decisions on this point, it would be convenient to state our view of the effect of S. 6(a) and S. 43, Transfer of Property Act read together. Section 43 was amended by the Amending Act 20 of 1929 by inserting the words "fraudulently" or before the words "erroneously represents". The section as amended read as follows:

"Where a person fraudulently or erroneously represents that he is authorised to transfer certain immoveable property and professes to transfer such property for consideration such transfer shall, at the option of the transferee operate on any interest which the transferor may acquire in such property at any time during which the contract of transfer subsists. Nothing in this section shall impair the right of transferees in good faith for consideration without notice of the 'existence of the said option."

Then follows an illustration which is also relevant:

"A, a Hindu, who has separated from his father B, sells to C three fields, X, Y and Z, representing that A is authorised to transfer the same. Of these fields Z does not belong to A, it having been retained by B on the partition; but on B's dying A as heir obtains Z. C, not having rescinded the contract of sale, may require A to deliver Z to him."

The section assumes that the transferor had no title at the time of the transfer or in any event that he had no authority to make a transfer, even if he had title. The essence of the principle underlying the section is that the person making the transfer makes a representation that he is authorised to transfer the property, and professes to transfer such property for consideration. After the amendment, the representation may even be fraudulent. The effect of the amendment is to make it clear that the erroneous representation may be an innocent misrepresentation or fraudulent misrepresentation. In either case the section applied. Believing the representation so made, the transferee parts with the money, obtains the transfer, which of course is ineffective to convey the property. If thereafter the transferor acquires any interest in the property so transferred, he must make good the transfer to the extent of the interest which he had so acquired subsequently. From this analysis, it follows that if no representation is made and the transferor in fact purports to transfer an expectancy or property which he had no right to transfer without making any representation that he had authority to transfer, the section will not help. Similarly if both the transferor and transferee knew the truth, the section cannot be invoked by the transferee. The section proceeds on the fundamental assumption that the erroneous or fraudulent representation induced the transferee to part with the consideration without knowing the true facts, and therefore such a transferee should be allowed to claim from the transferor if he subsequently acquires any title to the property that the transfer should operate on that title. A transfer which was made on an erroneous representation may, in fact and in effect, be a transfer of an expectancy, which is prohibited by the statute. That does not, in our opinion, prevent the section from operating. It is not concerned with the ultimate effect of the transfer when it was made. It is concerned only with an erroneous representation by the transferor of his authority to transfer when in fact he had none.

The same statute contains the two Ss. 6(a) & 43. If it was the intention of the Legislature that in all cases of transfer whether the transfer was made disclosing the true facts or was made with an erroneous representation regarding the authority, no effect should be given to the transfer, as the transfer is prohibited under S. 6(a) it would have stated so and created an exception to S. 43. On the other hand, the illustration to the section indicates a contrary intention on the part of the Legislature, for in the illustration, on B's dying, A as heir obtains Z and C is entitled to require A to deliver Z to him, though when A sold Z to C, his interest was in fact only an expectancy. At the time of the transfer, A made a representation that he was authorised to transfer the same, and he is called upon to make good the transfer, after the title had devolved on him. It is said that this illustration goes beyond the section, that it should be ignored and should not be taken into consideration in interpreting S. 43. This, in our opinion, is to put the cart before the horse and to assume in the first instance that S. 43 does not apply under any circumstances to transfers within the purview of S. 6(a) and then reach the conclusion that the illustration goes beyond the section.

In this connection, the words of Lord Shaw of Dunfermline in — 'Mahomed Syedol Arifin v. Yeoh Goi Gark', AIR 1916 P. C. 242 (F) should be borne in mind, as they contain the true view to take regarding the value of illustrations to a section in an Act. The learned Lord observes at page 244:

"It is the duty of a Court of law to accept, if that can be done the illustrations given as being both of relevance and value in the construction of the text. The illustrations should in no case be rejected because they do not square with the ideas possibly derived from another system of jurisprudence as to the law with which they or the sections deal. And it would require a very special case to warrant their rejection on the ground of their assumed repugnancy to the sections themselves. It would be the very last resort of construction to make any such assumption. The great usefulness of the illustrations, which have, although not part of the sections, been expressly furnished by the Legislature as helpful in the working and application of the statute should not be thus impaired."

See also Craies on Statute law at pp. 203 and 204 and Maxwell's Interpretation of Statutes, Edn. 9 at p. 46.

(10) On a plain reading, therefore, of the sections and having regard to the recitals in the document, Ex. III, and the finding of the trial Court that the transferee was not aware of the truth at that time, it seems to be a clear case to which S. 43 would aptly apply. This view is supported by some of the decisions of this Court, though there are also decisions against that view. It is now necessary to examine the decisions cited at the Bar in detail.

(11) The decisions cited before us may be classified under two categories: (a) those relaing to transfers by expectant heirs and (b) alienations of service inams. It has been held in this Court by Sir John Wallis C. J. and Tyabji J. in — 'Lakshmi Narayana Jagannadha Raju v. Varala Lakshmi Narasimma', AIR 1916 Mad 579 (G), that contracts for sale of expectancies are void and are not specifically enforceable by a suit, as to do so would be to defeat the provision in S. 6, Transfer of Property Act and would also be against public policy within the meaning of S. 23, Contract Act. This decision was confined to a case where a person purports and agrees to convey in present or in future the chance of an heir apparent to succeed to an estate and such a contract, it was held, could not be specifically enforced. The learned Judges in that case were not called upon to consider a case falling under S. 43, Transfer of Property Act. This decision was approved by the Privy Council in — 'Ananda Mohan Roy v. Gour Mohan Mullick', AIR 1923 P. C. 189 (H). We refer to these decisions to show that they are not concerned with the interpretation of S. 43, Transfer of Property Act, as in some decisions which will be referred to later. — 'AIR 1916 Mad 579 (G)', was referred to in support of the contrary conclusion that to facts similar to the present case S. 43 does not apply.

(12) — 'AIR 1915 Mad 972 (A)', a decision of Ayling and Tyabji JJ. is a case which directly supports the contention of the respondent. The mortgage in that case was by the son, and he had no right to it as his father was alive at the time of the alienation. As they were Mahomedans, after the death of the father, the estate devolved on the son, the mortgagor, under Mahomedan law. The mortgagee contended that under S. 43, Transfer of Property Act the mortgage purported to be made by the son will operate on the interest which he had acquired after the death of the father. The question was whether S. 43 supported the contention of the mortgagee. In the deed of mortgage, the son acknowledged that he had borrowed the amount for his necessity and stated that the land were mortgaged by him and that he would not alienate the properties in favour of others till the debt was discharged. This undoubtedly implied that the son was the absolute owner of the properties, and it is on that representation that the mortgagee advanced the amount as a loan on the security of the property. It was contended on behalf of the mortgagor that S. 43 should not be construed in such a manner as to nullify S. 6(a), Transfer of Property Act by validating a transfer which was at its inception void under S. 6(a). And reliance in support of the contention was placed upon — 'Ramasami Naick v. Ramaswami Chetti', 30 Mad 255 (I), which related to an alienation of a service inam. Tyabji J. who delivered the leading judgment in that case met this contention by pointing out that the argument neglects the distinction between 'purporting to transfer the chance of an heir-apparent" and "erroneously representing that he (the transferor) is authorised to transfer certain immoveable property". The deed under consideration fell under the latter class. There was a clear representation by the transferor to the transferee that he was authorised 'in praesenti' to transfer the property, while in — '30 Mad. 255 (I)', the transferor purported to transfer a mere possibility of succession which clearly was within the prohibition of S. 6(a), Transfer of Property Act.

The learned Judge then distinguished the cases cited before him on the ground that there was no erroneous representation in those cases either because both parties knew the true facts or the transferee was not misled by the erroneous representation of the transferor. The learned Judge also relied upon the illustration to S. 43 in support of his heir that the transaction in question was within the purview of S. 43 and that the transferee was entitled to require the transferor to make good the title by substituting the title subsequently acquired for what was purported to be conveyed. It must be noted that the learned Judge, Tyabji J. who was a party to the earlier decision in — 'AIR 1926 Mad 579 (G)', which was finally disposed of on 24-3-1915 was also a party to the decision in — 'AIR 1915 Mad 972 (A)', which was pronounced on 29-3-1915. It is not as if the learned Judge was not alive to the distinction between the two classes of cases, viz., (1) those in which the alienation in question on the face of it purports to transfer the chance of an heir-apparent and (2) those in which the alienation proceeds on an erroneous representation that the transferor was authorised to transfer the property, though in fact he was not, as the learned Judge definitely adverts to this distinction, at p. 974 in — 'AIR 1915 Mad 972 (A)', and what is more, distinguishes the case in — '30 Mad 255 (I)', on this very ground.

In our opinion, this decision correctly interprets the section and clearly brings out the distinction between cases falling under S. 6(a) of the Act and cases protected by S. 43, though in substance and in effect the transfer may be one which was hit at by S. 6(a). The principle of this decision is in consonance with the decision of Krishnan Pandalai J. — 'AIR 1933 Mad 856 (B)', though the learned Judge does not refer to the decision itself. It was also a case of a transfer by an expectant heir. The significant words used by the learned Judge at p. 857 were:

> "The plaintiff's father having sold this property by Ex. II-a, as if it belonged to him and to the plaintiff, at a time when they had admittedly no title thereto, the plaintiff cannot now be heard to set up that fact after acquiring the title as reversioner in 1921."

It must be noticed that that sentence clearly brings out the distinction between a transaction which was protected by S. 43 and one which is not so protected.

To a similar effect is the decision of Wadsworth J. in — '1937 Mad W. N. 416 (E)'. The learned Judge distinguishes the decision in — 'AIR 1933 Mad 795 (C)', in which a contrary view was taken by Beasley C. J. and Bardswell J. on the ground that it was a case in which

> "the transfer, although framed as a transfer of an existing title, was in fact to the knowledge of the parties a transfer of a 'spes successionis' such as is prohibited under S. 6 (a), Transfer of Property Act."

If there is no such knowledge and the alienee believed the representation made by the alienor, in such a case, S. 43, according to the learned Judge, would undoubtedly apply. — 'Muthuswami Pallai v. Sandana Velan', AIR 1927 Mad 649 (J), a decision of Krishnan and Odgers JJ. also takes the same view. At p. 649, it was observed:

> "In appeal it is contended that S. 43 is not applicable to this case. The question is whether defendant 1 represented that he was authorised to transfer the whole property and whether the transferee accepted the sale on that representation. There can be no doubt from Ex. A. that defendant 1 did purport to sell the whole property on behalf of himself and that the recital therein that he has purchased the property out of his self-earnings was in order to make the purchaser believe that he was getting a good title to the property. It is no indication that what was sold was less than the whole property."

This view was followed by the Allahabad High Court in—'Shyam Narain v. Mangal Prasad', AIR 1935 All 244 (K)', by Sir Mahomed Sulaiman C. J. and Rachhpal Singh J. in which all aspects of the question were fully and elaborately considered by the learned Judges. After a review of the authorities for and against, the learned Judges conclude at p. 246 as follows:

> "It seems to us that when there were clear cases under the unamended Transfer of Property Act applying S. 43, to the cases of heirs, and there was a specific illustration to S. 43 which was in point, and the Legislature has not thought fit to delete the illustration in the amended Act, it is impossible to hold that the illustration is repugnant to the provisions of S. 6 and is really wrong. Every attempt should be made to reconcile the provisions of S. 43, together with illustration, with the provisions of S. 6. Such a reconciliation is, in our opinion, patent enough. Section 6 does not prohibit emphatically the transfer of a chance of an heir; nor does it make it absolutely illegal so as to vitiate the entire contract. It merely lays down that property of any kind may be transferred, but the chance of an heir cannot be transferred. This is no more than saying that a transfer of a mere chance of an heir is void in law and is of no effect. Section 6(a) would, therefore, apply to cases where professedly there is a transfer of a mere 'spes successionis', the parties knowing that the transferor has no more right than that of a mere expectant heir. The result, of course, would be the same where the parties knowing the full facts fraudulently clothed the transaction in the garb of an out and out sale of the property, and there is no erroneous representation made by the transferor to the transferee as to his ownership.
>
> But where an erroneous representation was made by the transferor to the transferee that he was the full owner of the property transferred and was authorised to transfer it and what was purported to be the property transferred was not a mere chance of succession but the property itself, & the transferee acts upon such erroneous representation, then if the transferor happens later before the contract of transfer comes to an end, to acquire an interest in that property, no matter whether by private purchase, gift, legacy or by inheritance or otherwise, the previous transfer can at the option of the transferee operate on the interest which has been subsequently acquired, although it did not exist at the time of the transfer. The illustration to S. 43 is, in our opinion, directly applicable to such a case."

This passage summarises the view of the learned Judges considered from all aspects, with the additional reason that the continuance of the illustration to S. 43 in the amended Act even after the view expressed in some of the decisions that the illustration goes beyond the section is an indication that that view is not accepted by the Legislature.

(13) The Nagpur, Bombay and Patna High Courts have also taken the same view: See — 'Vithabai v. Malhar Shankar', AIR 1938 Bom 228 (L), which follows — 'AIR 1935 All 244 (K)', at pp. 230 and 231, — 'Ram Japan v. Jagesara', AIR 1939 Pat 116 (M), and — 'Bismilla v. Manulal Chabildas', AIR 1931 Nag. 51 (N).

(14) — 'AIR 1933 Mad 795 (C)', was strongly relied upon by the learned advocate for the appellant in support of his argument. It related to a mortgage of 'spes successionis' and the learned Judges held that though in form the transaction represents a conveyance of present interest in the property, in substance and effect the transfer was of a 'spes successionis' which was forbidden under S. 6(a), Transfer of Property Act does not become valid by the application of S. 43 and that the illustration to S. 43 of the Act is repugnant to S. 6(a) and goes beyond S. 43. The reasoning of the learned Judge was based partly on — 'AIR 1916 Mad 579 (G)', which as pointed out already, has nothing to do with S. 43. It was further observed that the decision in — 'AIR 1915 Mad 972 (A)', was opposed to the Full Bench decision in — 'Sannamma v. Radhabai', AIR 1918 Mad 123 (F.B.)

(O), and the Privy Council decision in — 'AIR 1923 P. C. 189 (H). The Privy Council decision in — 'AIR 1923 P. C. 189 (H)', related to the enforcement of a contract to sell an expectancy, like the decision in — 'AIR 1916 Mad 579 (G)', and has nothing to do with S. 43, Transfer of Property Act. The Full Bench decision in — 'AIR 1918 Mad 123(F.B.) (O)', will be considered presently. The learned Judge, Bardswell J. who delivered the judgment of the Court also remarked that the same learned Judge, Tyabji J. who was a party to — 'AIR 1916 Mad 579 (G)', and — 'AIR 1915 Mad 972 (A)', drew a distinction in — 'AIR 1915 Mad 972 (A)', between transfers which purported to be transfers of the chance of an heir-apparent and transfers which proceeded on an erroneous representation that the transferee was authorised to transfer certain immoveable property. And then follows the significant sentence at p. 796:

> "Reason has, however, already been given for holding that such a distinction cannot be drawn, at any rate when the erroneous description is deliberately made with knowledge of its falsity."

If this sentence is intended to mean that both the alienor and alienee were aware of the truth and they purposely and deliberately clothed the transaction with false recitals in order to circumvent the prohibition in S. 6(a), no exception can be taken to it. It is perhaps on the basis of this sentence that the learned Judge, Wadsworth J. in — '1937 Mad W. N. 416 (E)', treated this decision as a case in which both parties knew the truth, and so did the Allahabad Judges in — 'AIR 1935 All 244 (K)'. If, on the other hand, it is meant to lay down by this that if the transferor alone knew the truth and that he deliberately made an erroneous representation which was believed by the transferee who was ignorant of the truth, even in such a case, S. 43 cannot be invoked by the transferee to his aid to validate the grant, we must respectfully differ from the view of the learned Judges. The very foundation of the section is that it is intended to protect the innocent transferee and bind the transferor who made the erroneous representation to make good his representation, provided he has subsequently acquired an interest in the property. As pointed out by the Judicial Committee at p. 118 in — 'Tilakdhari Lal v. Kheden Lal', AIR 1921 P. C. 112 (P), the basis of the doctrine is:

> "This principle of law, which is sometimes referred to as feeding the grant by estoppel, is well established in this country. If a man who has no title whatever to property grants it by a conveyance which in form would carry the legal estate, and he subsequently acquires an interest sufficient to satisfy the grant, the estate instantly passes. In such a case there is nothing on which the second grant could operate in prejudice to the first."

(15) The very object of the section would be defeated if the transferor who makes the erroneous representation is allowed to escape on this principle by merely establishing that he knew the truth and his representation was not an innocent representation. It is to do away with any such fine distinction that the Legislature has now made it clear that whether the representation is innocent or fraudulent the section would apply, so as to put an end to all doubt. The illustration was brushed aside by Bardswell J. on the ground that it is opposed to S. 6(a) 'and no attempt was made to reconcile the illustration with the section. It is also stated that the illustration is opposed to the Privy Council decision in — 'AIR 1923 P. C. 189 (H)'. One is not able to find anything that is said in — 'AIR 1923 P. C. 189 (H)', to justify the observation of the learned Judges at p. 796 of — 'AIR 1933 Mad 795 (C)', in support of this view, as —'AIR 1923 P. C. 189 (H), did not concern itself with S. 43, Transfer of Property Act.

(16) For these reasons, we are unable to accept the view taken by the learned Judges in — 'AIR 1933 Mad 795(C)'.

(17) As the learned Judges in 'AIR 1933 Mad 795(C)', placed reliance on the Full Bench decision in 'AIR 1918 Mad 123 (F. B.) (O), which relates to service inams, it becomes necessary to deal with that class of cases. The starting point for the discussion of this group of cases is the decision of Benson and Wallis JJ. in '30 Mad 255(I)'. The alienation in question related to an impartible estate, and the question arose in execution proceedings in pursuance of a decree for sale on foot of a mortgage executed on 6-10-1892 by defendants 1 to 5 in a suit, mortgaging an impartible estate which was inalienable. Defendant 1 was the zamindar on the date of the decree, and defendants 2 to 5 were among the group of dayadis who were entitled to the succession to the zamindari. Defendant 2 subsequently succeeded to the zamindari, and one of the contentions raised was that even if the mortgage by defendants 2 to 5 was invalid under S. 6(a), Transfer of Property Act, as defendant 2 had succeeded to the zamindari, the mortgage could be given effect to against him. This contention was rejected on the ground that if the Indian statute intended that transfers forbidden by S. 6(a) should take effect against the transferors as and when they succeeded to the estate, a provision should have been inserted to that effect in S. 43, Transfer of Property Act in the same manner as they have provided in the case of persons erroneously representing that they were authorised to transfer immoveable property. There was no contention in that case that defendant 2 was within the provision of S. 43, as he made no sort of erroneous representation that he was authorised to transfer the property. As we were curious to know the language of the deed, we examined the printed records in the case and found that in the hypothecation deed the transfer was specifically of the right of expectancy to succeed to the impartible estate. It stated as follows:

> "We are entitled to succeed and enjoy one after another according to seniority of age the aforesaid Ammayanayakanur zamin within the four boundaries mentioned herein. We have hypothecated to you the aforesaid Ammayanayakanur Zamin being item No. 1 mentioned herein."

It is for the reason that the deed did not proceed on the basis of any representation regarding the authority to transfer that the learned Judges observed at p. 262 and treated the case as directly falling under S. 6(a) and that no exception was provided in S. 43 to transfers simpliciter of an expectancy so as to apply the doctrine of S. 43 in cases in which the transferors succeeded to the estate later. The case, therefore, has absolutely no

application to alienations which purport to transfer the property on an erroneous representation that the transferor had authority to deal with it. Had this distinction been noticed, the later decisions would have been the other way.

This was followed and applied in —'Angannayya v. Narasanna', 18 Mad LJ 247(Q), which related to the sale of a village service inam. The sale was in 1889. The inam was enfranchised or resumed in 1891 and was subsequently mortgaged by the alienee in 1892. The transfer of the inam which formed the emoluments of a village office was prohibited by Regulation 6 of 1831 which was in force on the date of the alienation and the alienation was null and void. The lands, however, became alienable after it was enfranchised. The learned Judges applied S. 43 as under the deed of 1889, Ex. A, the alienor purported to transfer certain immoveable property as having fallen to his share which constituted a definite representation that he was authorised to transfer them. There was no disclosure that it was at that date an unenfranchised village service inam, the transfer of which was prohibited by statute. In our opinion, S. 43, Transfer of Property Act was rightly applied in that case. The decision in '30 Mad 255(1), was distinguished on the ground that it was not a case to which S. 43 could be applied.

(18) The next case which related to a service inam is —'Narahari Sahu v. Korithan Naidu', 24 Mad LJ 462(R), a decision of Benson and Sundara Aiyar JJ. The judgment is very short, and it proceeds on the assumption that the transfer was of a service inam which was prohibited by law and S. 43 had no application. They applied the decision in '30 Mad 255(I) but expressed the view that the learned Judges were unable to agree with the decision in '18 Mad LJ 247(Q)'. The distinction pointed out in '30 Mad 255(I)', was not noticed by the learned Judges. Owing to this conflict of opinion between '18 Mad LJ 247 (Q)' and '24 Mad LJ 462 (R)', the matter was referred to a Full Bench by Abdur Rahim and Bakewell JJ. in 'AIR 1918 Mad 123 (F. B.) (O). It also related to village service inams which was situate in a proprietary estate, and therefore Madras Act 2 of 1894 applied. On 18-8-1906, an inam title deed was granted, but the necessary notification as required by S. 17 of the Act was issued later fixing 1-4-1911 as the date from which enfranchisement would take effect. The result of postponing the notification was to continue the tenure of the inam as before with the incident of inalienability until the notification was issued. In between these dates, 1906 and 1911, on 23-1-1909 the lands were mortgaged, and the mortgagor stated expressly that the land was "enfranchised mirasi inam land belonging to them". We examined the printed papers in the case to find out whether the mortgage was on record, but unfortunately it was not. We have therefore to take the contents of the deed from the extracts in the judgment of the learned Judges. Abdur Rahim J. at p. 123 expressly stated that "the lands were described in the deeds" as "the enfranchised mirasi and inam lands belonging to us". And the title deed issued did not mention anything about the enfranchisement of the inam or that the lands were dis-annexed from the condition of service, but they continued to be subject to the service until the notification was issued. Had the transferee looked into the title deed to satisfy himself whether it was enfranchised inam which was alienable or not, he would have noticed that as the necessary notification was not issued by that date, it could not be alienated, there was no erroneous representation on the part of the transferor that the property was such that he was authorised absolutely to transfer it. Sir John Wallis C. J. after stating the contents of the inam title deed, observed at page 125 that

> "It said nothing about the enfranchisement of the inam or the lands from the condition of service and they remained liable as before, and continued to form the emoluments of the village office until the issue of the notification which was after the date of the alienation now in question."

It was treated therefore as a decision falling within the principle of '30 Mad 255(1)' and '24 Mad LJ 462 (R)'. The decision in '18 Mad LJ 247(Q)', was dismissed with the remark that the learned Judges, White C. J. and Miller J. did not cite any authority in support of the view, and the original illegality of the transfer was not referred to. Apart from the correctness of this criticism, the case which came up for decision before the Full Bench was one in which there was no sort of erroneous representation by the alienor. The decision therefore in 'AIR 1918 Mad 123 (F. B.) (O)', does not at all support the inference that even in cases where in respect of what was in fact a transfer of an expectancy an erroneous representation is made by the transferor and the transferee believed in that representation and paid consideration, S. 43 could not be invoked by the transferee to claim the benefit of the subsequent title acquired by the transferor. The reliance by the learned Judges who decided 'AIR 1933 Mad 795 (C)', on this decision in support of their view was not justified.

(19) In our view, therefore, the decision in 'AIR 1915 Mad 972 (A)', lays down the law correctly and applies to the facts of the present case. The decision in 'AIR 1933 Mad 795 (C)', was wrongly decided and must be overruled.

(20) The result is, the view taken by the lower Court is correct, and the decision must be affirmed. The appeal is dismissed with costs.

(21) SUBBA RAO J.: I agree. My only justification for a separate judgment is the importance of the question raised in the appeal.

(22) The facts are fully and accurately stated in the judgment of my learned brother and it is not necessary to restate them. The question is whether a person with only a chance of succession or expectancy to a property, representing that he is the owner, transfers it to another and succeeds to the same, is precluded from questioning the validity of the transfer on the principle that the subsequent acquisition feeds the estoppel. The relevant provisions of the Transfer of Property Act affording a solution to the question raised may now be read.

S. 6: Property of any kind may be transferred except as otherwise provided by this Act or by any other law for the time being in force. (a) The chance of an heir apparent succeeding to an estate, the chance of a

relation obtaining a legacy on the death of a kinsman or any other mere possibility of a like nature, cannot be transferred.

S. 43 : Where a person fraudulently or erroneously represents that he is authorised to transfer certain immoveable property and professes to transfer such property for consideration, such transfer shall, at the option of the transferee, operate on any interest which the transferor may acquire in such property at any time during which the contract of transfer subsists.

Nothing in this section shall impair the right of transferees in good faith for consideration without notice of the existence of the said option.

Illustration : A, a Hindu, who has separated from his father B, sells to C three fields, X, Y and Z, representing that A is authorised to transfer the same. Of these fields Z does not belong to A, it having been retained by B on the partition; but, on B's dying A as heir obtains Z, C not having rescinded the contract of sale, may require A to deliver Z to him.

(23) The argument of the learned counsel for the appellant, Mr. Krishna Rao may be briefly stated thus : Under S. 6, Transfer of Property Act, 'spes successionis' cannot be transferred and that provision is based upon principles of public policy. Section 43 obviously based upon the principle of estoppel cannot be so construed as to defeat the statutory provisions embodied in S. 6(a) conceived in public interests, for, if so construed, it would offend the principle that there cannot be an estoppel against statute. Alternatively, he would exculde the operation of the provisions of S. 43 in regard to a case where the transferor with knowledge that he is possessed of only a 'spes successionis' professes to transfer the same as if he had an interest 'in praesenti' in it.

(24) At the outset, unhampered by judicial decisions, I shall attempt to consider the scope of the statutory provisions in accordance with the plain meaning of the words used therein. Section 43 is modelled on English law. The English common law doctrine of estoppel by deed was extended by equity to estoppel by representation. The rule in India is the rule extended by equity. The section is conceived in the interests of a 'bona fide' transferee. It assumes that the transferor had no title over at least a portion of the property he had engaged to transfer. It also presupposes that the transferor had a capacity to transfer the property. The foundation of the doctrine embodied in S. 43 is the representation made by a transferor either fraudulently or erroneously. Under the section, he is bound to make good the representation made by him. If he subsequently acquires good title to the property conveyed by him the said interest would feed the estoppel. The section saves only a transferee in good faith for consideration. In other respects, the wording of the section is imperative and it is not permissible to engraft any other exception to the statutory provision. If the Legislature intended to exclude properties, whose transfer is prohibited either by statute or by public policy, it would have added to the section a proviso or an exception to that effect. Far from enacting any such exception, it added an illustration, which directly covers the instant case. Under the illustration, though A transfers the property at a time when his father is alive and therefore has only an expectancy in the same, the transferee is entitled to require A to deliver the property to him when he succeeds to the property.

It is well settled rule of construction that "illustrations appended to sections of a statute should ordinarily be accepted & should only be rejected as repugnant to the sections as the last resort of construction."

(See Maxwell on Interpretation of Statutes, Edn. 9, p. 46). In '(1916) 2 A. C. 575(F)', the Judicial Committee had laid down the rule of construction in clear terms. Lord Shaw of Dumfermline delivering the judgment of their Lordships observed at p. 581 :

"It is the duty of a Court of law to accept, if that can be done, the illustrations given as being both of relevance and value in the construction of the text . . . . . And it would require a very special case to warrant their rejection on the ground of their assumed repugnancy to the sections themselves. It would be the very last resort of construction to make any such assumption. The great usefulness of the illustrations, which have, although not part of the sections, been expressly furnished by the Legislature as helpful in the working and application of the statute, should not be thus impaired."

In this case, as I have already pointed out, the illustration is in full accord with the scope of the section. It brings out the meaning and dispels any lurking doubt on the true construction of the section. It is, therefore, clear that the mere fact, that the subject-matter of the transfer is untransferable by reason of some statutory restriction or principle of public policy, cannot take the case out of the operation of the section. The want of title or a prohibition against transfer in a property affects the title purported to be conveyed. In either case, the transferee does not acquire title but that fact does not affect the competency of the transferor. To illustrate, a lunatic or a minor cannot transfer property. But in the case of 'spes successionis' or in the case of property in regard to which the transferor has no title, his transfer may not convey title but it cannot be said that he has no capacity to convey property. In one case, the representation is made by a person possessing a legal competency to convey an interest in property and, therefore, he will be bound to make good his representation. In the other case, his representation itself cannot bind him as he has no legal competency to transfer property. As representation is the basis of the section, the person, who is legally competent to make the representation, will be bound to make good his representation. If this distinction between legal competency to transfer a property and a statutory prohibition against transfer of a particular property is borne in mind, there will be no difficulty in reconciling the provisions of S. 43 with that of S. 6(a), Transfer of Property Act.

(25) It will be convenient at this stage to notice the cases cited at the Bar.

(26) Strong reliance is placed on the judgment of the Full Bench in —'AIR 1918 Mad 123 (F.B.) (O)', and it is contended that the said decision finally and authoritatively decided that there is no scope of the application of S.

43, Transfer of Property Act when the transfer is prohibited by law. A casual glance at the judgment seems to support the said contention but a deeper scrutiny of the facts discloses its irrelevance. There the mortgagor had by a deed dated 23-1-1909 mortgaged what he described as an enfranchised inam belonging to him. It appears that the authorities had decided to enfranchise the inam on 18-8-1906 but the formal notification spoken of in S. 17 of Madras Act 2 of 1894, fixed 1-4-1911 as the date from which the enfranchisement would take effect. The Full Bench held that the alienation being a prohibited and illegal one, on the date on which it was made, the subsequent removal of the prohibition by the notification of enfranchisement of the service inam land did not render the alienation valid and that S. 43, Transfer of Property Act could not be applied to make a transfer valid which on the date on which it was made was prohibited by a statute. The decision did not turn upon any principle of representation, either fraudulent or innocent. It proceeded on the basis that, on the date of the transfer of the service inam in regard to which though enfranchisement proceedings were started but not completed, S. 43, Transfer of Property Act could not apply as the transfer was one forbidden by law on the ground of public policy.

— '30 Mad 255 (I)', is also a decision where an expectancy was transferred. The facts were the owner of an impartible and inalienable zamindari who had only a life estate mortgaged the same to another in 1892 without possession. The four male members of the family who were in the line of heirs joined the owner of the estate in executing the mortgage. In the suit filed to enforce the mortgage, a consent decree was passed making the mortgagors liable for the amount. It was agreed that the amount decreed should be recovered from the owner for the time being and from other defendants when they succeeded to the estate. The impartible estate-holder died in 1904 and one of the mortgagors succeeded to the estate in 1905. When the decree was sought to be executed against the heir, the learned Judges held that the mortgage was a transfer of a bare expectancy and was a nullity under S. 6(a), Transfer of Property Act. When it was contended that S. 43, Transfer of Property Act would save the document, the learned Judges made following observations at p. 262:

> "We are unable to accept this contention. If the framers of the Indian Statute had intended, that transfers forbidden by S. 6(a) should take effect against the transferors whenever they succeeded to the estate they would have inserted a provision to this effect as they have in S. 43 in the case of persons erroneously representing that they are authorised to transfer immoveable property. It has not been contended that defendant 2 comes within the provisions of that section, and we see no ground on which a similar rule can be applied to cases under S. 6(a). 'Equitas sequitur legem' and we do not think that we are at liberty to limit the operation of the express provisions of S. 6(a) in the manner suggested."

This case is, therefore, only an illustration to the proposition that transfer of 'spes successionis' is invalid and is, therefore, not saved by S. 43, Transfer of Property Act. It has no application to a case where a person sells the property representing that he is the owner of the same.

The decision in — 'AIR 1915 Mad 972 (A)', brings out in bold relief the distinction between a transfer of an expectancy simpliciter and a transfer wherein a representation is made that the transferor is the owner of the property. A person mortgaged a property belonging to his father erroneously representing that he was entitled to the property 'in praesenti' and on his father's death he became entitled to the property as heir. In that case the learned Judges applied the provisions of S. 43, Transfer of Property Act and held that the mortgagee could enforce his mortgage against the property mortgaged. When a similar contention now argued before us was raised before them Tyabji J. repelled the contention in the following words:

> "This argument, however, neglects the distinction between purporting to transfer 'the chance of an heir-apparent' and erroneously representing that he (the transferor) is authorised to transfer certain immoveable property. It is the latter course that was followed in the present case. It was represented to the transferee that the transferor was 'in praesenti' entitled to and thus authorised to transfer the property. In — '30 Mad 255 (I)', what the transferors purported to transfer, were mere possibilities of succession within the prohibition in S. 6(a), Transfer of Property Act."

In — 'AIR 1933 Mad 856 (B)', the property was originally in the possession of the mother of the last maleholder and her daughter. They sold the property to defendant 6's father. Thus then reversioners, the plaintiff and his father filed a suit to set aside the alienation. Pending the suit the disputes were settled and one half of the property was restored to the reversioners and the other half was retained by the purchaser. The father of the plaintiff for himself and representing his sons including the plaintiff executed sale deeds conveying the property to defendant 6's father. When the succession opened the plaintiff filed a suit for setting aside the sale deeds. The learned Judge nonsuited the plaintiff relying upon the provisions of S. 43, Transfer of Property Act. The learned Judge stated at p. 857:

> "Under S. 43, Transfer of Property Act the plaintiff's father having sold the property by Ex. II-A as if it belonged to him and to the plaintiff, at a time when they had admittedly no title thereto, the plaintiff cannot now be heard to set up that fact after acquiring the title as reversioner in 1921."

In this state of law the question fell to be considered by a Bench consisting of Sir Horace Owen Compton Beasley C. J. and Bardswell J. in — 'AIR 1933 Mad 795 (C)'. There, the suit properties originally belonged to G. S. Venkatakrishnama Chetti who had three daughters. These daughters succeeded to his estate on his death and the last of them died in October 1926; on her death Venkatakrishnama Chetti the son of another of the three sisters, succeeded to the estate. The suit mortgages were executed by this Venkatakrishnama Chetti when he had only a 'spes successionis'. After the death of the last survivor of the three sisters, he sold the properties to Ananda Mohan Chetti who in turn mortgaged the same to the plaintiff. The

plaintiff filed the suit for a declaration that the two mortgages executed by Venkatakrishnama Chetti before succession opened were inoperative in law. The learned Judges accepted the contention. When the decision of — 'AIR 1915 Mad 972 (A)', was cited and the distinction drawn by the learned Judge between "purporting to transfer the chance of an heir-apparent" and "erroneously representing that he is authorised to transfer certain immoveable property" was brought to their notice they refused to follow the reasoning and rejected the distinction made on the ground that if such a distinction were accepted

> "the effect would be that by a clever description of the property dealt with in a deed of transfer one would be allowed to conceal the real nature of the transaction and evade a clear statutory prohibition."

When the illustration to S. 43, Transfer of Property Act was pressed upon them they held that the illustration was repugnant to the provisions of S. 6(a) of the same Act. They founded their conclusion on the Full Bench decision in — 'AIR 1918 Mad 123 (F. B.) (O)', and that of the Judicial Committe in — 'AIR 1923 P. C. 189 (H)'. They expressed their view in the following terms: "What has to be looked to is the substance of the transaction and not merely the form or colour of it."

This decision certainly supports the contention of the appellant. Learned counsel for the appellant contended that this decision lays down the principle that if a transferor knowing that he has only a right of expectancy transfers the property with a false recital the transfer would be invalid as the transferor has sold the same in contravention of the express prohibition in S. 6 (a), Transfer of Property Act. To put it differently, his argument was that the prohibition under S. 6(a) is against a person with only a right of expectancy, from transferring the same and if he transfers it any camouflage or cloak adopted by him would not validate a transaction which is otherwise invalid.

(27) I have gone through this judgment very carefully and I regret my inability to accept any of the reasons on which the judgment of the learned Judges was founded. Neither the decision in — 'AIR 1918 Mad 123 (FB) (O)', nor that of the Judicial Committee in — 'AIR 1923 P. C. 189 (H)', lays down the principle adumbrated by the learned Judges. The Full Bench considered the question of the applicability of S. 43, Transfer of Property Act to a transfer of a service inam inalienable in law on grounds of public policy. The Privy Council held in — 'AIR 1923 P. C. 189 (H)', that an agreement to sell an expectancy is void for they pointed out that S. 6(a), Transfer of Property Act, 1882, which forbids the transfer of expectancies woud be futile if a contract of the above character was enforceable. The question of the applicability of S. 43 in cases where representation was made fraudulently or erroneously did not arise for consideration in those decisions. Nor can I agree with the learned Judges that the distinction pointed out by Tyabji J. in — 'AIR 1915 Mad 972 (A)', is without foundation. Indeed in my view the said distinction is the only correct basis for reconciling the provisions of S. 6(a) with that of S. 43, Transfer of Property Act. I cannot also agree with the following observations at p. 796 in — 'AIR 1933 Mad 795 (C)', "Reason has, however, already been given for holding that such a distinction cannot be drawn, at any rate when the erroneous description is deliberately made with the knowledge of its falsity." To quote again

> "If such a distinction were allowed the effect would be that by a clever description of the property dealt with in a deed of transfer one would be allowed to conceal the real nature of the transaction and evade a clear statutory prohibition."

Section 43 was primarily enacted in the interests of a bona fide transferee and his interests cannot obviously be protected if the act of the transferor is the guiding factor. Indeed the section protects a bona fide transferee from a clever description of the property by an unscrupulous transferor. At the same time a collusive transferee would not derive any protection under this section for there can be no estoppel when the truth is known to the transferee.

I also find it very difficult to agree with the learned Judges when they rejected the clear illustration on the ground that it was repugnant to the provisions of S. 6(a), Transfer of Property Act. Repugnance in my view arises not because of statutory provisions but because of the wrong interpretation put upon them. When the illustration can be reconciled with the provisions of Ss. 43 and 6, Transfer of Property Act without doing violence to either it is not permissible to reject the illustration. I have, therefore, no hesitation in holding that the aforesaid decision is not only wrong on principle but also contrary to the express provisions of S. 43 of the Act. Wadsworth J. in — '1937 Mad W N 416 (E)' distinguished the case in — 'AIR 1933 Mad 795 (C)', on the ground that it "was a case in which the transfer, although framed as a transfer of an existing title, was in fact to the knowledge of the parties a transfer of 'spes successionis' such as is prohibited under S. 6 (a), Transfer of Property Act." The aforesaid statement of facts of that judgment and the reasoning of the learned Judge do not support the observation of the learned Judge. The facts do not disclose that the transferee had knowledge of the fact that what was sold was only 'spes successionis'. The decision in — '1937 Mad W N 416 (E)', accords with the view I have expressed. In that case one Ramanna executed a mortgage to the defendant 1's husband and then left the village. His whereabouts were not known for over ten years. It was presumed that he died. His heirs sold the property to the plaintiff. The plaintiff filed the suit for possession. The learned Judge applied the provisions of S. 43, Transfer of Property Act. In 'AIR 1935 All 244(K)', Sulaiman C. J. states the law at p. 246 as follows :

> "S. 6 does not prohibit emphatically the transfer of a chance of an heir; nor does it make it absolutely illegal so as to vitiate the entire contract. It merely lays down that property of any kind may be transferred but the chance of an heir cannot be transferred. This is no more than saying that the transfer of a mere chance of an heir is void in law and is of no effect. S. 6(a) would therefore apply to cases where professedly there is a transfer of a mere 'spes successionis' the parties knowing that the transferor has no more right than that of a mere ex-

pectant heir. The result, of course, would be the same where the parties knowing the full facts fraudulently clothe the transaction in the garb of an out and out sale of the property and there is no erroneous representation made by the transferor to the transferee as to his ownership. But where an erroneous representation is made by the transferor to the transferee that he is the full owner of the property transferred and is authorised to transfer it and the property transferred is not a mere chance of succession but immoveable property itself and the transferee acts upon such erroneous representation, then if the transferor happens later before the contract of transfer comes to an end to acquire an interest in that property no matter whether by private purchase, gift, legacy or by inheritance or otherwise, the previous transfer can at the option of the transferee operate on the interest which has been subsequently acquired although it did not exist at the time of the transfer."

(28) The learned Judges also pointed out in that case that the illustration is not repugnant to the provisions of S. 6, Transfer of Property Act. It is not necessary to consider it in detail the decisions of the other High Courts. It would be enough to state that the decision in 'AIR 1935 All 244(K)', was followed by Bombay High Court in 'AIR 1938 Bom 228(L)' and by the Patna High Court in 'AIR 1939 Pat 116(M)'. The same view was expressed by the Nagpur High Court in 'AIR 1931 Nag 51(N)'. I would therefore hold that 'AIR 1933 Mad 795(C)', has been wrongly decided.

(29) I agree with my learned brother that the appeal is liable to be dismissed with costs.

(30) RAMASWAMI J. : I agree.

A/R.G.D. Appeal dismissed.

A.I.R. 1953 MADRAS 647 (Vol. 40, C.N. 251)

SATYANARAYANA RAO J.

The Masulipatnam Municipal Council, represented by the Executive Authority and Commissioner, Appellant v. Movvachandrika Mahalakshmamma, Respondent.

Second Appeal No. 52 of 1951, D/- 16-9-1952.

(a) Municipalities — Madras District Municipalities Act (5 of 1920), Ss. 4 (1), 78 (3) and 80 — Levy of property tax in Frenchpet of Masulipatam — (Madras (Enlargement of Area and Alteration of Boundaries) Order (1948), Para 4).

Paragraph 4 (1) of the Order of 1948 clearly provides that the area known as Frenchpet is deemed to have always formed part of the town of Masulipatam, also known as Bandar. Further by Para 4 (2) of the Order, the enactments, notifications, orders, schemes, rules, forms and bye-laws issued, made or prescribed under such enactments for the time being in force in the town of Masulipatam which extend to and are in force in the added area are deemed always, to have extended to and to have been in force in the area included in the town by the preceding paragraph. This implies that the enactment, namely, the District Municipalities Act, must be deemed to have been in force all along in the Frenchpet. Thus the notifications constituting the Bandar town a municipality would also apply to this area and the municipality is entitled to levy property tax under the provisions of the District Municipalities Act. (Para 5)

(b) Madras (Enlargement of Area and Alteration of Boundaries) Order (1948), Para. 1 — Validity of the Order — (Government of India Act (1935), Ss. 290, 5).

In enacting the Order of 1948, it is not a legislative power which was exercised by the Governor-General under S. 290. The law is already there; it had to be applied to a particular area which has been added to a province. This right of providing for the law applicable by a notification is not unknown to constitutional law. It is considered merely as a power to extend the existing laws by an executive order to the newly added areas.

The Governor-General, therefore, was competent to issue the Order of 1948 under S. 290 of the Act, so as to bring into force in the Frenchpet the enactments, notifications, orders, rules and by-laws which had been in force till then in what was known as Bandar town alias Masulipatam. (Para 6)

(c) Municipalities — Madras District Municipalities Act (5 of 1920), S. 4(1) — Application to Frenchpet in Masulipatam — (Madras (Enlargement of Area and Alteration of Boundaries) Order (1948), Para. 4).

Issuing of a fresh notification under S. 4 for including the area known as Frenchpet in the Municipal area of Masulipatam town is wholly unnecessary in view of the clear language of the Order of 1948 which it was within the competence of the Governor-General to issue under S. 290, Government of India Act. (Para 6)

P. Satyanarayana Raju and V. V. Raghavan, for Appellant; J. Krishnamurthy, for Respondent.

CASE CITED:

(A) ('35) 1935 Mad WN 1034: 1935 Mad Cr. C 424

JUDGMENT: The Masulipatam Municipal Council by its Commissioner and Executive Authority, who was the defendant in the action, is the appellant in this second appeal. The suit was filed by the respondent for a declaration that the defendant was not entitled to levy any taxes on the schedule property and that the defendant should be restrained by a permanent injunction from recovering from her the sum of Rs. 78-2-2 and from levying further taxes on the schedule property. The tax that has been levied by the Municipality. is property tax and the property is situated in what was previously known as Frenchpet or French Loge in Masulipatam town. In the plaint it was admitted that the sovereignty of British India was transferred to the Dominion of India under the Indian Independence Act, 1947, and that the Dominion had acquired by transfer the said Loge which was subsequently included in Bandar Town in the Province of Madras, but it was claimed that the said Loge was never included in the municipality of Masulipatam and that the procedure laid down for inclusion under S. 4, District Municipalities Act, was not complied with. It was also alleged that there were no proper, legal and

valid notifications and resolutions under Ss. 78 (3) and 80, District Municipalities Act, and that therefore the defendant was not entitled to levy the tax. The defendant stated in the written statement that the French Loge was part and parcel of the Masulipatam town and it was so declared very early by Sir Samuel Hoare, the then Secretary of State for India, and that it was always within the Municipal limits of Masulipatam and constituted part of the Municipality under the District Municipalities Act, that there was no necessity for any notice under S. 4, District Municipalities Act, particularly in view of the order, — The Madras (Enlargement of Area and Alteration of Boundaries) Order, 1948 published in G. O. No. 899, Public (Political) Department, dated 14-4-1948 — by which the doubts, if any, which existed by that date were removed and it was declared that the French Loge at Masulipatam was included in the territories of the Dominion of India and shall be deemed always to have been included in the said territory. That notification further declared that the Loge at Masulipatam should form part of Bandar town in Kistna district and that the area should be administered accordingly. It was also further declared that all the enactments for the time being in force in the said town and all notifications, orders, schemes, rules, forms and by-laws issued thereunder, shall extend to or be in force in the said territory and shall always be deemed to have extended to and to have been in force in the area included in the town. It was also averred that there was no necessity to issue a fresh resolution or notification under S. 78 (3) or 80, District Municipalities Act, and the levy of the property tax by the Municipality was therefore valid and justified. The contention of the Municipality was upheld by the District Munsif and the suit was dismissed by him. On appeal this decision was reversed by the learned Subordinate Judge and hence this second appeal.

(2) It is no doubt true that for a long time French Loge or Frenchpet was under the French Government and the Municipality of Bandar or Masulipatam never exercised any rights over that area. In 1935, for the first time doubts arose whether the British Indian Court at Masulipatam had jurisdiction to try an offence which occurred in Frenchpet. Under S. 438, Criminal P. C., the Sessions Judge of Kistna referred the matter to the High Court. During the hearing of the reference the Advocate-General on behalf of the Crown obtained an adjournment of the case to obtain a declaration from the Secretary of State for India regarding the status of the territory in question. Under S. 57 (10), Evidence Act, the Court could take judicial notice whether a place is part of British territory or not and a declaration by the Political Department of the Government of India was treated as final. The Advocate-General obtained from the Foreign and Political Department of the Government of India, G. D. F. 24 x/35 dated 5-3-1935 and it was communicated to the High Court. It ran as follows:

"The Advocate-General is informed that the Secretary of State for India has since intimated that His Majesty's Government regard the Loge at Masulipatam as part of the territories in the dominion of the British Crown. He is requested to inform the High Court accordingly. Should the High Court require a copy of the official letter from the India office to be produced, Government will have no objection to furnish it. The Advocate-General is requested to ask for it at once if he finds it necessary."

When this was brought to the notice of this Court, the learned Judges accepted the communication as final and treated the area known as the Loge at Masulipatam as part of the territories under the Dominion of the British Crown. Vide — 'Emperor v. Appayya', 1935 Mad Cr. C 424 (A).

(3) One would have thought therefore that the question whether this Loge was or was not part of British territory became final by the communication of the Political Department which was accepted by this High Court in 1935, but for the fact that the learned Subordinate Judge in the present case thought that this is of no consequence as it may be a mere paper declaration without effect being given to it. After the declaration of independence in 1947, the provisions of the Government of India Act were amended so as to make them applicable to the altered circumstance that India became a dominion. Under S. 290, Government of India Act, as amended, to clear all doubts the Government of India issued a notification which is styled the Madras (Enlargement of Area and Alteration of Boundaries) Order, 1948. It reads:

"Whereas by S. 290, Government of India Act, 1935, as adapted by the Indian (Provisional Constitution) Order, 1947, it is provided that the Governor General may by order increase the area, and alter the boundaries, of any province and may make such provisions as the Governor-General may deem necessary or proper for any supplementary, incidental or consequential matters;

And whereas in accordance with the provisions of the said section, the Governor-General has ascertained the views of the Government of the Province of Madras, both with respect to the proposal to make the order and with respect to the provisions to be inserted therein;

Now, therefore, in exercise of the powers conferred on him by the said section and of all other powers enabling him in that behalf, the Governor-General is pleased to make that following order:

1. This order may be cited as the Madras (Enlargement of Area and Alteration of Boundaries) Order, 1948.

2. The areas specified in the schedule to this order, which were known as the French Loges at Masulipatam and Calicut, are hereby declared to be included in the territories of the Dominion of India and shall be deemed always to have been included in the said territories.

3. The said areas shall form part of the Province of Madras and shall be deemed always to have formed part of the said Province and the boundaries of the said Province shall be deemed always to have been so altered as to comprise within them the said areas.

4. (i) The area comprised in the loge at Masulipatam shall form part of Bandar town in Kistna district and the area comprised in the loge at Calicut shall form part of Calicut town in Malabar district and the said areas shall be administered accordingly.

(ii) All enactments for the time being in force in any of the said towns and all noti-

fications, orders, schemes, rules, forms and by-laws issued, made or prescribed under such enactments and for the time being in force in any of the said towns shall extend to and be in force in and shall always be deemed to have extended to and to have been in force in the area included in that town by the preceding paragraph."

To this order is appended a schedule giving the boundaries of the loge at Masulipatam and also of the loge at Calicut. It is clear therefore that whatever doubt there might have been was resolved by this order of the Government of India which declared that the French Loge at Masulipatam was included in the territories of the Dominion of India and should be deemed always to have been included in the said territories. It was treated as forming part of the Province of Madras and also deemed to have always formed part of the said Province. It further provided that this loge at Masulipatam should form part of the Bandar town and it should be administered accordingly and sub-s. (2) of S. 4 declared that the enactments, notifications, orders, etc. which were in force at that time in Bandar town should extend to & be in force and shall always be deemed to have been extended to and been in force in the area included in the town by the preceding paragraph, so that for all practical purposes the area of 66.48 acres formed part and parcel of what is known as Bandar town which is only an 'alias' for Masulipatam, and so subject to the laws which were applicable to that town and it was directed that it should be administered in accordance with those laws.

(4) The question now raised is that this notification could not have the effect of making this area part of the Municipality of Masulipatam even if it formed part of the town of Bandar for other purposes and that in any event, without a further notification under S. 4, District Municipalities Act, the tax could not be levied by the Municipality. My attention was drawn by the learned Advocate-General to the notifications constituting the town of Masulipatam a municipality under the District Municipalities Act, 1884. The Act of 1884 was the earliest of the District Municipalities Acts which was enacted for introducing municipal administration in this province. Section 4 of that Act empowered the Governor-in-Council by notification to declare any town, village, hamlet, suburb, bazar, station or other local area or any part of the same to be a municipality. Vide sub-s. (10) of S. 4. He could also cancel by a declaration a municipality and dissolve it, vide sub-s. (2) of S. 4. A "Municipality" is defined by that Act as meaning "any town, village, hamlet, suburb, bazar, station or other local area or any part of the same which may be declared to be a municipality in the manner hereinafter provided" so that it was open under that Act to constitute any local area into a municipality, and no other requirement is laid down by that section except a notification under S. 4 (1) by the Governor-in-Council. On 19-3-1885, Notification No. 597 was issued by the Governor-in-Council by virtue of the power vested in him under sub-s. (1) of S. 4, Madras District Municipalities Act, 1884, and it states:

"The Governor-in-Council is pleased to declare all the marginally noted local areas, which have hitherto been towns for the purposes of the Madras Towns Improvement Act, 1871, to be municipalities for the purposes of the said Madras District Municipalities Act, 1884 and to direct that the said Act shall come into force in the said Municipalities on 1-4-1885."

Among the marginally noted towns Masulipatam is one. Under the Towns Improvement Act, 1871, referred to in that notification, a notification was issued on 25-4-1871 by the Governor-in-Council extending the provisions of that Act to the town of Masulipatam. Under an earlier Town Improvement Act of 1865 (Act 10 of 1865) Masulipatam, commonly called and known as the town of Bandar, in the District of Kistna and the areas specified in the notification under the Act were united for the purposes of the Act under the name of the town of Masulipatam.

(5) The question is whether this area is part of the Municipality of Bandar town or Masulipatam and whether a further notification under S. 4, District Municipalities Act, 1920 is necessary before the property tax is levied under the provisions of the District Municipalities Act, 1920 as contended on behalf of the respondent. On a plain reading of the provisions of the Order of 1948, there can be no doubt that this area was deemed to have always formed part of the town of Masulipatam, also known as Bandar. That is what in terms sub-s. (1) of S. 4 states. If Masulipatam on that date was already a municipality governed by the provisions of the District Municipalities Act and if an area is added to it, it naturally follows that it forms part of the Municipality. Section 4(1) directs also that it should be administered as part of the Bandar town and what is more, sub-s. (2) of S. 4 not only provides that enactments, notifications, orders, schemes, rules, forms and by-laws issued, made or prescribed under such enactments for the time being in force in the town of Masulipatam should extend to and be in force in the added area, but should be deemed always, to have extended to and to have been in force in the area included in the town by the preceding paragraph. This implies that the enactment, namely, the District Municipalities Act, must be deemed to have been in force all along, in other words, it retrospectively makes the Act applicable. Not only the Act but also notifications issued under the enactments which were applicable to Bandar town would also apply and also must be deemed to have always applied and extended to the new area. By the force of this order the District Municipalities Act applies to the area added to the Bandar town and all the notifications issue i.e., notifications constituting the Bandar town a municipality would also apply to this area and the municipality would be entitled to levy property tax under the provisions of the District Municipalities Act.

(6) It is however argued on behalf of the respondent that it is not known when exactly this territory was made over to the British Government and unless that is known it is not possible to assume that it formed part of the Municipality. The exact date when this area became part of British territory in my opinion is irrelevant for on either hypothesis the area formed part of the Municipality. If before the District Municipalities Act, 1920, came into force, the area was part of the Bandar town, as British territory the procedure laid down by S. 4, District Municipalities Act, cannot obviously be applied because the provisions of that section are prospective in their operation and not retrospective. If, however, the taking over possession by the British Government of this area from the French Government was subsequent to the Act of 1920, then the provisions

of S. 4 would not apply to an area which was not till then British territory. It applies only to areas which are subject to the jurisdiction of Provincial Legislature, and in respect of which the Provincial Legislature could have enacted a law. When the possession was taken over, the British Government could make provision for its administration also and extend the operation of the laws which till then applied to what was then Bandar town to the newly added area. It was however urged that after India became a dominion after the Independence Act of 1947, the dominion had no power to acquire or add any fresh territory to it. This argument, in my opinion, overlooks the provisions of S. 5(d), Government of India Act, 1935. S. 5 reads:

"The Dominion of India established by the Indian Independence Act, 1947, shall, as from the 15th August 1947, be a Union comprising
(a) the provinces, hereinafter called the Governor's provinces;
(b) the Provinces hereinafter called Chief Commissioners' provinces;
(c) the Indian States acceding to the Dominion in the manner hereinafter provided; and
(d) any other areas that may with the consent of the Dominion be included in the Dominion."

The inclusion in the dominion of an area implies that it was originally not part of the dominion. There could be no question of inclusion of an area if it was already part of the dominion. This clause therefore empowers the dominion to add other areas whatever may be the mode by which the areas were acquired, i.e., whether it was acquired under international law, by cession, accretion, conquest or subjugation. Whatever may be the mode, if the area was acquired, the dominion with its consent could add that area to the already existing area constituting the Dominion of India. Learned counsel for the respondent when he advanced this extraordinary proposition overlooked the provisions of S. 5, Government of India Act, 1935. In my opinion the argument which is in the teeth of the clear provisions of the Constitution cannot be accepted. Under the Act when India became a dominion, the power and duty to alter the boundaries of a province, to create a new province, to increase the area of a province and to diminish its area is conferred upon the Governor-General by S. 290 of the Act. Before independence this power vested in His Majesty. That power was conferred on the Governor-General when India was a dominion. The Governor-General under this provision was authorised to make alterations in the area of a province subject to the proviso that in making the order the Governor-General should ascertain the view of the Government of such province which will be affected by the Order, both with respect to the proposal to make the order and with respect to the provisions to be inserted therein. When once the area is taken over and added to a province, it naturally follows that an arrangement should be made for its proper administration. An area so acquired cannot be left in the air without providing the law applicable and the machinery which should administer the law to that area which was included in a province and for this purpose sub-s. (2) authorised 'inter alia' by Cl. (e) that the Governor-General should make provisions for other supplemental, incidental and consequential matters. In other words, all the necessary machinery for the administration of the area by the province & the law that should be applied to it should be provided by the Governor-General while adding an area to a province. It is that that has been provided by the order of 1948. It was not a legislative power which was exercised by the Governor-General under S. 290 as was wrongly assumed by the learned Subordinate Judge. The law is already there; it had to be applied to a particular area which has been added to a province. This right of providing for the law applicable by a notification is not unknown to constitutional law of civilised countries. There are a number of decisions in which this power has been recognised and it is considered merely as a power to extend the existing laws by an executive order to the areas which have been newly added to a province. The Governor-General, therefore, was competent to issue the order under S. 290 of the Act, so as to bring into force the enactments, notifications, orders, rules and by-laws which have been in force till then in what was known as Bandar town alias Masulipatam. The requirement therefore that has been insisted on behalf of the respondent that there should be a fresh notification under S. 4 is, in my opinion, wholly unnecessary in view of the clear language of the order of 1948 which it was within the competence of the Governor-General to issue under S. 290, Government of India Act.

(7) There remains the objection to the tax itself on the ground that there were no fresh resolutions and fresh notifications under S. 78 (3) and S. 80, District Municipalities Act. This argument again, in my opinion, proceeds on a wrong assumption. It is not disputed that the property tax was properly levied in what was known as Masulipatam municipality before the inclusion of the area. Resolutions and notifications were regularly made and nobody ever disputed that the levy of property tax in the municipality was not warranted because the requirements of the two sections were not complied with. If the property tax was therefore properly levied by the Municipality and if this area was included within the municipal limits, it automatically follows that all the laws which were applicable under the District Municipalities Act to Masulipatam will equally apply to the area which has been added to the municipality. No fresh notifications or fresh resolutions are required and the tax in my opinion was properly levied by the Municipality.

(8) From the foregoing it follows that the decision of the learned Subordinate Judge which proceeds on an erroneous view cannot be supported and must be set aside and that of the District Munsif restored with costs here and in the Courts below. No leave.

A/D.R.R. Appeal allowed.

A.I.R. 1953 MADRAS 650 (Vol. 40, C.N. 252)

SATYANARAYANA RAO
AND RAGHAVA RAO JJ.

J. H. Irani and others, Appellants v. T. S. Pl. P. Chidambaran Chettiar and others, Respondents.

O. S. A. No. 37 of 1948, D/- 27-7-1951.

(a) Houses and Rents — Madras Buildings (Lease and Rent Control) Act (15 of 1946), S. 7 — Jurisdiction of Civil Court to entertain suit for eviction is not taken away though it cannot execute the decree. AIR 1949 Mad 765, Followed. (Para 6)

(b) Houses and Rents — Madras Buildings (Lease and Rent Control) Act (15 of 1946), S. 2(1)—"Building", what is—Site with superstructure — Lease held lease of building.

Building may consist of mud walls; but, it must be covered in by a roof. A mere superstructure dissociated from the site on which it stands cannot in law be considered to be a building.

The word 'building' in ordinary parlance "comprises not only the fabric of the building, but the land upon which it stands".

Where object of the lease was to run the cinema business in the buildings then in existence together with the other buildings used as booking office, office rooms, garages, latrines and so on, it is impossible to escape the conclusion that what was let was a "building". Case law Ref.

(Paras 14, 28, 36)

Held also that if the entire ground was occupied for the purpose of continuing the superstructure along with the building belonging to the lessor and the whole of it was treated as one unit, the site might be treated as appurtenance in the secondary sense of the word, meaning "usually occupied" (Meaning of the word "appurtenance" considered). (Paras 15, 25)

Per Raghava Rao J.: The word "appurtenance" occurring in the definition of "building" in the Act is used in the broad, secondary & non-technical sense of "relating to" "usually enjoyed or occupied with" and "adjoining". The idea of the legislature seems to be that if grounds appurtenant to the building in this sense are let along with the building they should stand attracted to the operation of the Act.

(Para 26)

(c) Interpretation of Statutes — Preamble — Key to statute.

The preamble which is said to be a good means of finding out the meaning of the statute and, as it were a key to the understanding of it may legitimately be consulted to solve any ambiguity or to find the meaning of words which may have more than one or to keep the effect of the Act within its real scope whenever the enacting part is in any of these respects open to doubt. (Para 23)

(d) Interpretation of Statutes — Words having more than one meaning.

Where a word admits of more senses than one that sense is to be adopted which best harmonises with the context and promotes in the fullest manner the policy and object of the legislature. The paramount object in construing statutes is to ascertain the legislative intent and the rule of strict construction is not violated by permitting the words to have their full meaning, or the more extensive of two meanings best effectuating the intention. They are indeed frequently taken in the widest sense, sometimes in a sense more wide than etymologically belongs. or is popularly attached to them in order to carry out effectively the legislative intent, "to suppress the mischief and advance the remedy." (Para 26)

T. V. Muthukrishna Iyer and C. Shrinivasachari, for Appellants; S. T. Srinivasagopalachari, K. R. Rangaswami Iyengar, T. Aravamudha Iyengar, D. Narasaraju, T. T. Srinivasan and A. N. Rangaswami , for Respondents.

CASES CITED:

(A) ('49) AIR 1949 Mad 765: 1949-1 Mad LJ 452
(B) (1892) 61 LJMC 33: (1892) 1 QB 264
(C) (1914) 83 LJKB 1617: (1914) 3 KB 196
(D) ('10) 7 Ind Cas 890: 15 Cal WN 84
(E) (1859) 13 Grey 311
(F) (1865) 144 ER 408: 18 CB (NS) 175
(G) ('27) AIR 1927 All 214: 99 Ind Cas 376
(H) (1921) 90 LJPC 213: (1921) 2 AC 384
(I) ('15) AIR 1915 All 459 (1): 13 All LJ 846: 30 Ind Cas 549
(J) (1938) 107 LJKB 687: (1938) 2 KB 508
(K) (1888) 57 LJQB 198:20 QBD 225
(L) ('46) ILR (1946) 2 Cal 326
(M) (1893) 62 LJCh 598: (1893) 2 Ch 315
(N) (1888) 37 WR 228: 22 QBD 224
(O) (1885) 51 LT 337: 26 Ch D 434
(P) (1824) 1 Bing 500: 130 ER 199
(Q) (1857) 26 LJ Ch 473: 6 HL Cas 61
(R) 31 Ny 389 at p. 394
(S) (1928) 1928 AC 469
(T) (1833) 110 ER 895: 5 B & Ad 555
(U) (1909) 78 LJKB 346: (1909) 1 KB 744
(V) (1902) 71 LJKB 837: (1902) 2 KB 574
(W) ('10) 8 Ind Cas 148: 8 Mad LT 431
(X) ('25) AIR 1925 Lah 252: 5 Lah 543: 26 Cri LJ 539
(Y) (1859) 7 CB (NS) 99: 29 LJCP 1
(Z) 49 JP 661
(Z1) (1865) 18 CB (NS) 175: 144 ER 408
(Z2) (1881) 51 LJQB 82: 8 QBD 421 ,
(Z3) (1900) 69 LJPC 66: 1900 AC 383
(Z4) (1892) 61 LJPC 50: 1892 AC 473

SATYANARAYANA RAO J.: This is an appeal by the plaintiff against the decision, dismissing his suit for recovery of possession of the property specified in the schedule attached to the plaint and in the plan. The plaintiff died during the pendency of the appeal and his legal representatives, appellants 2 to 7, are brought on record and the appeal is continued by them.

(2) The dispute relates to a piece of land, on which the Gaiety Theatre stands besides other structures. The plan attached to the plaint is marked as Ex. P. 1 and it contains the details of the properties sought to be recovered. The property in suit is B X Y A in the plan, bounded by Blacker's Road on the south, Dams Road on the west, a street on the north and the land belonging to Casino Theatre on the east. The space reserved for the parking of cars at the Gaiety Theatre is marked C X Y D. The Gaiety Theatre is in B C D A. The whole property B X Y A is enclosed by compound walls on all sides with gates on the south. Besides the superstructure of the Gaiety Theatre in the portion marked B C D A, there is what is described as a tiled shed F G H E, which contains a booking office and two rooms. Besides these structures, there are certain other sheds in the north of the site and other modern conveniences for the benefit of those who witness cinema shows. There is also some open space on all sides of the structure of the theatre.

(3) All the property excluding the superstructure of the Gaiety Theatre belongs to the estate of late Sir Haji Ismail Sait and defendants 2 to 6 in the action are the receivers appointed by this court in C. S. Nos. 280 and 286 of 1939 for the administration of that estate. The first defendant is the owner of the superstructure of the theatre and he is also the lessee of the rest of the property, holding the same under a lease

for seven years commencing from 1-5-1940 obtained from the then receivers of the estate of Sir Haji Ismail Sait with the sanction of the court. The plaintiff is a subsequent lessee who obtained a lease of the said property excluding the superstructure from the said receivers to come into effect after the termination of the lease in favour of the first defendant, that is, from 1-5-1947. The plaintiff claimed vacant possession of the property after the superstructure of the theatre is removed and mesne profits or damages from the first defendant; and he sought to make the receivers also liable for damages or mesne profits as under the lease in favour of the first defendant three months' time to vacate the premises was given by their predecessors after the termination of the period fixed in the lease. This contention, however, may not be very material in the view we take of the case.

(4) The main contesting defendant in the action was the first defendant who claimed that by virtue of the provisions of the Madras Buildings (Lease and Rent Control) Act, 1946 (Madras Act XV of 1946), (hereinafter called the Act) the plaintiff was not entitled to evict him from the property as what was leased to him was a "building" within the meaning of S. 2 (1) of the Act and that the Court had no jurisdiction to entertain and dispose of the suit as the only remedy of the plaintiff, if any, was to take proceedings under the Act for eviction if proper grounds are made out for such eviction. Though as many as eight issues were framed in the suit, the main questions considered were the two questions above stated. The suit was tried by Subba Rao, J., and the parties adduced no oral evidence, but were content to have the suit disposed of on the documentary evidence in the case.

(5) The learned Judge, after an elaborate consideration of the documentary evidence and the law bearing upon the subject, arrived at the conclusion that the property demised was a "building" within the meaning of the Act and that in view of the provisions of the Act, particularly, S. 7, the court had no jurisdiction to decide the suit.

(6) The view taken by the learned Judge regarding the jurisdiction to entertain the suit is not correct in view of the subsequent decision of a Bench of this court, consisting of the Chief Justice and Raghava Rao, J., in — 'Muhammadunny v. Melepurakkal Unniri', AIR 1949 Mad 765 (A) where it was held the provisions of the Madras Non-residential Buildings Rent Control Order, 1942, clause 8, did not take away the ordinary jurisdiction of the Civil Court to entertain a suit by a landlord for recovery of possession of the property in occupation of a tenant and that it is open to a Civil Court to pass a decree though it cannot execute the decree and the only remedy of the landlord would thereafter be to take appropriate steps under the provisions of the Madras Non-residential Buildings Rent Control Order for eviction. The learned counsel appearing for the first defendant respondent, Mr. Srinivasagopalachari, had necessarily to concede that in view of this decision of a Bench, he would not press the point, and in this he is justified as the provisions of the Act of 1946 are 'in pari materia'.

(7) The only question that remains for consideration is whether the finding of the learned Judge that the first defendant is a lessee of a "building" within the meaning of the Act and that he could not be evicted in view of the provisions of the Act is correct. The conclusion of the learned Judge on this point, to state in his own words, is as follows:

> "Having regard to the wide connotation that was given to the word 'building', the purpose for which the Madras Buildings (Lease and Rent Control) Act was enacted the nature of the structures in the suit premises and the manner in which the entire premises were being let out and used for a number of years, at any rate, from 1914, and the purpose for which the building was taken on rent by the lessee from time to time leave no doubt in my mind that the suit premises come within the meaning of the word 'building' under the Madras Buildings (Lease and Rent Control) Act, 1946".

(8) In order to better appreciate the contentions of the parties, it is necessary to state the facts leading up to this action. Late Sir Haji Ismail Sait was the owner of the land and premises known as the Blacker's stables, also called Blacker's yard, near Harris Bridge, the particulars and the boundaries of which can be gathered from Ex. P-3, the plan attached to Ex. P-2 of the year 1914. On that land, at that time (1914) there were masonry stalls marked in the plan which were perhaps used as stables and there was also intervening vacant space between the stalls. All round the property, there were masonry stalls excepting in the south, where there was an entrance to Blacker's Road. The property extended to Dams Road on the west, Blacker's Road on the south, Meeran Saheb Street on the east and Narsingapuram on the north. In 1914, under Ex. P-2 dated 4-6-1914, one R. Venkayya, the proprietor of R. Venkayya Bros., a well known firm of photographers, obtained a lease from the said Sir Haji Ismail Sait of the western portion of the property for a period of six years commencing from 1-5-1914 with an option of renewal for a further term of six years with a view to construct and build a superstructure on the said premises for carrying on cinema business. The lease, Ex. P-2, gives the boundaries of the property demised and even then it included the stable and the stalls all round except on the south. It will be seen from Ex. P-3 that this property is to the west of the two parallel lines near the arrow where 95 feet width is marked in the plan. Liberty was given under the lease not only to build a superstructure, perhaps with corrugated zinc sheets, but also to demolish, if necessary, the stalls to the extent needed. After the expiration of the period of the lease, the lessee had to give vacant possession of the premises by removing all superstructures, plant, fittings, fixtures, etc., belonging to the lessee. The schedule gives the description of the property as vacant land and premises being a portion of the premises known as Blacker's yard situate and bearing door No 1/1, Blacker's Road. Except for the stalls all round, the remaining space in the middle was a vacant land at that time. The superstructure now known as Gaiety Theatre was constructed by the said R. Venkayya who by 1927 became insolvent and his property became vested in the Official Assignee of Madras. There was a further lease (Ex. P-4) dated 4-5-1927 granted by the representatives of Haji Ismail Sait's estate to the Official Assignee of Madras representing the estate of R. Venkayya Bros., whereunder a lease for a further period of 9 years commencing from 1-3-1926 was granted to the Official Assignee. Ex. P-4 (a) is the plan attached to that lease.

The Gaiety Theatre is marked red in the plan and the shed or stall belonging to the lessor was marked blue. It would be seen from that plan that the shed on the west of the compound was

removed by that time and there was only the motor garage in the north and the shed marked blue on the east. The lease purports to demise the lands and the buildings standing thereon belonging to the lessor and reference is made to the fact that Venkayya Bros. erected the buildings known as Gaiety Theatre. There were the usual covenants for repairs and for delivery of vacant possession after removing the structures, etc., after the expiry of the period of lease. In this lease, it is significant that in the schedule the land is not described as vacant, as under Ex. P-2, probably because by that time most of the land was built upon and was occupied by the superstructure of the Gaiety Theatre. The schedule starts by saying, "All that piece or parcel of land together with the buildings marked A, B, C, D, being a portion of premises known as Blacker's yard situate and bearing door No. 1/1, Blacker's Road, ... together with the buildings belonging to the lessors and shown coloured blue in the plan hereto annexed."

(9) One Mrs. Piroja Fram Madan of Calcutta purchased the superstructure of the Gaiety Theatre and also obtained an assignment of the rights under the lease, Ex. P-4, some time before 1935, and on 27-6-1935 under Ex. P-5 this lady obtained a lease for period of seven years of the property from the executor appointed under the will of Sir Haji Ismail Sait. This again refers to the piece or parcel of land together with the said buildings belonging to the lessor, which is described as the demised premises to distinguish it from the superstructure owned by the lessee. The terms of the document are similar to the earlier leases and this again omits in the description of the property in the schedule the word 'Vacant' and describes the property as "All that piece or parcel of land together with the buildings marked A, B, C and D, being a portion of premises known as Blacker's yard situate and bearing door No. 1/1, Blacker's Road, etc." From Mrs. Madan the present first defendant purchased the superstructure and obtained an assignment of the rights under the lease, Ex. P-5, by document of 4-1-1937, Ex. P-6, for a sum of Rs. 36,000/- to carry on cinema business which was then a running concern and known as the Gaiety Theatre.

(10) The estate of Sir Haji Ismail Sait came under the administration of this court in C. S. No. 286 of 1939 and a renewal of the lease of the Gaiety Theatre together with an extra vacant site of 35 feet in width marked in the plaint plan as C X Y D was granted to the first defendant under the directions of the High Court by the then receivers, M/S. V. Subramanyam and A. Bhujanga Rao. The order of the Court is Ex. P-7, dated 21-3-1940. The permission granted is in these terms:

> "That the Receivers herein be and they are hereby permitted to execute forthwith a renewal of the present lease of the 'Gaiety Theatre' and include therein about 35 feet of vacant site next east of it and now comprised in the compound of the present English warehouse at a monthly rental of Rs. 750/- plus an additional rental for the vacant site now given and the period shall be not less then seven years from now."

The Receivers in obedience to these directions executed on 15-6-1941, Ex. P-9, a lease, in favour of the first defendant. Here again, in the operative portion of the deed it is stated

> "do hereby lease and demise unto the lessee all that piece or parcel of land together with the said buildings and compound walls belonging to the estate, hereinafter called the 'demised premises' and more particularly described in the schedule hereto."

The lease was to commence from 1-5-1940 and to be in force for a period of seven years, the rent fixed being Rs. 835/- a month. A distinction was drawn in this lease as in the previous leases between demised premises, that is, the land and the buildings, the title to which was with the lessor, and the superstructure of the Gaiety Theatre which was described as lessee's buildings, for which the lessor had no title. Liberty was given to the lessee to make additional constructions both in the vacant space of 35 feet now included in this lease and also in the space round about the Gaiety Theatre and there were clauses for insuring the buildings and also to give vacant possession after the expiry of the terms of the lease. A further period of three months was granted for removing the structures, etc., failing which it was provided that if the excess buildings with the superstructure were not removed, they should belong to the lessors as part of the demised premises without any liability to pay compensation to the lessee. The same description 'All that piece or parcel of land' is also repeated in this document. The land is not described as vacant land while the 35 feet site was described as vacant.

(11) Even before the expiry of the period of lease in favour of the first defendant, under the directions of the court given in the administration suit, the plaintiff obtained a lease of the property on 17-2-1943, Ex P.10, for a period of 13 years and 11½ months, commencing from 1-5-1947 at a monthly rental of Rs. 835/- the lease to come into operation, of course, after the termination of the previous lease in favour of the first defendant. The terms of this lease are also similar and this also included the vacant space of 35 feet on the east. The property is also described in similar terms. The terms of the lease in favour of the first defendant expired in 1947, by which time the Act came into force. He did not vacate the premises after the expiry of the three months' period even though he was called upon to do so and the plaintiff thereupon instituted the present suit for the reliefs already stated.

(12) The short question for decision is whether the first defendant is a "tenant in possession of a building" within the meaning of the Act. He would be a tenant of a 'building' if what was leased to him under Ex. P-9 was a building within the definition contained in the Act. A 'building' is defined in the Act as meaning

> "any building or hut or part of a building or hut let or to be let separately for residential or non-residential purposes and includes: (a) the garden, grounds and out-houses, if any, appurtenant to such building, hut or part of such building or hut and let or to be let along with such building or hut, (b) any furniture supplied by the landlord for use in such building or hut or part of a building or hut."

This definition is not very helpful in arriving at the meaning of the word 'building' as it states that a building means any building. But, what is a building? If we take the derivative meaning of the word 'building', it means that which is built. It may be a wall; it may be a structure not fit for human habitation; it may be anything and not necessarily a house. The legislature could not have intended to use the word in its derivative sense as it is clear from the object of the Act, which was to prevent unreasonable eviction of tenants from residential and non-residential buildings and to control the rents. The inclusion of a hut in the definition

and the other indications in sub-clauses (a) and (b) point to the fact that the word is used to denote a structure of the nature of a house intended for human habitation or for using it for non-residential purposes such as carrying on a business. The word 'building' is used in several Acts, English and Indian, enacted for different objects and the learned counsel on both sides drew our attention to some of the decisions. Lord Esher, M. R., gives the definition of a building as an "inclosure of brick or stonework covered in by a roof". Having regard to the Indian conditions, the inclosure need not necessarily be of brick or stonework. It may consist of mud walls; but, it must, I think, be covered in by a roof. I think this definition accords with the ordinary conception of a building (see — 'Moir v. Williams', (1892) 1 QB 264 at p. 270 (B). It is difficult to accept the view of Cozens Hardy, M. R. in — 'Waite's Executors v. Inland Revenue Commissioners', (1914) 3 KB 196 (C), at p. 201 that there need not necessarily be a roof or cover in order to constitute a building. He said:

> "I do not doubt that there may be a building constructed of wood as well as of brick or stone, and that it is not necessary that there should be a roof or cover in order to constitute a building."

The observations of the learned Judge were obiter and the only question that had to be considered in that case was whether an embankment was a building or a structure used in connection with a building within the meaning of S. 25 (2) of the Finance Act of 1910 for the purpose of valuation. Dealing with the same word under the Calcutta Municipal Act, section 151, the Calcutta High Court held in — 'Corporation of Calcutta v. Binoy Krishna', 15 Cal WN 84 (D) that a boundary or compound wall was not a "building" and that the word was not used in the Act and should not be interpreted in its derivative sense. In this decision, the decisions of the English Courts were exhaustively considered and the view expressed in — 'Tresdell v. Gay', (1859) 13 Grey 311 (E) that the term 'building' "cannot always be held to include every species of erection on land, and that, taken in its broadest sense, it very often means only an erection intended for use and occupation as a habitation, or for some purpose of trade, manufacture or ornament, constituting a fabric or edifice, and not merely a wall, a fence, a gate, or the like," was accepted and it was further stated that "in this view, a structure can hardly be called a building unless it is capable of occupation as falling within the residential class or within the class connected with commercial industry or in some way or other." The preponderance of authority, therefore, in England is in favour of the view taken by Lord Esher, M. R., already stated, and the observations of Cozens-Hardy, M. R., do not seem to be acceptable. Earle, C. J., in — 'Powell v. Boraston', (1865) 144 ER 408 (F) also laid down as follows:

> "We are also aware of the immense variety of structures which are sufficient buildings, considering the locality and the use for which they are adapted in that locality. Still, we are of opinion that the intention of the legislature would be defeated, and the words indicating the class of buildings which qualify would be without any effect, if everything which would be called a building was held sufficient. It ought to be in some degree adapted both to be used by man either for residence or for the industry to which the statute relates, and also to have the degree of durability which is included in the idea of a building."

The facts of that case are somewhat interesting. The respondent was in possession of a farm of which a few acres, worth more than £10/- were within a borough; but there was no building on it. In order to acquire a qualification to vote, an electioneering-agent erected on that land a shed, made of wood, with four boarded sides and a boarded roof, all of which were supported by four posts. The question was whether it was a "building" so as to confer a qualification to vote within the meaning of S. 27 of the Reform Act. The revising-barrister held that it was; but the court reversed that decision. It was merely a ruse to defeat the provisions of the Act and to acquire a qualification to vote. Such devices are not uncommon in this country. The shed in question was not intended for the occupation of any person and was made of such frail stuff that it could be destroyed at any moment. There was therefore no sort of permanency or it was wholly unfit for residence. It has been held in — 'Baladin v. Lakhan Singh', AIR 1927 All 214 (G) that a house in ruins was not a building or a house. Mere compound wall with a gate enclosing a space cannot, in view of the accepted interpretation of the word 'building' in the decisions above cited, be considered as a building within the meaning of the Act. The extreme contention of Mr. Srinivasagopalachari for the respondent was that apart from other considerations which ought to enter into the decision of the question, even if we take into consideration the compound wall with the gates, that would itself constitute a "building" within the meaning of the Act. It is impossible to accept such an extreme view in the light of the decisions above cited.

(13) The definition in the Act includes in it not only a building, but even a part of it. A building consists of not only the superstructure but also the site on which the superstructure stands and in which the foundation for the superstructure is erected. A mere superstructure dissociated from the site on which it stands cannot in law, in my opinion, be considered to be a building. The letting, in the present case, of a piece of land apart from the buildings belonging to the lessor was not a letting of a vacant land at the time it was let to the first defendant. In 1914, no doubt, the land was vacant land and it was so expressly described in the lease. But in the subsequent leases, the word "vacant" was significantly omitted. So, in substance and in effect, what was let to the first defendant under the lease, Ex. P-9, with which alone we are now concerned, was besides the building of the lessor the entire property with the compound walls and the gate. There was also the land occupied by the superstructure of the Gaiety Theatre besides the vacant land round about it. This land, on which the structure stands, undoubtedly both in the physical and in the ordinary sense, forms part of the building, namely, the Gaiety Theatre.

(14) Lord Atkinson in — 'Victoria City v. Bishop of Vancouver Island', (1921) 2 AC 384 (H) pointed out that the word 'building' in ordinary parlance "comprises not only the fabric of the building, but the land upon which it stands." The point became important in that case, because under S. 197 (1) of the Municipal Act of British Columbia, every building set apart and in use for the public worship of God was exempt from municipal rates and taxes while it was permissible to impose a tax upon lands or upon any real property. The question was whether the land occupied by a building, St. Andrew's Cathedral, dedicated and set apart for the public worship of God was exempt from taxation. On behalf

of the municipality, the contention was that the exemption under S. 197 extended only to the superstructure and not to the land on which the superstructure was built and as the land was taxable, the municipality was entitled to levy rates and taxes on the land occupied by the Cathedral. It was pointed out in the course of the judgment by the learned Lord:—

> "It is impossible to conceive the public worship of God being carried on in a building without the use of the land which it embraces within its walls, as it is impossible to conceive walls existing without the support, direct or indirect, of the soil of the earth. The conception of such things is not the less impossible because the Legislature has by statute made the attempt fancifully to divide for the purpose of taxation concrete entities notionally into sections or portions which are presumably mutually exclusive and independent of each other. Their attempt will be abortive unless the language used be clear and plain. Should it not be so, one must judge by the meaning of the ordinary language used what is the nature of the thing to be dealt with as it is described in that language."

It was therefore held that the ordinary and natural meaning of the word 'building' included the fabric and the ground on which it stood and therefore the exemption of the building extended as well to the site on which it stood. This decision, in my opinion, is very helpful to the respondent. Obviously, the letting of the land was for the purpose of carrying on cinema business and it was well known to the parties that the structure of the theatre owned by the first defendant was already there and what was being granted in substance and in effect under the lease was the right to continue the structure on the land as a building, as without the land the structure cannot stand. Taking all the facts into consideration, what was leased under Ex. P-9 was the entire property with its compound walls and with the buildings of the lessor shown in the plaint plan, Ex. P-1, together with the site on which the superstructure was erected and which gave continuous support to the building and the other vacant space round it. This undoubtedly is part of the building known as the Gaiety Theatre. So, the lessor leased not only his building but also part of the building of the Gaiety Theatre under the document. What was leased therefore was not merely a vacant land, the small shed in the east of the site belonging to the lessor being only an insignificant portion to be left out of consideration altogether, as contended on behalf of the appellant. The object of the lease was to run the cinema business in the buildings then in existence together with the other buildings used as booking office, office rooms, garages, latrines and so on. It is impossible therefore to escape the conclusion that what was let to the first defendant under Ex. P-9 was a "building". As pointed out by the learned Judge in his findings already extracted, the nature of the structures in the suit premises and the manner in which the entire premises were being let out and used for a number of years undoubtedly indicate that it was a building that was leased to the defendant.

(15) In the above view, it is unnecessary to consider the argument of Mr. Muthukrishna Ayyar, the learned Advocate for the appellant, whether the site, irrespective of the structure of the Gaiety Theatre, could be rightly considered as appurtenant to the sheds belonging to the lessor. He drew our attention to the decisions which have considered the meaning of the word 'appurtenant' in other contexts. The meaning of the word 'appurtenant' given in the Oxford Dictionary is "Belonging as a property or legal right; constituting a property or right subsidiary to one which is more important; appertaining as if by right to; proper, suited or appropriate to; relating to, pertinent."

That is the primary meaning of the word 'appurtenant'. In —'Budhi Mal v. Bhati', AIR 1915 All 459 (1) (I) AN APPURTENANCE is defined as an appendage, an adjunct, or something belonging to another thing as principal and passing as an incident to it. In — 'Trim v. Sturminster, Rural Council', (1938) 2 KB 508 (J), the learned Judge considered the meaning of the word 'appurtenance' at pages 515 and 516 and observed that the word 'appurtenance' had never been extended to include land, as meaning a corporeal hereditament; which does not fall within the curtilage of the yard of the house itself, that is, not within the parcel of the demise of the house. That may be so. In the definition contained in the Act, the grounds & outhouses, if any, appurtenant to such building are included in the definition. As pointed out in —'Thomas v. Owen', (1888) 20 QBD 225 at pp. 231, 232 (K), the word 'appurtenance' has also a secondary meaning as equivalent to 'usually occupied' and this was cited with approval in Woodfall on Landlord and Tenant. If from 1914 this entire ground was occupied for the purpose of continuing the superstructure along with the building belonging to the lessor and the whole of it is treated as one unit, the site may be treated as an appurtenance in the secondary sense of the word.

(16) Lastly, there is an argument of Mr. Srinivasagopalachari for the respondent which was raised by him for the first time in this court viz., that apart from these considerations, on the date of the suit the terms fixed under the lease had expired & that the first defendant was only a tenant holding over and as the building was not removed as provided by the lease under clause 6 of Ex. P-9, the building became part of the demised premises retrospectively and belonged to the lessors and therefore on the date of the suit the building was part of the lease. From this point of view, undoubtedly, the eviction of the tenant in possession of a building included by the operation of clause 6 in the demised premises would not be warranted. The answer attempted by Mr. Muthukrishna Ayyar for the appellant was that the words 'excess buildings' in clause 6 did not take in the lessee's buildings already in existence, that is, the Gaiety Theatre, but only excess buildings constructed after the lease either in the 35 feet vacant space newly added or in the other vacant space available. He invited our attention to clause 9 and also clauses 4 and 6 of the lease. The scheme of this lease as well as the earlier leases was to draw a distinction between demised premises which consisted of all the property belonging to the lessor, the land, and the other buildings. The lessee's property, that is superstructure, was always described as lessee's building and the provision even in the earlier leases was that if the building was not removed within three months, it should belong to the lessor. In Ex. P-9, under clause 8, if buildings were constructed on the 35 feet space, they should not be removed but should become the property of the lessor after the expiration of the lease without any compensation. As regards all other buildings, they have to be removed after the expiration of the lease at least within three months thereafter. If not, they become the property of the lessor. The excess

buildings, in my opinion, include not only the existing building but also buildings that may come into existence thereafter in the space outside the 35 feet ground granted under the lease. It must be interpreted in the light of the clauses in the earlier leases. It cannot be suggested that if within three months the superstructure is not removed, the lessor is under a liability to pay compensation for it as seems to be implied by clause 6 of the lease of the interpretation put by Mr. Muthukrishna Ayyar were to be accepted.

(17) Our attention was drawn in the course of the arguments to a decision of the Calcutta High Court in — 'Prafulla Chandra Ghosh v. Shaik Shamsuddin', ILR (1946) 2 Cal 326 (L). But that decision would not materially help either side as the land there was specifically let for the purpose of building and there was no building in existence on the date of the lease on the demised premises, the superstructure of which was owned & possessed by the lessee. The decision, assuming it was correctly cited, may properly apply to the situation under the lease of 1914, where for the first time R. Venkayya was permitted to construct a theatre. It is unnecessary therefore to consider some of the propositions therein laid down and to express an opinion.

(18) The claim against the receivers, defendants 2 to 7, was that the three months' period granted under Ex. P. 9 after the termination of the lease for removing the superstructure was not within the competence of the receivers to grant and therefore they should also be made liable for damages. There is no substance in this contention as under the order of the court itself the receivers were authorised to grant a new lease in terms of the old lease which undoubtedly contained a clause granting a further period of three months to vacate the premises. The plaintiff was undoubtedly aware of the lease of the first defendant when he obtained his lease in 1943. He cannot therefore complain that the extension of three months' period contained in Ex. P-9 was unauthorised or unlawful. The decision of the learned Judge, in my opinion, is correct. This appeal fails and is dismissed with costs of Respondent 1 (D. 1). The appellants will pay costs of the receivers also. Separate sets (calculated on the amount of damages.)

(19) RAGHAVA RAO J.: In this rather arguable case for the appellant, on the principal point debated, which I have carefully considered since reservation of judgment, in the light of the learned argument of counsel on both sides. I have on the whole made up my mind that we in appeal ought not to disturb the view of the court below for which there is enough of sound and rational basis in its judgment. It is true that this is not a case of oral evidence in which a trial Judge's conclusion must be respected on the ground of the special opportunities which he enjoys of hearing the evidence directly from the box. The case no doubt depends primarily upon a construction of the lease, Exhibit P-9 and incidentally too upon a consideration of the prior leases. There was, in fact, no oral evidence adduced, and it cannot be said that we sitting in appeal do not command the same advantage as the learned Judge below or construing the relevant documents and arriving at our own conclusion in reversal of his view, if necessary. At the same time we cannot overlook the fact that if in the process of such construction we feel ourselves in the position that all that we can say is that the view pressed for the appellant is just as possible as the view adopted by the learned Judge the reasonable course for us in appeal to adopt is to confirm the judgment appealed against. The burden after all lies upon the appellant before he can succeed to demonstrate the positive error of the judgment under appeal, especially where the question raised is one of construction of a document with reference to surrounding circumstances on which the court of first instance has arrived at one possible conclusion which is prima facie reasonable. And this certainly he cannot be said to have done merely by making out nicely balance calculations pointing to the equal possibility of the judgment being wrong as well as right. In fact I may go a step further and remark that whatever the state of my mind at the close of the argument I have since arrived at the clear and distinct conclusion that the view taken by the Judge below is the only correct conclusion which can be reached in the case.

(20) In answer to the argument of the learned counsel for the appellant which confined itself to the point as dealt with by the court below the learned advocate for the respondent has raised another point as well with which it is, in my opinion, unnecessary to deal in the view that we are taking on the former point in concurrence with the court below. The point for discussion is really issue No. 1 in the suit which runs thus:

> "Does Madras Act XV of 1946 apply to the property leased to 1st defendant and is he entitled to claim the benefit of its provisions?"

The learned Judge below has answered the issue in favour of the defendant, and the plaintiff appeals. The learned Judge sums up the reasoning employed by him in support of his conclusion thus:

> "Having regard to the wide connotation that was given to the word 'building', the purpose for which the Madras Buildings (Lease and Rent Control) Act was enacted, the nature of the structures in the suit premises and the manner in which the entire premises were being let out and used for a number of years, at any rate from 1914 and the purpose for which the building was taken on rent by the lessee from time to time leave no doubt in my mind that the suit premises came within the meaning of the word 'Building' under the Madras Buildings (Lease and Rent Control) Act, 1946. ..... I am also of opinion that the grounds enclosed within the boundaries are appurtenant to the buildings owned by the lessor situated within the boundaries."

(21) Before discussing the soundness of the reasoning and of the conclusion of the learned Judge it is as well that I set out so far as material to the present case, the terms of the definition of 'building' in Madras Act XV of 1946;

> " "building" means any building or hut or part of a building or hut, let or to be let separately for residential or non-residential purposes, and includes—
> (a) the garden, grounds and out-houses, if any, appurtenant to such building, hut or part of such building or hut and let or to be let along with such building or hut."

(22) Learned counsel for the appellant has assailed the conclusion of the learned Judge on the basis firstly that the subject matter of the demise has not been correctly appreciated by the learned Judge below, and secondly and consequently that the language of the definition has not been accurately applied by him to such subject matter. The first basis depends upon whether as contended by learned counsel for the ap-

pellant what was leased out is vacant land essentially with the buildings on it as appurtenant thereto. The contention for the respondent is that what was leased out is a building in terms of the statutory definition including the vacant grounds appurtenant thereto. Argument for the appellant in this respect has proceeded to a large extent upon the contents of prior leases which it is not, in my opinion, necessary to look into. What is really relevant is the lease, Exhibit P-9, on the expiry of which the present suit for eviction was laid. The contents of Exhibit P-9 where doubtful and ambiguous may well have to be understood by reference to the contents of prior leases to the extent that these latter threw light upon the construction of Exhibit P-9, looking at all the relevant evidentiary material it is beyond dispute—in fact, there has been no dispute before us in that respect between counsel—that the subject matter of the lease consists of (1) the site underneath the actual building known as "Gaiety Theatre" which belonged to the lessee; (2) the small sheds at one end of the premises and (3) all the vacant space within, exclusive of the theatre and the sheds. The entire premises embracing the three portions demised as well as the lessee's own structure known as "Gaiety Theatre" are described in the record as 'Blacker's stables', and at the time of Exhibit P-9 the Gaiety Theatre having become the property of the lessee himself it was the rest of Blacker's stables consisting of the three portions just referred to that was let out to the defendant. The question therefore is whether what was so let out is a "building" within the definition of the statute.

(23) It is common ground that as the preamble to the statute shows the object of the legislature is to regulate the letting out of residential and non-residential buildings alike and to control the rent of such buildings and to prevent unreasonable eviction of tenants therefrom in the state of Madras. It is common ground too that the preamble which is said to be a good means of finding out the meaning of the statute and, as it were, a key to the understanding of it may legitimately be consulted to solve any ambiguity or to find the meaning of words which may have more than one, or to keep the effect of the Act within its real scope, whenever the enacting part is in any of these respects open to doubt. (vide Maxwell on the Interpretation of Statutes Ninth Edition by Sir Gilbert page 46.)

For the appellant it is contended that the description of the premises in Exhibit P-9 as well as in prior leases points to land principally as the subject-matter of the letting and that since the sheds occupy only an inconsequential part of the entire premises, there is no reason to suppose that what was let out is a building. The dominant part of the premises let, it is urged, is the vacant space around the sheds and not the sheds or the site under the Gaiety Theatre. The argument for the respondent has been 'firstly' that the site under the Gaiety Theatre is itself part of that building let separately from that building itself together with the vacant space adjoining that site, that building and the sheds, with the sheds themselves. The purpose of the letting, it is emphasised, was to help the lessee to run his theatre with greater facilities than before by means of the vacant space and the sheds. In support of this branch of the argument, reliance has been placed on the ruling of the Privy council in — '(1921) 2 AC 384 (H)', as showing that land underneath a superstructure must normally be regarded as part of the building.

Secondly it is argued for the respondent that the sheds which are undoubtedly part of the property demised are within the expression "building" in the Act. The vacant space let along with the site under the Gaiety Theatre and with the sheds, it is argued, must be regarded as grounds appurtenant to the buildings constituted by the site under the Gaiety Theatre and the sheds, as contemplated by clause (a) of Sub-section (1) of Section 2 of the Act.

Thirdly, and lastly the argument for the respondent has proceeded on the basis that as the premises let are enclosed by a compound wall the site inside the wall obviously taken on lease for further facilities for the running of the theatre by way of providing for parking of cars and making further structures if necessary must together with the wall be regarded as a "building" within the definition of the Act, although the space inside the wall is not one covered with a roof. That in such circumstances a roof is not necessary to constitute the premises inside the wall a building for the purpose of the statute has been urged with reference to — '(1914) 3 KB 196 (C)', I am of opinion that the test propounded by the learned advocate for the appellant—whether in a composite lease the dominant part of the demise is a building or land—does not really arise for consideration in the present case. I am also of opinion that the three limbs of the argument of the advocate for the respondent are correct.

(24) The description of the premises in Exhibit P-9 as the preamble thereto shows is "that piece or parcel of land lying at and in No. 1/1 Blacker's road more particularly described in the schedule hereto annexed and the compound wall and certain buildings standing thereon". The description in the schedule is "that piece or parcel of land together with the buildings being a portion of the premises known as Blacker's road situate and bearing door No. 1/1, Blacker's road etc.,". It is urged by Mr. Muthukrishna Ayyar that the order in which the different parts of the premises demised as described—land and compound wall and buildings, as in the preamble, land together with the buildings as in the schedule—is significant as indicating the relative importance attached by the parties to the different parts. I am not prepared to say that the argument is altogether without force, 'prima facie'. At the same time it seems to me that that is a matter of detail of the form of conveyancing, while what has to be regarded on the whole is the substance of the subject matter demised. As observed by the learned Judge below, there is no evidence as regards the condition, nature and extent of the buildings belonging to the lessor within the compound wall, and it is difficult for us to say in what proportion of importance on a splitting up of the premises demised into land and buildings the land and the buildings would stand in relation to each other. As further observed by the learned Judge, it is sufficient to say that there are some buildings within the premises and that from the year 1914 down to Exhibit P-9 the land and the buildings enclosed in the compound wall have been treated as one unit and have always been leased out as one property. These are considerations sufficient in my opinion to entail failure of the argument for the appellant as presented to us.

(25) The force of these considerations is however sought to be whittled down by Mr. Muthukrishna Ayyar by citation of two cases, one reported in — '(1938) 2 K B 508 (J) and the other reported in — 'AIR 1915 All 459 (1) (I) on the basis of which he urges that the land around the

sheds cannot be regarded as strictly within the meaning of the expression "grounds appurtenant to such building" occurring in the definition of the word "building" in the Act. The English case was concerned with the construction of Section 188 of the Housing Act, which provides that 'House' includes "any yard, garden, out houses, and appurtenances belonging thereto or usually enjoyed therewith". In that case there were a cottage and 10 acres of land adjoining it which it was contended together constituted a house within the statutory definition. It was held that it was not the cottage together with the whole of the 10 acres of land but only the cottage with its out houses, yards, curtilage and gardens that constituted "house" within the definition inasmuch as the term "appurtenance" was there used in its well established legal sense as including such matters as outhouses, yards and gardens and not land as meaning a corporeal hereditament.

In the Allahabad case the question was whether a house which was in the occupation of a person long before he became an ex-proprietary tenant or acquired an occupancy tenancy in the village in which the house was situate was, under the Agra Tenancy Act an "appurtenance" to the holdings in his possession so as to render any mortgage of such house illegal. The learned Judge who decided the case (Tudballj) answered the question in the negative and in so doing observed thus:

> "An 'appurtenance' in common parlance and legal acceptation" is something belonging to another thing as principal and passing as an incident to it. It is an appendage, an adjunct, an accessory or something annexed to another thing more worthy. I quote this from Webster's International Dictionary".

It will be seen that in these two cases having regard to the object and purpose of the statute the stricter and primary legal sense of the word "appurtenance" was adopted by the court. It must be remembered that the expression bears a primary as well as a secondary sense, and whether one or the other is to be applied to the expression as it occurs in a particular statute depends upon the circumstances connected with the object of the enactment and with the context in which the expression occurs. Etymologically "appurtenance" means "pertaining" or relating to", and that is the wider sense in which the word may sometimes have to be understood and applied apart from the stricter sense of "belonging to". Ordinary Dictionaries, Law Lexicons as well as cases in the books do refer to both the senses, and the question which sense should be adopted depends upon the circumstances of the particular case in which it arises.

Apart from the passage in Woodfall on the Law of Landlord and Tenant and the passage in — '(1888) 20 Q B D 225 at p. 231 (K)', relied upon before us by learned counsel for the respondent, I may advert in this connection to what Bouvier, Wharton and Stroud say on this subject in their Lexicons. According to the first of these authors, "appurtenant" means "belonging to, pertaining to; the thing appurtenant must be of an inferior nature to the thing to which it is appurtenant". Vide Baldwin's Edition of the work (1928) at page 81.

Wharton's Law Lexicon at page 63 of the 13th Edition annotates the word thus: "pertaining" or "belonging to", (see appendant); and of "appendant" at pages 59 and 60, this is what we get;

> "A thing of inheritance belonging to another inheritance which is more worthy as an advowson, common etc., which may be appendant to a manor, common of fishing to a freehold; a seat in a church to a house etc".,

Further, the work illustrates appurtenances belonging to another thing thus:

> "as hamlets to a manor and common of pasture, turbary etc., liberties and services, outhouses, yards, orchards and gardens are appurtenant to a messuage",

and says further: "But lands cannot properly be said to be appurtenant to a messuage". It is further observed by the author; "The word 'appurtenances' should be construed strictly; (Re-Peck) and the School Board for London — '(1893) 2 C H 315 (M)', but it has a secondary meaning equivalent to "usually occupied with". (see — 'Roe v. Siddons', (1888) 22 Q B D 224 at p. 236 (N).

In Stroud's Judicial Dictionary, Second Edition, page 108 under the term "appurtenances" it is said:

> "And therefore if there be a messuage or dwelling house and diverse acres of land thereunto belonging called altogether by the name of Hedges and a grant is made by these words of, all that messuage with the appurtenances commonly called by the name "Hedges', by this grant nothing shall pass but the messuage, garden, curtilage and yet if a manor or farm be commonly called by the name of a messuage there by the grant of a messuage the whole manor or farm may pass" (Touch 94)"

It is further said at page 109: "But the word 'appurtenant' may be used in a secondary sense as equivalent to such phrase as "usually enjoyed with". (Elph 188; — 'Bayley v. Great Western Railway', (1885) 26 Ch D 434 (O).

In this context I may notice the case in—'Hasker v. Sutton', (1824) 130 E R 199 (P) in which the court construed a devise of the rectory or parsonage of with the messuages, lands etc 'Thereunto belonging' as including lands usually occupied with the rectory. At page 199 of the report the rule as laid down by Eyre C. J. in an earlier case is thus stated

> "Lands will not pass under the word "appurtenances" in its strict technical sense; they will pass if it appears that a larger sense was intended to be given to it".

The Law Lexicon of British India by Ramanatha Iyer at page 80 says of the expression "appurtenance" or "appurtenant" quoting from Abbot's Law Dictionary

> "belonging to another thing as principal, as hamlet to another village, garden to a home; that which passes as incident to the principal thing, a thing used with and related to or dependent upon another thing more worthy and agreeing in its nature and quality with the thing whereunto it is appendant or appurtenant; that which belongs to something else, an adjunct, an appendage".

The author proceeds to observe: "It is sometimes used in the non-technical sense of 'adjoining".

(26) In my opinion the word "appurtenant" occurring in the definition of "building" in the Act with which we are concerned is used in the broad, secondary and non-technical sense of "relating to", "usually enjoyed or occupied with" and "adjoining" just noticed by me. The idea of the legislature seems to be that if grounds appurtenant to the building in this sense are let along with the building they should stand attracted to the operation of the Act. That the grounds should also be let along with the building would not be a matter of specific provision in the definition of the statute, if the primary or legal

sense of the word "appurtenant" were intended, as in that case any thing appurtenant to another in that sense would pass with it under the demise whether specifically let or not along with it. It is settled law that where a word admits of more senses than one that sense is to be adopted which best harmonises with the context and promotes in the fullest manner the policy and object of the legislature. The paramount object in construing statutes is to ascertain the legislative intent and the rule of strict construction is not violated by permitting the words to have their full meaning, or the more extensive of two meanings best effectuating the intention. They are indeed frequently taken in the widest sense, sometimes in a sense more wide than etymologically belongs or is popularly attached to them in order to carry out effectively the legislative intent, or to use Lord Coke's words "to suppress the mischief and advance the remedy". (vide Maxwell on Interpretation of Statutes, 9th Edition by Sir Gilbert Jackson. 280). Bearing the several considerations adverted to in the foregoing, I have no hesitation in repelling the argument of Mr. Muthukrishna Ayyar based upon — '(1938) 2 KB 508 (J) and — 'AIR 1915 All 459 (1) (I).

(27) Now to turn to the three limbs of the respondent's argument, I may dispose of the second first, admitting as it does of a treatment brief and simple. The sheds are certainly within the statutory definition of "building". So much was not disputed; nor indeed could it be. Whether the land included in Exhibit P-9 is to be regarded as appurtenant to the sheds or the sheds being a comparatively inconsequential part of the premises demised are to be regarded as appurtenant to the lease was the matter seriously debated. With this I have already dealt rejecting the appellant's contention for the reasons indicated in the foregoing. So I need say no more on this part of the case.

(28) The first limb of the argument too needs no elaborate treatment. It is amply supported by the case in — '(1921) 2 A C 384 (H)', cited by Mr. Srinivasa Gopalachari. It cannot be doubted too that the site underneath the theatre which would be part of that building was let out 'separately' from superstructure according to the meaning of the word "separately" which I shall refer to later. It must also be remembered whether with reference to this limb of the respondent's argument or the third one with which I shall hereafter deal that a word like "building" as shown by the several cases, English and Indian, cited to us must be understood in different senses in different statutes & contexts according to the purpose and object of the statute and the context. In the context of sub-s. (1) of Section 197 of the Municipal Act (British Columbia) it was held by the Privy council applying the golden rule of adherence to the grammatical and ordinary sense of words laid down by Lord Wensleydale in — 'Grey v. Pearson', (1857) 6 HL Cas 61 (Q) that the exemption from tax extended not only to the fabric of the building in question but to the land upon which it stood. It was observed that

> "the thing most necessary for the use of the cathedral as a place of worship which is the ground of exemption from taxation is that the congregation which frequents it should be able to stand or kneel upon the ground embraced within its walls and forming the floor of it, or sit upon chairs resting upon that floor."

We have in the present case to see whether the ordinary meaning of "building" which includes the site underneath as applied in that decision is applicable to the present case. I find nothing in the considerations connected with the purpose of the statute with which we are concerned or in the language to be found in its several provisions which excludes the application of the ordinary meaning of the word. The purpose of the lease was admittedly to help the lessee to run the theatre of which he was the owner with greater facilities than before by the use of the vacant space, and it cannot be suggested that the theatre could have been at the time contemplated by the parties without relation to the site underneath which would be an integral part of the building as constituting its very foundation without which it could not possibly stand.

As pointed out by Davis J. in — 'Benedict v. Ocean Ins. Co.', 31 NY 389 at p. 394 (R) the word "building" necessarily embraces the foundation on which it rests; and the cellar if there be one under the edifice is also included in the term. The latter part of the quotation I may mention, is also supported by the Privy Council decision in —'Rector and Churchwardens of the Parish of St. Nicholas Acons v. London County Council', (1928) AC 469 (S) to which our attention has been drawn by Mr. Srinivasa Gopalachari. It was held in that case that the prohibition of section 3 of Disused Burial Grounds Act 1884 (47 and 48 Vict. C. 72) that it shall not be lawful to erect any buildings upon any disused burial ground except for the purpose of enlarging a church, chapel, meeting house, or other places of worship would extend to an underground chamber sought to be built under the surface of a churchyard.

(29) Turning to the third and last branch of the argument for the respondent I have come to the conclusion that it is also well founded and must be accepted. Before dealing with it in detail it is worthwhile considering certain features of the provisions of section 2 of Madras Act XV of 1946. That "building" should be defined by the use of that very word as meaning "any building" seems indeed curious. That only suggests, in my opinion, that the ordinary meaning of the word "building" is what is intended by the legislature. The epithet "any" attached to the word "building" in the definition is designed to suggest that if there are more senses than one in which the word can be understood, the more extensive of the meanings should be adopted, and if there are more kinds of buildings than one conceivable, any kind of building must be treated as within the contemplation of the legislature. "Building" as observed in Halsbury's laws of England, Hailsham's Edition, Volume XXVI, page 335 "is a term of wide significance." The structure need not be fastened to the ground or be above the surface of a street."

(30) In the Concise Oxford Dictionary the word "building" is annotated at page 144 of the Third Edition as equivalent to "house, edifice." And "Edifice" is at page 363 annotated as equivalent to "building (especially a large one)". In Baldwin's Edition (1928) of Bouvier's Law Dictionary at page 141 "building" is annotated as meaning "an edifice erected by art & fixed upon or over the soil composed of stone, brick, marble or wood or other proper substance connected together and designed for use in the position in which it is so fixed." This, it will be seen, is a very comprehensive annotation which does not insist on a roof for the structure or on brick or stone in its composition. Then in Wharton's Law Lexicon at page 130 of the 13th Edition, although it is first stated that the word has been "defined by Lord Esher in '(1892) 1 QB 264 at p. 270 (B)' as an enclosure

of brick or stone covered by a roof and said by Parke J. in — 'Rex v. Gregory', (1833) 5 B and Ad 555 (T) not to include a wall", it is further pointed out that the "definition depends on circumstances and may include a reservoir (— 'Moran & Son Ltd. v. Marsland', (1909) 1 KB 744 (U). The definition of Lord Esher M. R. is only a working definition and not, in my opinion, intended to exclude in all cases structures other than those made of brick or stone or covered by a roof whether in England or in India. The learned Lord himself observes that what is a building must always be a question of degree and circumstances and then proceeds to state that its "ordinary and usual meaning is a block of brick or stonework covered in by a roof. This definition of Lord Esher M. R. has come up for adverse criticism in England in '(1914) 3 KB 196 (C)' where in addition to the passage from the judgment of Cozens Hardy M. R. quoted by my learned brother, we have the following passage in the judgment of Swinfen Eady L. J. at page 204 of the Repoprt:

> "The solicitor-General contended that the word was restricted to erections of brick or stone covered by a roof; See '(1892) 1 QB 264 (B)'. In my opinion, such a construction is too narrow. 'A building is not necessarily limited to a structure of bricks and mortar.' (Per Collins M. R. in — 'Long Eaton Recreation grounds Co. v. Midland Ry. Co.', (1902) 2 KB 574 at p. 581 (V). Cottages built of wood would certainly be included as 'buildings', so also would be barn and stables of a farm though built only of wood and thatched with straw."

(31) In my opinion the word 'building' is a more generic word than house. A building need have no roof while a house must have. A house is, according to Tomins' Law Dictionary, a place of dwelling or habitation which means ordinarily that there must be a roof for it which provides shelter. Of course neither building nor house need be of brick or stone as I have already remarked. It seems to me that even if "building" generally indicated a structure of brick or stone and with a roof as defined by Lord Esher M. R. it may be that definitions under special Acts contemplate a building without a roof & a building not made of brick or stone. Such was the case for instance so far as the need of a roof is concerned in the decision reported in — 'Public Prosecutor v. Kalia Perumal Naidu', 8 Mad LT 431 (W) wherein it was pointed out that by section 3 of the Madras District Municipalities Act, Act IV of 1884 "building" was defined as including a wall. So it was held that the word "building" in clause (5) of section 180 of the Act included mere walls built for the purpose of erecting a house and the construction of such walls without the license of the municipality rendered persons constructing them liable to the penalty prescribed in section 263, even though the house to support which the walls were designed had not been built. "Building" in the etymological sense means "any thing built", and there is no reason why if that is the intendment of the legislature in connection with a particular enactment, compound walls with the space inside may not be regarded as a building.

(32) Then so far as the need of brick of stone about the structure is concerned there is the case in — 'Nandu Mal v. Municipal Committee Simla', AIR 1925 Lah 252 (X) which is rather instructive. There the facts were as follows:

> "The petitioner constructed a wooden shed on a piece of ground belonging to him within the limits of the Simla Municipality. The shed was roofed by tin sheeting, was mounted on wheels, and was used for sleeping purposes at night. No notice of intention to erect it was given to the Municipal committee. Tne committee served the petitioner with notice under section 195 of the Punjab Municipal Act, demanding demolition of the shed. The petitioner thereupon moved the shed a distance of six feet, but did not demolish it. The petitioner was prosecuted under section 219 of the Act, and fined Rs. 10/-."

It was held that

> "a wooden shed mounted on wheels and intended to be a permanent fixture to the site is a 'building' within the meaning of section 3(2) of the Punjab Municipal Act, and that the fact that its construction permits it to be moved from one part of that site to another does not render inapplicable to it the description 'any hut or shed' ".

Reference is made at page 646 of the Report to two English cases, —'Stevans v. Gourlay', (1859) 29 LJCP 1 (Y) and — 'Richardson v. Brown', 49 JP 661 (Z) where structures have been held to be buildings, although made only of wood and not of masonry.

(33) The case of — 'Richard Powell v. John George Boraston', (1865) 144 EP 408 (Z1) which was cited before me for the appellant is one of a shed made of wood and improvised for the occasion of an election as a ruse to avoid disqualification as to voting which might otherwise result. Such a case is obviously one of fraud upon the statute which required a certain house qualification for a borough election.

(34) That any building in the defunction of Mad. Act XV of 46 must also refer to a building of any size whatsoever of course goes without saying. The inclusion of hut in the statutory definition indeed emphasises this view of the matter. One wonders whether such inclusion was necessary at all after the expression "any building". Apparently it has come in by way of abundant caution and serves only to further emphasise the implications of the expression. "Hut" according to the concise Oxford Dictionary, page 556 means "small mean house of rude construction."

(35) Then in regard to the expression "part of a building or hut" it may be worthwhile noticing what Jessel M. R. has said of houses in —'Yorkshire Insurance v. Clayton', (1881) 8 QBD 421 at p. 424 (Z2) which Halsbury L. C.& Lord Brampton have cited with approval in — 'Grant v. Langston', (1900) AC 383 (Z3).

> "Formerly houses were built so that each house occupied a separate site, but in modern times a practice has grown up of putting seperate houses one above the other. They are built in separate flats or storeys; but for legal and ordinary purposes they are separate houses. Each is separately let and separately occupied, and has no connection with those above or below, except in so far as it may derive support from those below instead of from the ground as in the case of ordinary houses."

The idea of the legislature seems to have been to go a step further and to include within the definition any part of even an ordinary house or hut not built in flats, if let separately from the rest of house or hut. "Separately" in the context must mean, as is indeed its ordinary Dictionary meaning, "distinctly from the rest of the building or hut."

(36) Bearing these considerations in mind and the purpose of the statute as declared by preamble as being to control non-residential as well as residential accommodation it seems to me perfectly clear that, having regard to the compound

walls and the space inside, which although not built upon with a roof might well be used for non-residential purposes connected with the Gaiety Theatre, there is nothing unreasonable about the view of the learned Judge below that the whole of the property demised can be regarded as a "building" within the scope of the statutory definition.

(37) In this view it is unnecessary to consider the further point raised for the respondent that on account of the provision in Exhibit P-9 that "if the excess buildings are not removed within the three months' period above mentioned they shall at the expiration of the period of three months mentioned above belonging to the lessors as part of the demised premises without any liability to pay any compensation to the lessee", the Gaiety Theatre must be regarded as at least part of the demised premises in his possession so as to entitle him to a continuing tenancy in respect of it notwithstanding the expiry of the term. The point was not raised before the learned Judge in the court below, and although, to use the language of Lord Watson in — 'Connecticut Insurance Co. v. Kavanagh', (1892) AC 473 at p. 480 (Z4), the question being one of construction it is not only competent but expedient in the interests of justice for the appellate court to entertain the plea, I must say I am not satisfied on the merits of the question that the intention of the parties in providing as aforesaid was to create a tenancy in respect of the Gaiety Theatre as contended by the learned advocate for the respondent. It seems to me that there is considerable force in the argument for the appellant that the expression "excess building occurring in the provision has reference to the additional constructions which may come into existence after the lease in the space outside the 35 feet ground granted under the lease and not to the lessee's buildings adverted to in clause (4) of the later set of covenants in the document between the lessor and the lessee. It may still be a question at the same time, if Mr. Muthu Krishna Ayer's construction is to be accepted whether the effect of the failure on the part of the lessee to remove the building in accordance with the liberty given to him by clause (4) of the later set of covenants will be to make of the lessee's building property of the lessor and that too without any liability to pay any compensation. As already stated, I do not feel called upon to express any final opinion upon this aspect of the matter in view of the conclusion that we have reached on the main point argued in concurrence with the court below.

(38) I agree that the appeal must be dismissed with costs.

B/R.G.D. Appeal dismissed.

A.I.R. 1953 MADRAS 661 (Vol. 40, C.N. 253)

RAJAMANNAR C. J.
AND VENKATARAMA AIYAR J.

Kalapala Sri Hari Rao, minor by father and guardian Venkatakrishnaiah and others, Appellants v. Kalapala Venkaiah and others, Respondents.

Second Appeal No. 1528 of 1947, D/- 22-11-1951.

Hindu Law — Adoption — Authority — Construction.

Where the husband by his will authorises his widow to adopt a son "for the perpetuation of his family and for the performance of the obsequies" and that is his principal object and he gives her authority to adopt "till the adoptions stands" the power so given is unmistakably a general power of adoption. Any further provision in the will that the widow should adopt one of husband's brother's sons is a direction subordinate to it and does not limit her power to the adoption of those boys.

(Paras 5 and 8)

When at the time she exercises the power those persons are not available she can validly adopt any other person. The facts that the change of circumstances under which it became possible for her to adopt such other person was brought about by her own delay and that in so delaying she might have acted improperly cannot invalidate the adoption. Case law referred to.

(Paras 9, 10, 16)

K. V. Venkatasubramania Iyer, for A. Sambasiva Rao, for Appellants; D. Muni Kanniah, for Respondents.

CASES CITED:
(A) ('16) AIR 1916 Mad 1040: 29 Mad LJ 144
(B) ('18) AIR 1918 Mad 1078: 32 Mad LJ 47
(C) ('50) AIR 1950 Mad 601: 1950-1 Mad LJ 537
(D) ('41) AIR 1941 Mad 937: ILR (1942) Mad 173 (FB)
(E) 1 Mad Strange's Notes of cases 78
(F) ('06) 33 Ind App 145: 29 Mad 382 (PC)
(G) ('91) 1 Mad LJ 177: 14 Mad 65
(H) ('39) AIR 1939 Mad 909: ILR (1940) Mad 233
(I) ('21) AIR 1921 PC 88: 47 Cal 1012 (PC)
(J) ('30) AIR 1930 PC 242: 10 Pat 187 (PC)
(K) ('96) 23 Ind App 18: 23 Cal 563 (PC)
(L) ('22) AIR 1922 PC 63: 1 Pat 305 (PC)
(M) ('03) 26 Mad 681
(N) ('50) AIR 1950 Mad 601: 1950-1 Mad LJ 537
(O) ('19) AIR 1919 PC 75: 47 Cal 466 (PC)

VENKATARAMA AIYAR J.: Defendants 1 to 3 are the appellants. The properties which are the subject-matter of this litigation belonged to one Kotayya who died sometime in May 1910 leaving behind a widow called Venkamma. He had also executed a will on 30-4-1910 under which he conferred power on his widow to make an adoption. In exercise of this power she adopted the 1st defendant on 11-9-1943 and died on 6-11-1943. The plaintiff and defendants 2 and 4 to 9 are the nearest reversioners of Kotayya and would have been entitled to succeed to his estate but for the adoption. The plaintiff sued to recover his 1/8th share in the suit properties on the allegation that the 1st defendant was not in fact adopted and that even if the adoption was true it was invalid as not being within the terms of the authority contained in the will. The courts below held that the adoption was true but that it was not valid because the directions in the will had not been strictly followed by the widow. It is against this decision that defendants 1 to 3 prefer this appeal.

(2) The will executed by Kotayya has been marked as Ex. D. 1 and paragraphs 4 and 5 therein relating to the authority to adopt conferred on the widow are as follows:

"For the perpetuation of my family and for the performance of our obsequies, my wife Venkamma shall adopt a son of one of my brothers according to her choice, whenever it is convenient for her, bring him up till he ceases to be a minor, perform his marriage etc, and preserve the immoveable properties described hereunder; and from the income derived therefrom, my wife shall pay the cist, etc.,

thereon and discharge the debts mentioned hereunder, hand over the income, or the balance of the debts to him when he attains majority and he and my wife shall live on amicable terms. If for any reason my adopted son and my wife do not agree with each other, my wife Venkamma shall take possession of the land, bearing demarcation No. 170/3 of the extent of 1 acre 90 cents out of the magani lands situate in Kalavapamula village fallen to my share and shall independently enjoy only one acre out of it with all absolute rights of gift, transfer sale etc. therein and with regard to the remaining land of the extent of 90 cents my wife shall pay the cist thereon and enjoy only the income derived therefrom during her lifetime and convey the same to the adopted son afterwards. With reference to all the matters mentioned above, authority has been given to my wife Venkamma to adopt till the adoption stands."

(3) Kotayya had two brothers, Appayya and Ratnam. Defendants 2 and 4 to 7 are the sons of Appayya and the plaintiff and defendants 8 and 9 are the sons of Ratnam & all of them were alive at the date of the will and at the time of the death of the testator. On 11-9-1943 when the 1st defendant was adopted they were not available for adoption. The contention of the plaintiff is that the will conferred on Venkamma only a limited power of adoption and that, therefore, she had no authority to adopt any boy other than the brother's sons of Kotayya.

(4) The contention of the appellants on the other hand is that the will conferred on the widow a general power to adopt, that the brothers' sons were mentioned only by way of preference and as they were not available for adoption on 11-9-1943 Venkamma was entitled to adopt any boy of her choice and that the adoption of the 1st defendant was, therefore, valid. On these contentions two questions arise for determination:

(1) Is the power to adopt limited to the boys mentioned in the will or is it a general power to be exercised subject to the directions contained in the will, and (2) If it is a general power, is the adoption of the 1st defendant valid on the ground that the directions became impossible of performance at the date of the adoption.

(4a) The determination of the first question must depend on the construction of the will and of the second question on the rules of Hindu law.

(5) Taking up the first question it is provided in the Will that the testator authorises the widow to adopt a son "for the perpetuation of his family and for the performance of the obsequies". That clearly is his principal object. The further provision that the widow should adopt one of his brothers' sons is a direction subordinate to it. Moreover the testator declares in paragraph 5 that Venkamma should have authority to adopt "till the adoption stands." These words unmistakably confer a general power of adoption on the widow.

(6) We have not to decide in this case whether a general intention to be represented by an adopted son could be inferred when the testator authorises the adoption of a specified boy and there is no further indication of his intention in the Will.

(7) In — 'Chengareddi v. Vasudeva Reddi', AIR 1916 Mad 1040 (A), the facts were that the husband conferred an authority on his widow to adopt a boy named Chenga Reddi. The widow adopted him but he died. Then she made a second adoption. The question was whether she had authority to make the second adoption. Sankaran Nair J. held that as the testator was anxious to be represented by a son a general power of adoption could be implied. This is what he observed:

> "There is little doubt that in the opinion of their Lordships of the Privy Council, if the intention of the husband that he should be represented by an adopted son is clearly expressed in the will, the adoption should be upheld unless there is anything in the will to show that a second adoption should not be made."

Oldfield J., however, differed. He held that as express authority was given only for adopting a specified boy, a general authority to adopt any boy could not be implied. In —'S. Lingappa v. S. Sidda Basappa', AIR 1918 Mad 1078 (B), the widow was authorised to adopt either Gavappa or Lingappa. She made no attempt to adopt either of them though both of them were available and adopted another boy. The question was raised whether a general intention to adopt a boy could be inferred when the will specified the boys to be adopted and there was no other provision.

(8) The court referred to the conflict of views expressed by the learned Judges in 'AIR 1916 Mad 1040 (A), but declined to express any opinion on the question, as it held that the adoption would in any event be void as the directions of the husband had not been followed. In this case it is clear beyond doubt that the testator intended to confer on Venkamma a general authority to adopt with directions as to the boys to be adopted attached thereto and that it is not a power limited to the adoption of those boys.

(9) That takes me on to the second question, whether the adoption of the 1st defendant can be held to be valid on the ground that the adoption of the brother's sons had become impossible at the time of the adoption on 11-9-1943. This question arose directly for decision in — 'Lakshminarayana Sastri v. Sundararamayya', AIR 1950 Mad 601 (C). The facts of that case were that one Dattrayalu executed a will on 27-11-1896 conferring on his widow power to adopt one Durgayya and in case the father of Durgayya was unwilling to give him in adoption to adopt any boy of her choice. Though Durgayya was available for adoption in 1896 and long afterwards, the widow did not exercise the power of adoption. Then after Durgayya became unavailable she adopted the plaintiff, Lakshminarayana. It was argued that the general power conferred on the widow to adopt was subject to the limitation that Durgayya was to be adopted and that as the widow deliberately avoided adopting Durgayya when that could have been done it was not open to her to fall back upon the general power and adopt another. In negativing this contention the learned Chief Justice, Mr. Rajamannar observed as follows:

> "There can be no doubt that if the husband when giving authority to the widow directs that a particular boy should be adopted, the widow would have no power to make an adoption of another boy unless the boy mentioned by her husband was not available. At the same time it is clear that if the boy indicated by the husband is not available the widow has the power to make an adoption of another if there is a general intention manifest in the document that the widow should make an adoption."

In answer to the contention that the widow had ample opportunity to adopt Durgayya and that as she had deliberately delayed exercising the

power, the adoption of Lakshminarayana must be held to be invalid it was observed,

"It is now well established that the motive of a widow in making an adoption is absolutely irrelevant for deciding on its validity. What then is the position? On the date of the adoption. it obviously could not be said that the boy indicated by her husband was available. If so, there is nothing in the will to prohibit the widow from adoption of any other boy. In the absence of direct authority, we find ourselves unable to hold that because the boy indicated by her husband was available at some period after her husband's death when she could have made an adoption the widow is precluded from making an adoption at a future date when at that time the boy indicated by her husband is not available."

I agree with these observations. It must be remembered that the power of adoption is conferred on a widow for the benefit of her husband and his ancestors, and, therefore, considerations of the conduct of the widow would be irrelevant in judging the validity of the adoption. The widow might have acted improperly in delaying the adoption but to hold that the adoption should fail for that reason would be to visit the husband with the consequences of the default of the widow. It is well established that the validity of an adoption could not be impeached on the ground that the widow was not actuated by religious motives or that her real object was to spite the reversioners or her co-widow.

(10) In — 'Kanakaratnam v. Narasimharao', AIR 1941 Mad 937 (FB) (D) it was held by a Full Bench that an adoption would not be invalid because the widow was actuated by improper motive, namely, to defeat her co-widow. The following observations occurring at page 180 may be cited:

"Bearing in mind that the adoption confers spiritual benefit on the deceased husband and that in the Madras Presidency a widow can only adopt when she has received authority to do so, it seems to us that her motive is entirely irrelevant. However spiteful her action may be towards others, the benefit conferred upon her deceased husband by her action is in no way affected and the fact that she cannot act without authority makes the position all the more clear".

On the same reasoning the fact that the change of circumstances under which it became possible to adopt the 1st deft. was brought about by the widow by her own delay would not affect the validity of the adoption. It is hardly necessary to add that a widow is entitled to in law to exercise the power of adoption at any time she chooses and Ex. D. 1 the will expressly authorises her to adopt "whenever it is convenient for her".

(11) I shall now consider the other cases cited by Mr. K. V. Venkatasubramania Aiyar the learned advocate for the appellants. In — 'Veerapperumal Pillai v. Narain Pillai, 1 Mad Strange's Notes of cases', p. 78 (E) the husband conferred an authority in these terms:

"If Iyah Pillai begets a son, besides his present son you are to keep him to my lineage".

The widow adopted another boy without waiting for Iyah Pillai to be-get another son and the validity of his adoption was questioned. It was held on a reading of the will that it conferred a general power to adopt a boy, that the mention of a son of Aiyah Pillai as the boy to be adopted was by way of preference, that the widow was not bound to wait indefinitely and that, therefore, the adoption was valid. The present is the converse of that case. There the widow adopted without waiting for the boy mentioned in the will and here the widow waited until the boy mentioned ceased to be available. But there is this in common between the two cases: that the husband had expressed a general intention to be represented by an adopted son and at the time of the adoption the boy mentioned in the will was not available for adoption.

(12) In — 'Suryanarayana v. Venkataramana, 29 Mad 382 at 388 (PC) (F) the husband conferred on the widow a general power to adopt. She made an adoption but the adopted boy died. Then again she adopted. It was the validity of this adoption that was in question. It was held that as the power to adopt was general the second adoption was valid. The following observations occurring at page 387 may be quoted:

"The object and purpose of the authority given by the husband was to perpetuate his family as well as to secure his spiritual benefit and it would be unreasonable to hold that an accident such as the early death of the boy first adopted should be allowed to frustrate the fulfilment of his object and to preclude the widow from making another adoption in the absence of any legal impediment to her doing so".

When the general intention of a Hindu to be represented by an adopted son is clear, as in this case, there seems no reason why effect should not be given to such intention, if it is possible to do so without contravening the law. Each case must be decided on its own merits, without applying too strict a rule of construction in regard to powers of this description.

(13) This decision was taken on appeal to the Privy Council and in affirming the judgment of the High Court the Privy Council observed as follows in — '29 Mad. 382 at p. 388 (P. C.) (F)',.

"Their Lordships agree with the learned Judges of the High Court in the opinion that the main factor for consideration in these cases is the intention of the husband. Any special instructions which he may give for the guidance of his widow must be strictly followed; where no such instructions have been given, but a general intention has been expressed to be represented by a son their Lordships are of opinion that effect should, if possible, be given to that intention".

(14) In that case there were no special directions by the testator with reference to the exercise of the power and therefore, the decision does not cover the point which falls to be determined in this appeal. Mr. D. Munikanniah, the learned advocate for the respondents relied on the decisions in — 'Amirthayyan v. Ketharamayya', 14 Mad 65 (G), — 'Sundarasivadu v. Adinarayana Sastri', AIR 1939 Mad 909 (F. B.) (H), — 'Sitabai v. Babu Anna Patil', A. I. R. 1921 P C 88 (I) and — 'Rajendra Prasad Bose v. Gopal Prasad Sen', 10 Pat 187 (J). In — '14 Mad 65 (G), the widow was authorised to adopt a boy "from the children that may be born in the families of my brothers". There were such children available for adoption but the widow ignored them and adopted another boy. The question was whether this adoption was valid. This Court held that there was no general power conferred on the widow to adopt, and that it was a limited authority to adopt the boys mentioned. Moreover as the boys of the class mentioned in the will were available the adoption would be bad as the directions of the testator had not been followed. This was not a case in which a general power to adopt was conferred nor was it a case in which it was impossible to

carry out the directions of the testator at the time of the adoption.

In — 'AIR 1939 Mad 909 (H)', the authority was in these terms:

"My wife shall adopt a suitable boy from our family or a boy belonging to the same gotra as myself".

The widow adopted her own brother who neither belonged to the family of the testator nor was he of the same gotra. It was held on a construction of the will, that there was no general power to adopt conferred on the widow and that further she did not carry out the instructions of her husband. The adoption was accordingly held invalid. This is similar to the decision reported in — '14 Mad 65 (G). Reliance was placed on the following observations occurring at p. 911,

"In this view we do not think it necessary to examine the other contention of Mr. Somasundaram that the widow made every possible attempt to make the adoption but failed to secure a boy of the qualifications required by the testator and therefore the adoption must be upheld. The contention is that we must so read the will as to hold that, if the conditions imposed by the testator were not possible of fulfilment, the widow was permitted to adopt a boy of her own choice by adding the words 'if possible' to the power conferred. We are, therefore, unable to uphold the contention of Mr. Somasundaram".

These observations must be taken along with the finding of the learned Judges that there was no general power of adoption conferred on the widow.

In — 'AIR 1921 P C 88 (I), the authority was in these terms: "My wife should as far as possible adopt Shankar the second son of my elder brother. If he (the boy) cannot be obtained any other boy should be adopted with the advice of the trustees". Owing to enmity between the two families, the widow would not adopt Shankar and another boy was adopted. It was held that the widow had not followed the directions of her husband and that therefore, the adoption was void. The power of adoption was no doubt general but it was expressly found that the boy named was available for adoption.

In — 'AIR 1930 P. C. 242 (J), the husband authorised the widow to adopt a boy with the permission of his father. After the death of the father she adopted the son. It was held by the Privy Council that the adoption was invalid because the permission of the father was a condition precedent to the exercise of that power. But I have already held that the power to adopt is general, and to hold that the adoption of the boys named is a condition precedent to the exercise of that power is to convert a general power into one limited to adopting specified boys. This decision is moreover largely based on the construction put on the Anumathi Patra that the paramount intention of the husband in authorising the adoption was secular and not religious. It would be unsafe to apply the principle of this decision to the present case where the will discloses that the testator was actuated by religious considerations. As observed by the Judicial Committee in — 'Narendranath Sircar v. Kamal Basini Dasi', 23 Cal 563, at p. 572 (K),

"To construe one will by reference to expresssions of more or less doubtful import to be found in other wills is for the most part an unprofitable exercise".

In — 'Mst. Sasiman v. Shib Narain', A. I. R. 1922 P. C. 63 (L), Sir John Edge observed as follows:

"Their Lordships may observe that it is always dangerous to construe the words of one will by the construction of more or less similar words in a different will, which was adopted by a court in another case".

(15) The result of the authorities may be summed up as follows:

1. Where a power to adopt is conferred on a widow it may be either general or limited. Where the power specified the boy or boys to be adopted, it is a question of construction of the instrument whether it is a general power indicating a preference in favour of the boy or boys named, or whether it is itself limited to adopting the boy or boys named. It is an open question whether an authority to adopt a named boy without more can be construed as conferring a general power of adoption. — 'AIR 1916 Mad 1040 (A) and — 'A. I. R. 1918 Mad 1078 (B). Where the power is limited to adopting a specified boy or boys the adoption of any other boys in exercise of this power would be invalid — '14 Mad 65 (G)', and — 'AIR 1939 Mad 909 (H).

3. Where the power is general and there are not special directions then successive adoptions would be valid. — 'Suryanarayana v. Venkataramana'. 26 Mad 681 (M) and —'29 Mad. 382 P C (F)',

4. Where the power is general and special directions are attached to it then these directions must be strictly followed. If not, the adoption will be invalid notwithstanding that the authority is general. — 'AIR 1921 P C 88 (I).

5. Where the power to adopt is general and there are also special directions attached to it but those directions become impossible of observance then an adoption can validly be made in exercise of the general power. — 'Lakshminarayana Sastri v. Sundararamayya', AIR 1950 Mad 601 (N).

(16) Applying these principles and bearing in mind that the courts should not be "astute to defeat an adoption not clearly in exercise of the power" — 'Bhagwant Koer v. Dhanukdhari Prasad Singh', AIR 1919 P C 75 at p. 77 (O). I am of opinion that Ex. D. 1 conferred on Venkamma a general power to adopt and that on 11-9-1943 the persons mentioned in the will not being available for adoption she could validly adopt another boy of her choice and that the adoption of the first defendant is therefore valid.

(17) In the result this appeal is allowed and the suit is dismissed with costs of the appellant throughout.

(18) RAJAMANNAR C. J.: I agree.

B/M.K.S. Appeal allowed.

A.I.R. 1953 MADRAS 664 (Vol. 40, C.N. 254)

RAJAMANNAR C. J. AND VENKATARAMA AIYAR J.

P. Arumugham and others, Petitioners v. The State of Madras, through the Chief Secretary, Fort St. George, Madras and another, Respondents.

Civil Misc. Petn. No. 6867 of 1951 D/- 24-10-1952.

(a) **Madras Restriction of Habitual Offenders Act (6 of 1948), S. 16 — Scope.**

Section 16(1) does not contemplate the issue of a fresh notification. The language employed in S. 16(1) is "a notification shall be deemed to have been issued under S. 3 (1) of this Act." No overt action on the part of the Government is necesary for

the application of S. 16(1). If any person satisfied the conditions laid down in that sub-section, then he automatically comes within the scope of the operation of the Act. (Para 8)

(b) Madras Restriction of Habitual Offenders Act (6 of 1948), Ss. 2(4) and 16 — Validity — (Constitution of India, Art. 14).

The provisions of the Act do not contravene Art. 14 of the Constitution and as such are not invalid.

The Act cannot be said to be discriminatory merely because it left to the discretion of Government or the Magistrate to take action in respect of the same class of persons, viz., habitual offenders either under S. 110, Cr. P. C., or under the provisions of the Act or because it made a discrimination between persons coming under S. 2(4) and persons coming under S. 16(1) of the Act. AIR 1951 All 718, Applied. (Paras 9, 11)

(Difference in the scope of S. 110, Criminal P. C. and S. 16 read with S. 2(4) of Madras Act pointed out). (Para 9)

(c) Madras Restriction of Habitual Offenders Act (6 of 1948), Ss. 5, 6 and 16(1) — Validity — (Constitution of India, Art. 19(1)(d), (5).)

Though the Act undoubtedly imposes restrictions on the right of free movement of habitual offenders, the validity of the impugned provisions must be upheld as reasonable because of the purpose behind such restrictions. The restrictions imposed by Ss. 5, 6 and 16(1) are reasonable and in the interests of the general public and as such the Act cannot be said to be unconstitutional and void. (Paras 13, 14, 15 and 16)

(d) Constitution of India, Art. 19 (5) — 'Reasonable' meaning of.

The expression "reasonable" is so wide and elastic that a Court should not ordinarily strike down any restrictive provision as void as being not reasonable, unless it appears to the Court that a different view could not be taken with any justification. (Para 16)

(e) Madras Restriction of Habitual Offenders Act (6 of 1948) — Validity — (Constitution of India, Art. 20 (2).)

The provisions of the Act imposing obligations and restrictions cannot be said to be inconsistent with Art. 20 (2) of the Constitution. It is impossible to describe the restrictive precautions taken under the Act as prosecution and punishment. "Prosecuted and punished" have definite meaning and significance in the administration of criminal justice, and in that sense the impugned Act does not provide for any prosecution or punishment except it be for contravening the provisions of the Act itself, in which case there is no question of any person being prosecuted and punished for the same offence more than once. (Para 17)

K. Bhashyam, for Petitioners; Advocate-General and R. Santhanam, for Public Prosecutor, for the State.

CASES CITED:
(A) ('51) AIR 1951 All 718: 52 Cri LJ 1251
(B) ('50) AIR 1950 SC 211: 1950 SCJ 323: 52 Cri LJ 550
(C) (1940) 309 US 270: 84 Law Ed 744
(D) (1926) 274 US 200: 71 Law Ed 1000

RAJAMANNAR C. J.: The main question in this application is whether the Madras Restriction of Habitual Offenders Act (Act 6 of 1948) in its entirety or any of its provisions has become void after the coming into force of the new Constitution as being inconsistent with the provisions of Part III of it. The 16 petitioners are residents of Ramjeenagar, a village in Tiruchirapalli taluk or Tiruchirapalli District. One of them, namely, the first petitioner, was served with a memorandum of the proceedings of the District Magistrate, Tiruchirapalli, dated 12-5-1951. It is alleged that similar notices were intended to be served on the other petitioners and other persons. The memorandum is in the following terms:

"Memorandum for imposing restrictions on Habitual offenders:

It is hereby informed that as the person whose name and address is described below has been registered under the Criminal Tribes Act, 1924, and as he within a period of five years immediately preceding 29-4-1948 had been either ordered to give security for good behaviour with reference to S. 110, Cr. P. C. or convicted of an offence under S. 24 of the said Act or of a non-bailable offence under any other law, a notification is deemed to have been issued under S. 3, sub-s. (1), Restriction of the Habitual Offenders Act, 1948, he is declared to be subject to all the provisions of the said Act, and further subject to all the restrictions imposed under the Criminal Tribes Act before 29-4-1948. Further the said person is informed that he is bound to intimate to village or police officers of the place mentioned in column 5 of the schedule hereunder every change or intended change of his residence.

(By order)
Sd. G. M. Muthuswami,
for District Magistrate.
Fascimile of Muthukannu,
Huzur Head Clerk.

SCHEDULE

No.	No. under Criminal Tribes Act	Name	Father's Name	Residence	Particulars of the place to which the person is confined.
1	2	3	4	5	6
14	266/TRI/KEP	Arumugam Servai	Ponniah Palaniandi	Ramjeenagar'	Within five miles round Ramjeenagar Area.

To understand the implication of this notice and the contentions of learned counsel for the petitioners it is necessary to refer to the provisions of the impugned Act as well as the prior

enactments, namely, the Criminal Tribes Act, 1924, and the Madras Restriction of Habitual Offenders Act, 1943.

(2) The Criminal Tribes Act was passed by the Indian Legislature in 1924 and was amended by the Criminal Tribes (Madras Amendment) Act, 1943 and another amending Act of 1945. It is useful to first refer to its main provisions as they stood before the amendments. Under S. 3 of that Act, if the Provincial Government had reason to believe that any tribe, gang or class of persons or any part thereof was addicted to the systematic commission of non-bailable offences, it was empowered to declare by notification that such tribe, gang or class or part thereof was a criminal tribe for the purposes of that Act. Sections 4 to 9 deal with the registration of members of any criminal tribe or part of a criminal tribe by the District Magistrate. The District Magistrate had to publish a notice at the place where the register was to be made and other places as he thought fit calling upon all the members of the criminal tribe to appear at a time and place specified before the person appointed in that behalf and to give that person such information as may be necessary to enable him to make the register. The District Magistrate was given the power of exempting any member from registration. After the preparation of the register, no person's name could be added to the register nor any register cancelled except by or under an order in writing by the District Magistrate. Section 7, sub-s. (2) expressly provides that before the name of any person is added to the register the Magistrate shall give notice to the person concerned. Section 8 is as follows:

"Any person deeming himself aggrieved by any entry made, or proposed to be made, in such register, either when the register is first made or subsequently, may complain to the District Magistrate against such entry, and the Magistrate shall retain such person's name on the register, or enter it therein or erase it therefrom, as he may think fit."

Under S. 10 the Provincial Government may, by notification, issue in respect of any criminal tribe either or both the following directions, namely, that every registered member shall in the prescribed manner (a) report himself at fixed intervals and (b) notify his place of residence and any change or intended change of residence and any absence or intended absence from his residence. Section 11 provided that if the Provincial Government considered it expedient that any criminal tribe or any part or member of such tribe should be restricted in its or his movements to any specified area or settled in any place of residence, it could declare that such tribe, part of the tribe or member shall be restricted in its or his movements to the areas specified in the notification, or shall be settled in the place of residence so specified as the case may be. Before making such a declaration the Provincial Government had to consider certain matters set out in S. 11(2). Power to vary the specified area of restriction was given to the Government under S. 12. Sections 16 to 19 dealt with the establishment of industrial, agricultural or reformatory settlements and provided for placing members of the tribe in such settlements. There is also provision for establishing schools for children of the criminal tribe. Section 20 confers on the Provincial Government the power to make rules. Sections 21 and 22 deal with the penalties for breach of the sections or rules framed under the Act. Section 24 is a special section providing for punishment even when no actual offence is committed. It is in these terms:

"Whoever, being a registered member of any criminal tribe, is found in any place under such circumstances as to satisfy the court, —

(a) that he was about to commit or aid in the commission of, theft or robbery, or

(b) that he was waiting for an opportunity to commit theft or robbery, shall be punishable with imprisonment for a term which may extend to three years and shall also be liable to fine which may extend to one thousand rupees."

(3) The other provisions are not material for this application.

(4) This Act was amended by Madras Act 29 of 1943. The important amendments carried out by this Act are as follows:

1. The epithet "criminal" was substituted by "notified" in describing the tribe.

2. In S. 3 of the Act a proviso was added that before a notification was issued reasonable opportunity should be given to the tribe, community, group or class or part thereof which will be affected by the notification to show cause against the issue.

3. Likewise, in S. 5 a proviso was added that before registering any member the District Magistrate shall give him a reasonable opportunity to show cause against such registration.

4. A similar proviso was added to sub-s. (2) of S. 7.

5. Section 8 was deleted.

Along with this Amending Act another Act was passed, Madras Act 30 of 1943, called the Madras Restriction of Habitual Offenders Act. "Habitual offender" was defined for the purposes of the Act as meaning any person

"(a) who has committed not less than three non-bailable offences, or

(b) who has been ordered to give security for good behaviour with reference to S. 110, Cr. P. C., 1898, or

(c) who, by repute as established at a Magisterial enquiry, is addicted to the commission of offences against the public peace or against property or is of such a character that it is necessary to impose restrictions on him under this Act."

Under S. 3(1) of this Act, if the Provincial Government were satisfied that any person was a habitual offender they could declare that he shall be subject to any of the provisions of the Criminal Tribes Act, 1924 and the rules made thereunder with modifications and restrictions, if any. Section 3(3) provided for a reasonable opportunity being given to the person concerned before any notification was issued in respect of him to show cause against such issue. Section 5 barred the jurisdiction of Courts to question the validity of any notification issued under the Act. Under S. 6, the Provincial Government was empowered to make rules to carry out the purposes of the Act.

(5) The Criminal Tribes Act was repealed so far as Madras was concerned by the Criminal Tribes (Madras Repeal) Act, 1947, except for the purpose of S. 3, Madras Restriction of Habitual Offenders Act, 1943.

(6) The Madras Restriction of Habitual Offenders Act, 1948 came into force on 29-4-1948. It repealed the Madras Restriction of Habitual Offenders Act, 1943. The definition of a "habitual offender" for the purposes of this Act is as follows:

"'Habitual offender' means a person who before or after the commencement of this Act, has been sentenced to a substantive term of imprisonment, such sentence not having been set aside in appeal or revision, on not less than three occasions, for one or another of the offences under the Indian Penal Code, set forth in the schedule, each of the subsequent sentences having been passed in respect of an offence committed after the passing of the sentence on the previous occasion;

Explanation: The passing of an order requiring a person to give security for good behaviour with reference to S. 110, Cr. P. C., 1898, shall be deemed to amount to the passing of a sentence of substantive imprisonment within the meaning of this clause."

Section 3, sub-s. (1) provides that the Government may by notification declare that a person shall be subject to the provisions of the Act to such extent and subject to such restrictions if any as may be specified if they are satisfied that he is a habitual offender. They may also cancel or modify such declaration. Sub-section (2) of S. 3 provides for reasonable opportunities being given to the person concerned to show cause against such issue or modification, if the modification was to his disadvantage. Under S. 4 the Government were empowered to delegate their powers under S. 3 to a District Magistrate. The disabilities of a habitual offender are contained in Ss. 5 and 6. Every notified offender shall intimate to the prescribed authority his place of residence, every change or intended change thereof and every absence or intended absence therefrom (S. 5). The Government may by notification declare if, in their opinion it was expedient to do so, that any notified offender shall be restricted in his movements to a specified area. Before making such a declaration the Government had to consider the nature of the offences, the circumstances in which they were committed, whether the offender follows any lawful occupation genuinely or only as a pretence and the suitability of the area to which his movements are to be restricted, the manner in which he should earn his living in such area and the adequacy of the arrangements therein. Under S. 7 the Government may cancel any declaration made under S. 6 or alter any notified area. Sections 8 to 10 deal with the establishment of settlements. Section 11 relates to rule-making, and Ss. 12 to 14 to penalties and procedure. Section 16 is the most important section for the purpose of this application, and may be cited in full:

"1. In respect of every person who stood registered under the Criminal Tribes Act, 1924 (hereinafter in this section referred to as the said Act) at the commencement of this Act and who, within a period of five years immediately preceding such commencement had been either ordered to give security for good behaviour with reference to S. 110, Cr. P. C., 1898 or convicted of an offence under S. 24 of the said Act or of a non-bailable offence under any other law, a notification shall be deemed to have been issued under S. 3, sub-s. 1 of this Act, declaring him to be subject to all the provisions of this Act; and this Act shall apply to every such person accordingly.

2. Every notification issued in respect of any person under S 3, Madras Restriction of Habitual Offenders Act, 1943, and in force at the commencement of this Act, shall be deemed to have been issued under S. 3, sub-s. (1) of this Act, all references in that notification to the provisions of the said Act and the rules made under it being construed as references to the corresponding provisions of this Act and the rules made under it.

3. Any notification or order issued or made under the said Act in respect of any person referred to in sub-s. (1) or sub-s. (2), and in force at the commencement of this Act, restricting the movements of such person or placing him in a settlement shall be deemed to have been issued or made under this Act.

4. All settlements established under S. 16 of the said Act and existing at the commencement of this Act shall be deemed to have been established under S. 8 of this Act."

(7) It was not disputed that the petitioners before us stood registered under the Criminal Tribes Act, 1924 at the commencement of Madras Act 6 of 1948, i.e., 29-4-1948. Therefore, if any of them had, within a period of five years immediately preceding 29-4-1948 been either ordered to give security for good behaviour under S. 110, Cr. P. C. or was convicted of an offence under S. 24, Criminal Tribes Act or of a non-bailable offence under any other law, a notification shall be deemed to have been issued under S. 3, sub-s. (1) of the Act declaring him to be subject to all the provisions of the Act. It was not denied by the petitioner's counsel that one or other of these conditions is fulfilled in respect of every one of the petitioners. If so, under S. 16(1) a notification shall be deemed to have been issued under S. 3, sub-s. (1). Section 16(1) does not contemplate the issue of a fresh notification. Nevertheless the District Magistrate apparently thought it better to bring to the notice of the petitioners and others similarly situated the effect of S. 16 of the Act of 1948. We read the memorandum of the District Magistrate referred to earlier on in this judgment, as nothing more than an intimation to the concerned persons of the effect of the enactment. Section 16(3) declares that any notification or order issued or made under the said Act (Criminal Tribes Act) in respect of any person referred to in sub-s. (1) or sub-s. (2) which was in force at the commencement of the Act restricting the movements of such person or placing him in a settlement shall be deemed to have been issued or made under this Act. Though the memorandum of the Magistrate does not mention the relevant provisions of the Act in detail, the purport of the proceedings is clear. It is merely a reminder to the petitioners and similar persons and does not purport to be a substantive order passed under any section of the Act.

(8) If this is realised, the objection, that the notices issued are vague in character and indefinite in particulars in that they do not give the offences committed by the petitioners, the date of conviction and other details, disappears. The learned Judges who directed a 'rule nisi' to issue made a note as follows:

"We think however this petition should be admitted on another ground, namely, the de-

fects in the notification bringing the petitioners within the scope of the Act. The notification does not 'inter alia' indicate the particulars of previous convictions or registration under the Criminal Tribes Act applicable to each petitioner and is merely couched generally in terms of the alternative mentioned in S. 16(1) of Act 6 of 1948."

We too were inclined to take the same view at first. But on closer examination of the provisions of S. 16 it became evident that there was no question of any fresh notification being contemplated under that section. The language employed in S. 16(1) is "a notification shall be deemed to have been issued under S. 3(1) of this Act." No overt action on the part of the Government is necessary for the application of S. 16(1). If any person satisfied the conditions laid down in that sub-section then he automatically comes within the scope of the operation of the Act. Now it is not denied that the petitioners are all persons who stood registered under the Criminal Tribes Act, 1924, at the commencement of Madras Act 6 of 1948. Nor is it denied that every one of them has been convicted of a non-bailable offence or an offence under S. 24, Criminal Tribes Act within a period of five years immediately preceding the commencement of Act 6 of 1948. The schedule appended to the counter affidavit filed on behalf of the State, the accuracy of which was not disputed, clearly establishes the fact that every one of the petitioners comes within the mischief of S. 16(1). We therefore find that this objection is without substance.

(9) Mr. Bhashyam's main contentions on the constitutional invalidity of the provisions of the Act were based on Arts. 14 and 19(1)(d) of the Constitution. Article 14 was sought to be invoked on two grounds. The first is that the Act was discriminatory because it left to the discretion of Government or the Magistrate to take action in respect of the same class of persons, viz., habitual offenders either under S. 110, Cr. P. C. or under the provisions of the Act. Section 110, Cr. P. C,, runs thus:

"Whenever a Presidency Magistrate, District Magistrate, or Sub-divisional Magistrate of the first class specially empowered in this behalf by the Provincial Government receives information that any person within the local limits of his jurisdiction—

(a) is by habit a robber, house breaker, thief, or forger, or

(b) is by habit a receiver of stolen property knowing the same to have been stolen, or

(c) habitually protects or harbours thieves or aids in the concealment or disposal of stolen property, or

(d) habitually commits, or attempts to commit, or abets the commission of, the offence of kidnapping, abduction, extortion, cheating or mischief, or any offence punishable under Chap. XII, I. P. C., or under S. 489-A, S. 489-B, S. 489-C or S. 489-D of that Code, or

(e) habitually commits, or attempts to commit, or abets the commission of offences involving a breach of the peace, or

(f) is so desperate and dangerous as to render his being at large without security hazardous to the community.

Such Magistrate, may, in manner hereinafter provided, require such person to show cause why he should not be ordered to execute a bond, with sureties, for his good behaviour for such period, not exceeding three years, as the Magistrate thinks fit to fix."

A comparison of this section with S. 2(4) which defines "habitual offender" and S. 16, sub-s. (1) which brings certain registered members of tribes notified under the Criminal Tribes Act within the Act demonstrates the difference in the scope of the two enactments. Persons who can be dealt with under S. 110, Cr. P. C. may not necessarily fall within the definition of "habitual offender" in the Act though a "habitual offender" within the meaning of S. 2(4) of the Act may be liable to be proceeded against under S. 110, Cr. P. C. In that case there is nothing to prevent such a person being dealt with both under the Act and under S. 110 of the Code. It will not be accurate to say that the same person is being punished twice for the same offence because neither a declaration under S. 3(1) of the Act nor an order under S. 110 of the Code can be said to be tantamount to punishment for an offence. Both enactments only provide for safeguards in the public interests, in one case the safeguard consisting in the execution of a security bond for good behaviour and in the other consisting in restriction of movement and an obligation to intimate the whereabouts of the person.

(10) Mr. Bhashyam relied on the decision in — 'Deodat Rai v. State', AIR 1951 All 718 (A), in support of this contention of his. There the learned Judges were dealing with the provisions of an Act similar to Madras Act 6 of 1948 but certainly not in 'pari materia'. The main provision of that Act is S. 3 which lays down that if a Magistrate is, on a police report or otherwise, satisfied with respect to any person that he is by repute a bad character and is either a habitual offender or a person who habitually manufactures, imports or sells an intoxicant in contravention of the provisions of the Excise Act of that State or is a keeper of a gambling den or a person who has committed or is about to commit a non-bailable offence contained in Chapter XVI or XVII, I. P. C., or that he is a person who habitually commits or attempts to commit or abets the commission of offences involving a breach of the peace or that he is a person who is so dangerous as to render his being at large without security hazardous to the community, he (that is, the Magistrate) may cause to be served on such person a notice to show cause why he should not be ordered to enter into a bond for his good behaviour or keeping the peace or both. In addition to the order, requiring the person to enter into a bond the Magistrate may also require such person to leave the State if he is not a resident of that State or to leave such area as may be specified or to report his presence or movements in such manner as may be specified. The learned Judges held that the Act is discriminatory; the discrimination lay in the fact that some are left to be prosecuted under S. 110 of the Code while the others are prosecuted under the Act, according to the fancy or whim of the Magistrate or the Police who moved him. Desai J. says:

"It was open to the Legislature of Uttar Pradesh to make a special law regarding habitual criminals or offenders. Making one law for habitual criminals and another law for other criminals would not, by itself, contravene Art. 14. Habitual criminals would, of necessity, require a different treatment; so

long as the treatment meted out to them has some reasonable connection with their being habitual criminals, they cannot complain on the ground of inequality of laws. But the law regarding habitual criminals must apply to all habitual criminals alike and should not discriminate between some and others. The impugned Act, however, discriminates between habitual criminals who have acquired a bad reputation and others who have not and the difference in the treatment meted out to them has no intelligible connection with the acquisition, or non-acquisition of a reputation as bad character. There is no reason why habitual criminals who have not acquired a bad reputation should be dealt with under S. 110 of the Code while those who have acquired a bad reputation may be dealt with under the Act."

Earlier on in his judgment the learned Judge sums up the law as regards the classification and discrimination thus:

"The law that I gather from the above authorities is this. It is absurd to speak of one law for all circumstances; it is sheer impossibility because there must be different laws to deal with different circumstances. What the equal protection clause means is simply this that the same law should govern those similarly circumstanced; it cannot and does not prohibit different laws for these differently circumstanced. The Legislature has full freedom to classify people according to circumstances and enact different laws for different classes; but it must treat equally all similarly circumstanced or falling in one class and the difference in treatment must have some intelligible or rational connection with the difference in circumstances and not be arbitrary. Discrimination among persons in one class or similarly circumstanced whether apparent on the face of the statute or resulting in practice is all that is prohibited under the clause. It is competent for the Legislature to leave it to the discretion of an authority to apply different laws to people in different circumstances but always provided that it lays down a rational standard to guide its discretion or such a standard can be presumed to exist; it cannot leave it to its arbitrary or naked discretion."

(11) With these general observations we are in entire agreement. Whether, applying these general principles, learned Judges were right in holding that the Uttar Pradesh Act which they were considering was unconstitutional in certain respects, it is not necessary for us to say. But clearly these principles have not been violated by the provisions of the Madras Act, which differs widely from the Uttar Pradesh Act. It is obvious that all persons against whom action can be taken under S. 110. Cr. P. C. would not necessarily fall within the definition of "habitual offenders" in S. 2(4) or within S. 16(1) of the Act. There may be instances of overlapping in the sense that the same person may fall within the scope of both the enactments. But then, in such a case action could be taken under both.

(12) Mr. Bhashyam, then contended that the Act also made a discrimination between persons coming under S. 2(4) and persons coming under S 16(1) of the Act. Under S. 3(1) the discretion is vested in the Government or the District Magistrate to whom the powers of Government are delegated to declare or not to declare a person to be subject to the provisions of the Act. It is also provided that before any notification is issued in respect of any person under sub-s. (1) of S. 3 a reasonable opportunity shall be given to him to show cause against such issue of a notification. But under S. 16, sub-s. (1), there is no discretion vested in the Government nor is there any provision for a reasonable opportunity being given to a person who is deemed to be subject to all the provisions of the Act. Undoubtedly this difference is real. But the question is whether persons falling within S. 2(4) and persons falling within S. 16(1) can be said to be both similarly situated. We think not.

A person may be registered as a member of a notified tribe under the Criminal Tribes Act even if he has not actually committed any of the offences mentioned in S. 2(4) of the Act & even though he may not have been required to give security for good behaviour under S. 110, Cr. P. C. He might have been registered because he happened to be a member of a tribe which is addicted to the systematic commission of non-bailable offences. If before the registration under the Criminal Tribes Act a person is given an opportunity to show cause why his name should not be entered in the register or if after the registration a person included in the register is given an opportunity of getting his name removed, it may be said that the Legislature did not find any necessity for again giving him an opportunity to show cause against the application of the Act to him. But the Government may cancel the declaration which is deemed to have been made under S. 3(1). This the Government can do not only in the case of persons falling within S. 2(4) but also in the case of persons falling under S. 16(1) of the Act. Though it might have been more satisfactory if even persons falling under S. 16(1) had been given an opportunity to show cause against the automatic application of the Act to them, yet we cannot hold that because there is no such provision, the Act is discriminatory.

(13) The next contention of Mr. Bhashyam was that the provisions of the Act are inconsistent with Art. 19(1)(d) of the Constitution which confers the right on all citizens "to move freely throughout the territory of India". Subclause (d) has of course to be read with Art. 19 (5) which runs as follows:

"Nothing in sub-cls. (d), (e) and (f) of the said clause (Cl. 1) shall affect the operation of any existing law in so far as it imposes, or prevent the State from making any law imposing, reasonable restrictions on the exercise of any of the rights conferred by the said sub-clauses either in the interests of the general public or for the protection of the interests of any schedule tribe."

Undoubtedly the Act does impose restrictions on the right of free movement. The question therefore is whether the restrictions imposed can be said to be reasonable and in the interests of the general public, because in this case it is not suggested that the restrictions are for the protection of the interests of any schedule tribe. It has been pointed out time and again that there cannot be any precise or exhaustive definition of the term "reasonable" nor can any definite tests be laid down to ascertain whether a particular restriction is or is not in the interests of the general public. In this case,

however, we do not think that it can be seriously contended that the restrictions imposed by the Act are not in the interests of the general public. Obviously the purpose of the Act is to prevent the commission of crime by persons who by reason of hereditary and traditional inclinations or by inherent nature are prone to commit serious offence. Any legislation which has such a purpose must necessarily be in the interests of the general public who must be protected against a comparatively small section of the community likely to injure the members of the entire community.

(14) Are the restrictions then reasonable? Mr. Bhashyam contended that they are not. He impugned both the substantive and procedural provisions of the Act as not being reasonable. Section 5 only requires every notified offender to intimate to the prescribed authority his place of residence and every change or intended change thereof and every absence or intended absence therefrom. The section does impose obligations on a notified offender which it does not impose on other citizens. But there are many other conceivable cases in which intimation of change of residence and notice of absence is necessary. Sometimes such intimation is necessary for official purposes. We see nothing in the provisions of this section which can be said to impose restrictions on the right of free movement, still less any unreasonable restrictions on that right.

(15) Section 6 undoubtedly, indeed expressly, provides for the restriction of the movements of notified offenders. It is not every notified offender that is made subject to the restrictions under this section. It is only if, in the opinion of the Government, it is expedient to do so in the case of any particular notified offender that a notification declares him to be restricted in his movements to a specified area. Before making such a declaration the Government have to consider several important facts and circumstances, for example, the nature of the offences of which the offender has been convicted and the circumstances in which they were committed and whether the offender follows any lawful and bona fide occupation. The suitability of the area to which his movements are to be restricted has also to be considered and the Government should have regard to the opportunity which the offender is likely to have to earn his living in such area adequately. The obvious intention is that these restrictions are imposed only on persons whose record shows that they are likely to be a menace to the general public. The Government are also empowered under S. 7 to cancel any declaration made under S. 6. In —'Dr. N. B. Khare v. State of Delhi', AIR 1950 S. C. 211(B), the Supreme Court upheld an externment order which restricted the movements of Dr. Khare in the interests of public safety. It is true that the action in that case was taken under a temporary enactment, whereas the Restriction of Habitual Offenders Act is a permanent one. It is also true that the notification imposing restrictions under S. 6 need not fix any period. If the Government do not choose to cancel the declaration the restrictions may continue till the end of the life of the notified offender. Nevertheless we think that the validity of the impugned provisions must be upheld as reasonable because of the purpose behind such restriction. It is assumed that the notified offenders are persons who commit serious offences by habit and not on momentary provocation. If the movements of such persons are not restricted and they are allowed to be at large it may be difficult for the Government through their police to have a control over them and prevent them from committing offences. In spite of the provisions of the Criminal Tribes Act being applied to them we find from the schedule appended to the counter affidavit filed on behalf of the State that some of the petitioners who belong to Tiruchirapalli district have been convicted of offences at Jamshedpur, Jullunder, Poona, Bombay, Alipore and Ranchi. We hold, therefore, that S. 6 of the Act is not void as the restrictions imposed by it must be deemed to be reasonable and in the interests of the general public.

(16) Mr. Bhashyam then contended that the procedural provisions of the Act are not reasonable in so far as they relate to persons coming under S. 16(1) of the Act. There are safeguards against hasty and illconsidered action so far as persons falling within the definition of S. 2(4) of the Act are concerned. Firstly, they are given an opportunity to show cause against the issue of a notification under S. 3(1). The Government are given discretion to issue or not to issue a notification. The rules framed under the Act provide even for the filing of a written statement and permit the person against whom action is intended to be taken to appear in person or by pleader. But in the case of a person coming under S. 16(1), learned counsel submitted there is no such opportunity given. He drew our attention to the two decisions of the Supreme Court of United States in Minnesota Ex. Rel. —'Pearson v. Probate Court', (1940) 84 Law Ed. 744(C) and —'Buck v. Bell', (1926) 71 Law Ed. 1000(D), to show that before the fundamental rights of a citizen are curtailed adequate safeguards are provided to ensure against the misapplication of the provisions of a statute which has the effect of so curtailing his rights. There is some force in this complaint. An opportunity to show cause against the application of the Act to a person coming under S. 16(1) was evidently thought unnecessary presumably because such person had that opportunity before he was notified under the Criminal Tribes Act. Section 8 of the original Act gave an opportunity to any person deeming himself aggrieved by any entry made or 'proposed to be made' in the register of notified persons to complain to the District Magistrate. The amendments to the Act made by Act 29 of 1943 expressly provided for a reasonable opportunity to show cause against the issue of a general notification under S. 3 and before the registration of any member of the notified tribe. The fact however remains that such opportunity would have been given only before the passing of Madras Act 6 of 1948 and a long time might have elapsed since the registration under the Criminal Tribes Act. It would have been more satisfactory, if, before the new Act of 1948 was made applicable, the person concerned had been given an opportunity to show cause against it and the Government had a discretion either to issue or not to issue a notification under S. 3(1). Nevertheless we do not feel constrained to hold that on this account S. 16(1) is void. The expression "rea-

sonable" is so wide and elastic that a Court should not ordinarily strike down any restrictive provision as void as being not reasonable, unless it appears to the Court that a different view could not be taken with any justification.

(17) Lastly, Mr. Bhashyam contended that the provisions of the Act imposing obligations and restrictions are inconsistent with Art. 20(2) of the Constitution which says : "No person shall be prosecuted and punished for the same offence more than once". It is impossible to describe the restrictive precautions taken under the Act as prosecution and punishment. "Prosecuted and punished" have definite meaning and significance in the administration of criminal justice, and in that sense the impugned Act does not provide for any prosecution or punishment except it be for contravening the provisions of the Act itself, in which case there is no question of any person being prosecuted and punished for the same offence more than once. There is nothing in this objection.

(18) Mr. Bhashyam referred to the general policy of all civilised Governments to reclaim even the worst offenders and to make them honest citizens of the land by improving their conditions and giving them opportunities to lead a clean life and urged that the Act is not in accordance with such a policy as it more or less segregates certain persons as perpetual offenders. It is not the province of this Court to embark on considerations of policy. The Legislature might feel that certain restrictions are necessary in the interests of general security and make special provision for settling those persons, though it is neither adequate nor comprehensive. In any event we cannot hold that any of the provisions of the Restriction of Habitual Offenders Act is unconstitutional and void because it is not in consonance with social idea.

(19) The application is therefore dismissed. There will be no order as to costs.

A/K.S. Application dismissed.

A.I.R. 1953 MADRAS 671 (Vol. 40, C.N. 255)

CHANDRA REDDI J.

Kumarasami Chetti, Appellant v. T. R. Subramania Iyer, Respondent.

Second Appeal No. 767 of 1948, D/- 17-1-1952.

(a) Evidence Act (1872), S. 115 — Section creates estoppel by inconsistent position taken. **(Para 21)**

Anno: Evidence Act, S. 115 N. 26.

(b) Civil P. C. (1908), O. 21 R. 91 — Sale under Madras Estates Land Act — (Tenancy Laws — Madras Estates Land Act (1 of 1908), Ss. 131 and 192 (1)).

Since O. 21 R. 91 is not one of the provisions that have been excluded by S.192(1), Madras Estates Land Act, an auction purchaser in a sale under that Act is entitled to resort to this provision of law. There is no repugnancy between O. 21 R. 91 and S. 131, Madras Estates Land Act. (Paras 19 and 20)

Anno: C.P.C., O. 21 R. 91 N. 1.

R. Gopalaswami Iyengar, for Appellant; M. S. Venkatarama Iyer, for Respondent.

CASES CITED:
(A) (1921) 91 LJKB 39: (1921) 2 KB 608
(B) (1819) 4 ER 1: 1 Bligh 1
(C) (1908) 77 LJPC 64: (1908) AC 224
(D) ('38) AIR 1938 Mad 1004: 1938-2 Mad LJ 835

JUDGMENT: The plaintiff is the appellant. He sued for the recovery of a sum of Rs. 1099-10-0. Though decreed in the trial Court, the suit was dismissed on appeal by the Subordinate Judge of Kumbakonam. The suit was instituted in the following circumstances:

(2) The respondent herein, a land-holder, obtained a decree against one of his tenants one Balasubramania Padayachi, for arrears of rent in S. S. No. 28 of 1937 on the file of the Revenue Divisional Officer, Kumbakonam, and, in execution thereof, brought the tenant's holding to sale. The property was purchased by the appellant on 5-7-1943. Within 30 days of the sale, the judgment-debtor instituted proceedings under S. 131, Madras Estates Land Act for setting aside the sale. This application was opposed by the appellant, who was the auction-purchaser, mainly on two grounds. The first was that the applicant did not comply with the requirements of S. 131, Madras Estates Land Act and the second was that the applicant had no subsisting interest in the property to enable him to maintain the application, the property having been purchased by third parties in execution of a money decree against him long before and the transfer having been recognised by the land-holder.

These objections prevailed with the Sub-Collector, Kumbakonam, who heard the application with the resul that the petition was dismissed. Thereupon the appellant obtained the usual sale certificate and also possession of the property through Court on 2-9-1943. Subsequently, the appellant attached the surplus sale proceeds in execution of a decree, which he obtained against the above mentioned Balasubramania Padayachi. When a claim was preferred by the widow of the purchaser in execution of the money decree to the surplus sale proceeds on the ground that the property in dispute belonged to her husband by virtue of the earlier sale, the appellant objected to the same and contended that the sale proceeds belonged to his judgment-debtor. The executing Court agreed with his objection and dismissed the claim petition with the consequence that he could proceed against the surplus sale proceeds in execution of his decree.

Sometime thereafter, one Venkatarama Aiyar, who acquired interest in the suit properties by a series of transactions filed a suit O. S. No. 237 of 1944, alleging that the property in question was purchased by his predecessor-in-interest in execution of a money decree and the transfer having been recognised by the land-holder the judgment-debtor Balasubramania Padayachi had no subsisting interest in the property and therefore the subsequent sale had no effect at all and would not, in any way, prejudice the purchase of these properties by his predecessor-in-interest.

(3) In spite of the opposition by the present appellant, the suit was decreed and, in execution of the decree, he was dispossessed. It may be mentioned here that one of the grounds of the judgment in Venkatarama Aiyar's suit was the statement of the appellant that, on the date when the property was brought to sale in

execution of the decree in S. S. No. 28 of 1937, the judgment-debtor had no saleable interest in the property, the title therein having long before passed to the purchaser of the same earlier in execution of another decree and the transfer having been recognised by the land-holder.

(4) It is as a result of his having lost possession of the property that the present suit came to be laid. The plaint claim was made up of Rs. 750 being the purchase money which he paid, Rs. 115-7-0 being the costs in O. S. No. 237 of 1944 and Rs. 100 being the costs incurred by him and the balance as interest at 6 per cent per annum on the amounts due to him. The contention put forward by the plaintiff in the plaint was that, as the sale was void 'ab initio' and that nothing was purchased by him at the Court auction, the defendant was bound to make good the purchase money, which he deposited into Court.

(5) The suit was resisted on various grounds, the chief of them being that the purchasers at the Court auction in execution of the decree in O. S. No. 193 of 1933 did not comply with the procedure laid down in Ss. 145 and 147, Madras Estates Land Act with the result that his judgment-debtor continued to be the registered 'pattadar' and (consequently, the defendant could validly bring the properties to sale, without impleading the previous auction purchasers and that, secondly, the plaintiff was estopped from questioning the validity of the sale, having adopted the same on two earlier occasions.

(6) The trial Court decreed the suit, agreeing with the contentions put forward on behalf of the plaintiff that the sale was 'ab initio' void, as, at the time of the court auction, the judgment-debtor had no subsisting interest in the property and that there was nothing which the plaintiff could purchase at that sale & that the plaintiff was not estopped from contending that the sale was void.

(7) On appeal, the Subordinate Judge reversed the judgment of the trial Court. His view was that the non-compliance by the purchasers in the earlier court auction with the procedure laid down in Ss. 145 and 147 enabled the land-holder to bring the property to sale validly and the failure to bring on record the transferees did not affect the legality of the sale. He was also of the opinion that the plaintiff was precluded from attacking the validity of the sale, having regard to the attitude adopted by him both with regard to the application for setting aside the sale and the attachment of the surplus sale proceeds.

(8) The correctness of this decision is questioned in this second appeal on both the points by Mr. Gopalaswami Aiyangar, the learned counsel for the appellant. It is argued for the appellant that the lower appellate Court erred in not giving a definite finding on the question, whether the land-holder had recognised the transfer. I entirely agree with Mr. Gopalaswami Aiyangar that the lower appellate Court took an erroneous view of the law and failed to consider that point and if my decision is to rest on this, I would have to call upon the lower appellate Court to go into that matter and give a finding. But in the view I take of the other point, it looks to me to be unnecessary to adopt the course indicated above. The second appeal can be disposed of on the other ground of decision adopted by the lower appellate Court. As I have already stated above, the lower appellate Court took the view that the plaintiff was precluded from contending that the sale was not valid. Mr. Venkatarama Aiyar, the learned counsel for the respondent, supports the judgment of the lower appellate Court on this aspect of the case by citing to me certain decisions, which I will refer to presently.

(9) Mr. Gopalaswami Aiyangar canvasses the finding of the lower appellate Court on this point and contends that there can be no question of any estoppel in a case like this. The rule of estoppel is embodied in S. 115, Evidence Act. Section 115 runs thus:

> "When one person has, by his declaration, act or omission, intentionally caused or permitted another person to believe a thing to be true and to act upon such belief, neither he nor his representative shall be allowed in any suit or proceeding between himself and such person, or his representative, to deny the truth of that thing.
>
> 'Illustration:' 'A' intentionally and falsely leads 'B' to believe that certain land belongs to 'A', and thereby induces 'B' to buy and pay for it. The land afterwards becomes the property of 'A' and 'A' seeks to set aside the sale on the ground that at the time of the sale he had no title. He must not be allowed to prove his want of title."

(10) Based on this section, the contention of Mr. Gopalaswami Aiyangar is that there was no declaration, act or omission attributable to the plaintiff, acting upon which the defendant was, in any way, prejudiced. It is not necessary for me to consider the soundness of the proposition put forward by Mr. Gopalaswami Aiyangar. The plaintiff was non-suited in the lower appellate Court which invoked the rule against approbate and reprobate in support of its judgment.

(11) This doctrine is tersely stated by Scrutton L. J. in — 'Verschures Creameries Ltd. v. Hull and Netherlands Steamship Co.', (1921) 2-KB 608 (A). What happened there was this. Certain goods were delivered by the owners to the forwarding agents for forwarding them to a customer in Manchester. Before the goods were actually delivered to the customer the owners directed the agents not to deliver them to the customer. Despite this, the agents delivered the goods to the customer. The owners thereupon invoiced the goods to the customer and also sued him for recovery of the amount. The owners, having failed to get satisfaction of the decree, wanted to proceed against the agents. The question was whether the owners could proceed against the agents also having elected first to proceed against the customer. The Court of appeal held that the owners could not proceed against the agents. Dealing with the argument put forward on behalf of the owners that it was not easy to see why the act of the owners should enure to the benefit of the agents, who were no parties to the action for goods sold and delivered and who have in no way altered their position in consequence of any election involved in bringing that action, Scrutton L. J. summed up the position thus:

> "A plaintiff is not permitted to 'approbate and reprobate'. The phrase is apparently borrowed from the Scotch law, where it is used to express the principle embodied in our doctrine of election, viz., that no party can accept and

reject the same instrument, — 'Ker v. Wauchope, (1819) 1 Bligh 1, 21 (B); — 'Douglas Menzies v. Umphelby', (1908) A C 224, 232 (C). The doctrine of election is not, however, confined to instruments. A person cannot say at one time that a transaction is valid and thereby obtain some advantage to which he could only be entitled on the footing that it is valid, and then turn round and say that it is void for purpose of securing some other advantage. This is to approbate and reprobate the transaction."

(12) This principle was applied to the case of a sale in our Court by Burn J. in — 'Bonagiri Sreeramulu v. Venkatanarasimham', AIR 1938 Mad 1004 (D). There a person, who had a decree against a father and his three sons, first objected to the sale of the son's share in the joint family properties by the Official Receiver in the insolvency of the father. He then allowed the sale and also took part in it. After the sale was concluded, he protested against it but later on he not only withdrew his protest but received his share of the sale proceeds from the Official Receiver's sale. Having done all this, he sought to bring to sale the son's share in the joint family property in execution of his decree. When the matter came up finally before this Court, it was decided by Burn J. that having approved of the sale, as seen from the various acts of his, he was precluded from contending subsequently that the sale was void.

(13) Mr. Gopalaswami Aiyangar, the learned counsel for the appellant sought to distinguish those decisions on the ground that in this case it is not the appellant that is repudiating the sale but it is the decree of the Court that has resulted in rendering the sale void and depriving the appellant of the possession of the property. His argument is that the interposition of a decree makes all the difference and the decisions cited by Mr. Venkatarama Aiyar have no application to this case. I do not think I can agree.

(14) No doubt it is the decree that has deprived the appellant of the property. But it cannot be overlooked that the appellant was fully aware of the situation, viz., that the judgment-debtor at the time of the sale had no subsisting interest, he having lost all his interest long before the property was brought to sale and the transfer having been recognised by the land-holder as can be seen from his assertion in the proceedings for setting aside the sale and yet he deliberately chose to stand by it and obtained an advantage for himself.

(15) The decree in question was only the result of facts and circumstances which rendered the sale 'ab initio' void of which the appellant was fully aware. Having adopted the sale as a valid one with full knowledge that the sale was a void one and that he purchased nothing at that sale, for his own purpose, and thereby obtained an advantage he cannot turn round and say that he must be put back in the same position in which he was prior to the sale, merely because it turns out later on that the course followed by him was to his disadvantage.

(16) It was next urged by Mr. Gopalaswami Aiyangar that the rule against approbate and reprobate is nothing but another form of estoppel and can have no application to a case like this. He referred me to a passage in the Law of Estoppel by representation by Spencer Bower at page 214. The passage runs thus:

> "The basic principle underlying all these cases is that where 'A', dealing with 'B', is confronted with two alternatives and mutually exclusive courses of action in relation to such dealing, between which he may make his election and 'A' therefore so conducts himself as reasonably to induce 'B' to believe that he is intending definitely to adopt the one course, and definitely to reject or relinquish the other, and in such belief alters his position to his detriment, 'A' is precluded, as against 'B', from afterwards resorting to the course which he has thus deliberately declared his intention of rejecting. This principle is in some of the authorities enunciated, without the actual use of the word 'estoppel', as if it were part of the doctrine of 'election' or 'waiver', or is expressed in the form of the rule against 'approbation and reprobation'."

(17) What is argued by Mr. Gopalaswami Aiyangar, is that the rule against approbate and reprobate or the rule of election would arise only in cases, where two remedies are open, but if a party has only one remedy, it cannot be said that he could elect a remedy. He contended further that the cause of action, so far as his client was concerned was the deprivation of possession of the property and, so long as his possession was not disturbed, he had no cause of action to sue the decree-holder for refund of the amount, which he deposited under the void sale. I do not think I agree with him. In this case, at the time when he opposed the application for setting aside the sale, two remedies were open to him. One was to have the sale set aside and get back his money and the other was to stand by the sale and take the consequences.

(18) Under O. 21 R. 91, Civil C. P. the auction purchaser can have a sale set aside in certain circumstances. That rule is in the following words :

> "The purchaser at any such sale in execution of a decree may apply to the Court to set aside the sale on the ground that the judgment-debtor had no saleable interest in the property sold."

The question is whether this provision of law is applicable to sales held under the Madras Estates Land Act. S. 192, sub-s. (1), Madras Estates Land Act lays down that the Provincial Government may from time to time make rules consistent with this Act declaring that any provision of the C. P. C., 1908, shall not apply to suits, applications, appeals or other proceedings under this Act in any civil or revenue Court or to any specified classes of such suits, applications, appeals or proceedings or to applications or other proceedings before the tribunal constituted under S. 185-A or shall apply to them subject to modifications and additions specified in the rules.

(19) It is clear from this section that unless any of the provisions of the Civil Procedure Code are specifically excluded, they will have application to suits, applications or appeals or other proceedings under the Madras Estates Land Act. Since O. 21, R. 91 is not one of the provisions that has been excluded, an auction purchaser is entitled to resort to this provision of law and to have the sale set aside on the ground that the judgment-debtor had no saleable interest in the property sold. If so, in this case the auction

purchaser, that is the appellant, could pursue his remedy and get back his money.

(20) Mr. Gopalaswami Aiyangar seeks to get over this by arguing that since this provision is repugnant to the provisions of S. 131, Madras Estates Land Act, the remedy under O. 21 R. 91 is not available to an auction purchaser like the present appellant. I do not think there is any force in this contention. S. 131, Madras Estates Land Act provides only for setting aside a sale by a judgment-debtor and does not contemplate an application by the auction purchaser for that purpose. So, there is no repugnancy between O. 21 R. 91 and S. 131, Madras Estates Land Act which, in my opinion, corresponds to O. 21 R. 89, the former contemplating an application by the auction purchaser and the latter an application by the judgment-debtor.

It is thus clear that there were two remedies open to the auction purchaser (1) to repudiate the sale, have it set aside and get back the amount, which he deposited and (2) to adopt it and get whatever advantage he could therefrom. Despite his knowledge about the nature of the sale, he chose to affirm it and stand by it. In view of the fact that, in this case the auction purchaser could avail himself of O. 21 R. 91, having known the defects in the sale before its confirmation, it is unnecessary for me to consider the question whether a purchaser at an auction sale, which turns out to be 'ab initio' void has to wait till he is deprived of the possession of the property and has no remedy to repudiate the sale and claim a refund of the purchase money before that, in spite of his knowledge that no title passed to him in the property since the judgment-debtor had none at the time of the sale.

(21) My conclusion is that a person, who adopts a sale with full knowledge that nothing was purchased by him at the sale by reason of the judgment-debtor having ceased to have any interest therein and derives some benefit thereby, is precluded from subsequently contending that the sale was void and that he should get a refund of the purchase money. To such a person, the doctrine that a person cannot approbate and reprobate is applicable.

(22) In the result, the second appeal fails and is dismissed. No costs in this Court. Leave granted.

B/V.R.B. Appeal dismissed.

A.I.R. 1953 MADRAS 674 (Vol. 40, C. N. 256)

RAMASWAMI J.

Annamalai Reddi and others, Petitioners v. Abdul Sathar Sahib, Respondent.

Criminal Revn. Case No. 131 of 1952 and Criminal Revn. Petn. No. 122 of 1952, D/- 9-9-1952.

(a) Criminal P. C. (1898), S. 133 — Petitions under Chaps. 11 and 12 — Magistrate can proceed under S. 133.

Though the petitions are presented under Chaps. 11 and 12, it is perfectly competent for a Magistrate to proceed under S. 133. Section 133 does not oust the jurisdiction of a Magistrate to proceed under S. 147 and vice versa. The only restriction naturally is that when proceedings are insituted and action taken under S. 133, orders under Section 147 cannot be passed since the two sets of proceedings are under entirely different chapters, governed by different procedures in detail, and orders are made for entirely different purposes. 4 Mad 121 and Obiter in 1 Weir 143, Held not followed in AIR 1914 Mad 712; 12 Cri LJ 43 (Cal), Rel. on. (Para 8)

Anno: Cr. P. C., S. 133 N. 5.

(b) Criminal P. C. (1898), Ss. 133 to 137 — Order under, when can be passed, indicated: Case law discussed. (Para 7)

Anno: Cr. P. C., S. 133 N. 3.

(c) Criminal P. C. (1898), S. 133 — Public nuisance — Shops walled from outside — This is both an obstruction and public nuisance, since it affects unascertained members of public whose ordinary avocation may take them to neighbourhood of the shops. (Para 6)

Anno: Cr. P. C., S. 133 N. 10, 14.

L. S. Veeraraghava Iyer, for Petitioners; V. Rajagopalachari, for Respondent; Public Prosecutor, for the State.

CASES CITED:
(A) ('98) 1898 All WN 141: 20 All 501
(B) ('68) 9 WR (Cr.) 70
(C) ('02) 4 Bom LR 687
(D) ('85) 11 Cal 8
(E) 2 Weir 61
(F) (1900) 4 Cal WN 596
(G) ('86) 12 Cal 137
(H) ('86) 12 Cal 696
(I) ('90) 17 Cal 562
(J) ('88) 15 Cal 564
(K) ('99) 3 Cal WN 345
(L) ('98) 2 Cal WN 554
(M) ('96) 23 Cal 499
(N) ('01) 1901 All WN 30: 23 All 159
(O) ('04) 8 Cal WN 143
(P) ('98) 22 Bom 988
(Q) ('05) 2 Cri LJ 517: 28 All 98: 1905 All WN 202
(R) ('04) 9 Cal WN 72: 31 Cal 979
(S) ('98) 25 Cal 278
(T) ('03) 7 Cal WN 117
(U) ('05) 2 Cri LJ 349: 1 Cal LJ 434
(V) ('82) 2 Weir 113: 4 Mad 121
(W) ('93) 1 Weir 143
(X) ('14) AIR 1914 Mad 712: 26 Mad LJ 233: 15 Cri LJ 362
(Y) ('11) 15 Cal WN 667: 12 Cri LJ 43

ORDER: This is a Criminal Revision case which has been filed against an order made under S. 143, Criminal P. C.

(2) The facts are: On proceedings which were initiated by petitions under S. 147, Criminal P. C., but which were taken on file and proceeded with under Ss. 133 to 143, Criminal P. C., Chap. 10 (Public Nuisance) this order under S. 143 came to be made in regard to the putting up of a wall in front of certain shops in Avalurpet village. In the village of Avalurpet there is Grama Natham of the extent of 7 cents adjoining the village and comprised in R. S. 150/1A. On the eastern side of this Grama Natham and inside that Grama Natham there are number of shops belonging to Abdul Sathar Sahib. This village of Avalurpet consists of an overwhelming majority of Hindus and a small minority of Muslims. These Muslims among themselves are divided. The owners of these shops and other shops and supporting this Abdul Sathar Sahib are Muslim householders consisting of ten in number. There can be no dispute that in 1950 feelings between these ten

Muslim householders and the Hindu inhabitants had became strained. Therefore what the Hindu respondents did was that they put up a wall practically adjoining the front of these shops and purported to enclose the rest of the Grama Natham and made it into Gandhi Park. On a portion of this Grama Natham a masonry platform has been put up on which a statue of Mahatma Gandhi has been installed and another cement platform has been put up but without anything being erected thereon.

The learned Magistrate who enquired into this matter and who inspected this area found that this alleged conversion of the site into a park was nothing more than a mere pretence. He found there no shrubs or flower plants excepting two old rain trees. The only substantial structure was the cement granite wall six feet high put up in front of these shops and practically adjoining it and with a small opening at the place shown in the plan filed in this case. This opening itself was secured by doors and it was locked and the key was with respondent 2. In other words, by constructing this wall the respondents effectively walled-in the shops and cut off all access thereto by the villagers. The result was that the shops remained closed for three months. Only after the Sub-Collector of Tindivanam came to the spot, he opened the door at DE and the shops became accessible through that opening. The narrow passage left between the front of the shops and the wall and the narrow opening let into the wall made the shops, according to the learned Magistrate who inspected the place, to look like cells in a prison enclosed by high prison walls and within the enclosure with very little elbowroom.

Therefore Abdul Samad Sahib, one of the shop-keepers therein, filed an application under S. 145, Criminal P. C., against Annamalai Reddi and two others in the Court of the Sub-Divisional Magistrate, Tindivanam, on 31-1-50. Another application under Ss. 144, 147 and 148 was filed by Abdul Sathar Sahib, the undivided brother of that Abdul Samad Sahib, against the same respondents in respect of some other shop there on 3-2-1950. The former application was referred to the Civil Inspector of Police, Gingee, for report. The Circle Inspector who has inspected the place and who has been examined as a prosecution witness testified that he visited the place on 6-2-1950 and submitted his report Ex. P-2 and warned the Hindus not to persist in this course of conduct and that they did not heed his words and that he then visited the spot on 8-3-50 along with the District Superintendent of Police and they found the state of things unaltered and these Muslims shop-keepers put to trouble. Then these proceedings were proceeded with under S. 133 and which it was perfectly competent for the Magistrate to do though the proceedings were presented under Chaps. 11 and 12, Criminal P. C. There is no dispute that the correct procedure prescribed under Ss. 133 and 143 had been followed in this case. The learned Magistrate came to the conclusion that the place on which this wall had been constructed is a public place and a public way and that it constitutes an obstruction and a nuisance and that the public right set up by the respondents is bogus and passed an order for demolition of the same and it is against this order that the present Criminal Revision has been filed.

(3) In this case we have to consider four points viz., (i) whether the wall which has been ordered to be demolished has been put up in a public way or a public place; (ii) whether it constitutes an obstruction and a nuisance; (iii) whether the public right set up by the respondents (in the lower Court) is bogus or bona fide & (iv) whether in a petition under S. 147 the Magistrate can proceed under Chap. 10, Ss. 133-143, Criminal P. C.

(4) On all these three points I have come to the same conclusion as the learned Magistrate and here are my reasons.

(5) Point 1:— That the place on which this wall has been constructed is a public place and a public way cannot be seriously disputed. The place itself is registered as Grama Nathan bearing R. S. No. 150/1A. It is in evidence that the public are using it not for the celebration of Muthalamman and Mariamman festivals as was sought to be set up but for display of fire works on festive occasions. The celebration of festivals was set up in order to make out that the Hindus were in exclusive possession and had the exclusive user of the property. The respondents when examined by the Sub-Divisional Magistrate of Tindivanam on 1-3-50 took up this position. Then when examined by the Executive First Class Magistrate, Tindivanam, on 13-8-1951 after the case was remanded they stated that the land in dispute was in possession and the petitioners had no right to possession. Respondent 3, however, admitted that the said place belongs to the public and in joint written statement filed on 13-8-51 before the same Magistrate they admitted that the concerned land is vacant site comprised in R. S. No. 150/1A with the extent of 12 cents being Grama Natham intended for the use of the villagers. Exhibits D. 1 and D. 2 also did not lend any support to the contention of the respondents. It is clear that the land is Government Poramboke and is a public place. The learned Magistrate who inspected the place found that it was also being used as a public way. This land lies between the Avalurpet-Chetput Road and the private property of petitioners and others. Near the point F in the plan filed in this case the Avalurpet-Chetput Road and the Bazaar street meet and the former is bus route. This plot now enclosed by the compound wall is necessary for the convenient use of both the roads both for vehicular as well as passenger traffic. In short it falls within the definition of a public road within the meaning of S. 3(13), Madras Local Boards Act, 1920, where a public road is defined as meaning and including the drains attached to any such road, public bridge or causeway and the land which whether entered or not by any pavement, verandah or other structure, lies on either side of the road way up to the boundaries of the adjacent property, whether that property is private property or property belonging to Government. This public place and public way have not become the property of the villagers and the Panchayat Board which hastily passed a resolution, and which resolution is not being produced, had no authority to deal with this land. P. W. 1 admitted that the land is not vested in the Panchayat Board and for erecting a permanent structure or wall the orders of the Government are necessary. He also admitted that no such order has been passed either by the Revenue Department or by the Government. Therefore, point 1 has to be decided in the affirmative.

(6) POINT 2:— I have already indicated sufficiently to show that this wall constructed on a public place and a public way constitutes an obstruction and nuisance. It was sought to be suggested that this will only hit the shop keepers and not the public. The evidence in this case shows that this obstruction would also affect the unascertained members of the public whose ordinary avocations may take them to the neighbourhood of such shops, apart from the customers & that therefore this would constitute both obstruction as well as a public nuisance. Public nuisance is nuisance caused not only to the persons as in this case living in the shops but also to, as I have just now pointed out, unascertained members of the public whose ordinary avocation may take them to neighbourhood. 'Queen Empress v. Jasoda Nand', 20 All 501 (A) and — 'Begg v. Lamessor', 9 W R (Cr.) 70 (B). In other words this is not merely a case of infringement of a private right or a private dispute which is outside the scope of Chap. 10, Criminal P. C.

(7) POINT 3: The powers embodied in Ss. 133 to 137 with regard to the obstruction of public ways, are not intended to be exercised where there is a bona fide dispute as to the existence of the public right; see — 'In re Narayan Jivan', 4 Bom L R 687 (C) where there is such a dispute, the Court should pass no order under those sections until the public right has been established by proper legal proceedings, civil or criminal. See —'Basaruddin Bhuiah v. Baharali', 11 Cal 8 (D); — 'In re Venkanna', 2 Weir 61 (E); — 'Budhai Nath v. Nil Mahanto', 4 Cal W N 596 (F); — 'Askar Mea v. Sabdar Mea', 12 Cal 137 (G); — 'Lal Miah v. Nazir Khalashi', 12 Cal 696 (H) and — 'Queen Empress v. Bissessur Sahib', 17 Cal 562 (I). But the mere assertion of a claim of title made without reasonable ground, or honest belief in it, or honest intention to support it will not oust a criminal Court of its jurisdiction under Ss. 133 to 137 of the Code; — 'Luckhee Narayan v. Ram Kumar', 15 Cal 564 (J); —- '17 Cal 562 (I)'; — 'Nasaruddi v. Akiruddi', 3 Cal W N 345 (K); — 'Mukundalal Dey v. Haribole Saha', 2 Cal W N 554 (L); — 'Upendranath Bhuttacharjee v. Khitish Chandra', 23 Cal 499 (M); — 'Queen Empress v. Kedarnath', 23 All 159 (N) — Belat Ali v. Abdur Rahim', 8 Cal W N 143 (O) —'In re Jaswatsangi', 22 Bom 988 at p. 995 (P). It is not open to any person illegally causing obstruction to public property to set up a bogus question of title for the purpose of ousting the jurisdiction of the Magistrate and notwithstanding the raising of such a question the Magistrate is entitled to hear a case sufficiently to enable him to make up his mind whether or not bona fide question of title is raised. It is quite true that when it is found that this claim of title is advanced in good faith and is supported by prima facie respectable evidence the Magistrate cannot proceed further and decide whether the title set up does or does not exist but must leave the matter to be decided by the civil Court; — 'Emperor v. Dost Muhammad', 28 All 98 (Q); — 'Matuk Dhari Tewari v. Hari Madhab Das', 31 Cal 979 (R); — Preonath Dey v. Gobordhonemalo', 25 Cal 278 (S); — 'Rakhal Chandra v. Kailash Chandra', 7 Cal W N 117 (T). In this case the Magistrate has followed the correct procedure and has only come to the conclusion that the respondents' claim was not a bona fide question of title but only an attempt to cause annoyance and inconvenience to the persons with whom they were at enmity and their act amounted to obstruction and a public nuisance and made the order absolute under S. 137, Criminal P. C.; — 'Nundo Gopal v. Kusum Kumari', 1 Cal L J 434 (U).

(8) POINT 4:— Section 133 does not oust the jurisdiction of a Magistrate to proceed under S. 147 and vice versa. The contrary view held in — 'In re Lindsay', 4 Mad 121 (V) and a similar obiter dictum in — 'In re Lutchmiah Maistry', 1 Weir 143 (W) was not followed in — 'Karuppana Kowndan v. Kandasawmi', AIR 1914 Mad 712 (X). The only restriction naturally is that when proceedings are instituted and action taken under S. 133, Criminal P. C., orders under S. 147 cannot be passed since the two sets of proceedings are under entirely different chapters, governed by different procedure in detail, and orders are made for entirely different purposes; 'Abdool Rackman Mia v. Safar Ali', 12 Cri L J 43 (Cal) (Y). The instant case is not one such instance.

There are no grounds to interfere with the correct order made by the learned Magistrate and it will be sufficient only to indicate to him that in regard to the further proceedings after S. 143, Criminal P. C., he must have recourse to the instructions given in G. O. No. 133 dated 14-1-1933 dealing with the financing of the initial expenditure which might have to be incurred under S. 140(2), Criminal P. C. The initial expenditure should be debited to contingencies and the costs, if any, recovered from the parties should be credited to the miscellaneous head of account and in cases where the costs are not recovered separately but are included in the fine levied by the Court, the fine or realization should be credited to "Administration of Justice General Fees, Fines and Forfeiture".

In the result, this revision case is dismissed.

B/R.G.D. Revision dismissed.

A.I.R. 1953 MADRAS 676 (Vol. 40, C. N. 257)

SUBBA RAO AND RAMASWAMI JJ.

Brahmanandam Ramamma alias Ramalakshmamma, Applicant v. Rupakula Venkata Lakshminarasimham and others, Respondents.

Appeal No. 467 of 1948, D/- 10-10-1952.

(a) Registration Act (1908), S. 17 — Will or adoption deed — (Hindu Law — Will).

The question whether there is an intention to create a disposition of property posthumously is one of fact depending upon the construction of the particular document. The intention of the testator has to be gathered primarily from the language of the will.

By an instrument executed by him, the testator gave to his wife during her lifetime specific property for her maintenance. The instrument was to come into effect after the death of the testator and the wife was appointed as the executrix. She was given the power to discharge the debts and take a boy in adoption, making him the office-holder and get the duties done by a deputy till the boy attained majority.

Held that the instrument contained a testamentary disposition and that it was a will and not a mere authority to adopt requiring registration and that the adop-

tion made thereunder was a valid adoption. 12 Mad 490, Rel. on; 18 Ind Cas 1006 (Mad), Not foll. (Para 11)
Anno: Reg. Act, S. 17 N. 14 Pt. 3.

(b) Hindu Law — Adoption — Motive of widow making adoption.

Where a Hindu widow has proper authority to adopt and the adoption is otherwise proper the motives of the widow in making the adoption are not relevant. The fact that she accepted a consideration for giving the boy or getting the boy does not affect the adoption. The validity of an adoption must be judged intrinsically on its own merits and not with reference to considerations extraneous to it. Case law Ref. (Para 6)

(c) Civil P. C. (1908), S. 11 — Suit against Hindu widow.

Where a Hindu widow puts up a bona fide and serious contest in a suit, she represents the estate in such a manner as to bind the reversioners and the decision given in the suit constitutes res judicata even as against the reversioners. (Para 13)
Anno: C.P.C., S. 11 N. 63 Pts. 7 to 9.

N. Subramaniam, for Appellant; P. Somasundaram, P. Suryanarayana, P. Satyanarayana Raju and P. Ramchandra Raju, for Respondents.

CASES CITED:

(A) ('76-78) 4 Ind App 1: 1 Mad 174 (PC)
(B) ('98) 22 Bom 199
(C) ('98) 22 Bom 558 (FB)
(D) ('89) 16 Ind App 53: 16 Cal 556 (PC)
(E) ('06) 16 Mad LJ 22: 29 Mad 161
(F) ('50) AIR 1950 Mad 601 :1950-1 Mad LJ 537
(G) ('52) AIR 1952 Nag 199: ILR (1949) Nag 416
(H) ('22) AIR 1922 Bom 382: 46 Bom 908: 67 Ind Cas 850
(I) ('35) 18 Nag LJ 1: 158 Ind Cas 1042
(J) ('33) AIR 1933 Mad 540(2): 146 Ind Cas 346
(K) ('32) AIR 1932 Mad 227: 62 Mad LJ 187
(L) ('89) 12 Mad 490
(M) ('13) 18 Ind Cas 1006: 1913 Mad WN 199
(N) ('19) AIR 1919 Mad 447: 49 Ind Cas 929
(O) ('25) AIR 1925 Mad 748: 87 Ind Cas 187
(P) ('30) AIR 1930 PC 242: 10 Pat 187 (PC)
(Q) ('36) AIR 1936 Pat 323: 15 Pat 151
(R) ('35) AIR 1935 Cal 716: 159 Ind Cas 437
(S) ('22) AIR 1922 PC 162 (2): 44 Mad 733
(T) ('31) AIR 1931 PC 109: 54 Mad 440 (PC)
(U) ('33) AIR 1933 Mad 492: 64 Mad LJ 650
(V) ('63-66) 3 WR 15: 10 Moo Ind App 279 (PC)
(W) ('04) 27 Mad 30

RAMASWAMI, J.: This is an appeal preferred against the decree and judgment of the learned Subordinate Judge of Tenali in Original Suit No. 4 of 1947.

(2) The facts are:— In Valiveru village of Tenali Taluk there was a karnam by name R. Sitaramaiah. His family consisted of himself and his wife Mahalakshmamma and two daughters Annapurnamma and the present plaintiff Ramamma. Both these daughters were married and the son of that Annapurnamma is Kavutha Sambayya who was the plaintiff in O. S. No. 16 of 1916 on the file of the Temporary Sub-Court, Guntur. The plaintiff's husband is Brahmandam Venkatappayya who as a matter of fact has been living with this Sitaramaiah for some years before his death and assisting him in his karnam's job. This Sitaramaiah had no male issue.

(3) In September 1907 this Sitaramaiah became seriously unwell and he executed on 12-9-1907 the following Will:

"Will executed on 12-9-1907 in favour of Mahalakshmamma, wife of Rupakulu Sitaramaiah, Brahmin, Inamdar residing at Valiveru, Tenali, Sub-District, Guntur District by Rupakula Sitaramaiah, one of Punnayya Garu, Brahmin, Inamdar and Karnam, residing in Valiveru village

As you are my wife, as we have no male issues excepting female issue & as I who have been very ill for the last five days and afraid that I will not survive you should keep in possession after my death the entire movable and immovable properties specified in the schedule hereunder.

In order to perpetuate our family you should bring and adopt a boy, where you will feel convenient, from among the persons of our gotra as would be accepted by Sastras, transfer my Karnam's list in his name and have the work conducted through a gumastah until his minority ceased.

You should safeguard all the movable and immovable properties owned by me till the minority of the adopted boy ceases, without alienating them in any manner and deliver the said entire property to him after his minority ceased.

If you and the adopted boy should feel impossible to live together, you should enjoy till your death 3 acres of land out of D. No. 87C for your maintenance without powers to sell, gift, mortgage, etc. You should discharge the debt due by me to others.

This is the will executed with consent".

This will has been signed by Sitaramaiah and attested by no less than 8 persons and written by G. Subramanya Sastri.

(4) On 21-9-1907 viz. nine days after executing the will this Sitaramaiah died and the activities of his widow are chronicled in Exs. A-3 to A-7. Ex. A-3 is an Arji sent by the widow Mahalakshamma a few days after the death of her husband & even before the execution of Ex. B-3, wherein she stated that the present plaintiff's husband Venkatappayya had been brought into the family to help her husband in his duties as karnam even 7 or 8 years before his death and that he got sufficient training and that he may be permitted to function in the karnam's duties till she gets her adopted son within 7 or 8 days and till the list is granted in his favour. Ex. A-7 is a report to the Deputy Collector by the Tahsildar in pursuance of Ex. A-3 reporting the death of Sitaramaiah on 21-9-1907 and that his widow presented the above petition that she would adopt a boy in 7 or 8 days and on 13-3-1908 she had filed another petition that she intended to adopt the 1st defendant and requesting that his name might be registered as heir and that her son-in-law (Venkatappayya plaintiff's husband) might be appointed as his deputy but that on 16-12-1908 she filed a petition denying the above and requesting to register the name of the boy, that she may thereafter adopt, and that she had mentioned therein that Mallayya had filed a civil suit for the validation of the adoption of the 1st defendant. Ex. A-4 is another Arji by the widow dated 8-12-1908 wherein she claimed that she was given authority to adopt under the will of her husband dated 12-9-1907 and that he died on 21-9-1907 but still she could not take any boy in adoption due to customary objections, that she should not do so till she went to her mother's house after one year of the husband's death, and that she had already sent the Arji as per Ex.

A-3 on which Venkatappayya was so appointed, and that in the interval when she went to her mother's house and returned the said Venkatappayya had secreted paddy turmeric, a pair of bulls etc. as well as the salary upto date besides Rs. 800/- worth of her movable property and refused to account for them and that he had also set up the adoption of the 1st defendant and also forwarded some applications with her signatures for adding the minor as list-holder in collusion with the 1st defendant's natural father by taking 2 acres worth Rs. 14000/- from him and got a suit filed by him for declaration in the District Court, after having handed over the original of the will to him, and had also secreted several of her documents; but that she never adopted the 1st defendant and requiring that the said Venkatappayya may be removed from Karnam's duties. The next in date is Ex. A-5 of 1909, which is a statement given by the widow Mahalakshmamma to the Tahsildar in the enquiry following Ex. A-4 wherein she stated that Venkatappayya got several forged documents and petitions into being and that she was contemplating the adoption of some suitable boy and that the will executed by her husband is in the custody of Venkatappayya, who is not returning it to her. Ex. A. 6 is another such report dated 30-8-1909 in which she had set up the adoption of one Sivaramakrishnayya on Ashadha Bahula 12 and that the 1st defendant was not adopted by her and that her brother Konduru Sriramulu may be appointed as deputy conditionally, and that if he was not so accepted as not qualified, the assistant Karnam Daita Seshayya may be appointed.

(5) There were two litigations concerning the adoptions by this Mahalakshmamma. O. S. No. 76 of 1908, Sub Court, Guntur and re-numbered as O. S. No. 62 of 1910 on the file of the Temporary Sub Court, Guntur, was filed by the present first defendant who was then a minor and was represented by his natural father and next friend Mallayya. It was a suit for a declaration that this Venkata Lakshminarasimham was the legally adopted son of the late R. Sitaramaiah and for recovery of possession of the properties concerned in that suit with mesne profits. The sole defendant was Mahalakshmamma, the widow of Sitaramaiah. The scope of the contentions between the parties is indicated by the following issues framed:

1. Whether the plaintiff is the validly adopted son of the defendant?
2. Whether the suit has been properly valued?
3. Whether the suit is bad for want of a prayer as to the defendant's maintenance?

The contention of Mahalakshmamma before the learned Subordinate Judge was that it was quite true that her husband had executed the original of the will, copy of which is Ex. B-1 reproduced above, and that he had also given her authority to adopt therein but that she did not adopt this Venkata Lakshminarasimham as alleged and that this adoption has been concocted by her son-in-law Venkatappayya, the husband of this plaintiff, for ulterior object of his own. In fact during the course of the trial, as seen from the judgment of the learned Subordinate Judge, this Mahalakshmamma even set up a trial (sic) adoption of an elder brother of this Venkata Lakshminarasimhan and stated that as this elder boy was found to be dull and not suitable for adoption the idea was discarded. In the suit however she was discreetly silent about her adopting T. Sivaramakrishnayya on 14-7-1909 which had been mentioned by her in the Arji to the Tahsildar, mentioned above. In other words, this Mahalakshmamma had a straight fight and severely contested fight with this first defendant on the question whether she adopted him or not. The learned Subordinate Judge came to the conclusion:

> "I have given the case my best and most anxious consideration and I feel that I cannot come to any other conclusion than that the minor plaintiff was in fact adopted by the defendant some time after the date of Ex. A-(i. e., Ex. B1 here). I find the issue accordingly for the minor plaintiff".

There were appeals therefrom to the High Court and these appeals are A. S. Nos. 12 and 13 of 1913 and they were disposed of by Sir John Wallis C. J. and Coutts-Trotter, J. The learned Chief Justice dismissed the appeals observing among other things:

> "The Subordinate Judge has found that the adoption is proved and I see no reason to differ from his conclusion. It is admitted that Sitaramaiah the last male owner left a will in which he enjoined on his widow to make an adoption".

The learned Chief Justice then proceeded to examine the relevant documents viz Exs. A-3 to A-7 which have been referred to above and held:

> "On the whole it seems to me that the documentary evidence and the respectable evidence of the revenue Inspector sufficiently prove the adoption and the conclusion I have come to is that the judgment of the Subordinate Judge should be confirmed and the appeal dismissed with costs".

In this Coutts-Trotter, J. agreed and stated:

> "I agree for the same reasons. I think this is a perfectly hopeless appeal. ..... These four documents are not only damaging to the appellant's case but wholly inconsistent with any other conclusion than that the adoption had taken place somewhere in the month of November 1907. I agree that the appeal should be dismissed with costs".

Thus ended the first round of litigation.

(6) We have just mentioned before that Sitaramaiah had two daughters and that one daughter was Annapurnamma ALIAS Punnamma. This Punnamma's minor son Kavutha Sambayya filed O. S. No. 102 of 1915 and re-numbered as O. S. No 16 of 1916, on the file of the Temporary Sub Court, Guntur, represented by his paternal uncle and next friend Kavutha Lakshmayya. In this suit this Sambayya impleaded his grandmother Mahalakshma as the first defendant, his own mother as the second defendant, his aunt the present plaintiff as the third defendant and an infant boy of hers as the fourth defendant and the adopted son Venkata Lakshminarasimham, the present first defendant, as the fifth defendant and the other person who is said to have been adopted by Mahalakshmamma on 14-7-1909 and which she did not set up in the prior suit as the sixth defendant. We may at once eliminate this sixth defendant by pointing out that nobody worried about this adoption including himself and under issue 4 the learned Subordinate Judge who disposed of that suit stated:

> "In this suit no evidence had been let in to prove the alleged adoption of the 6th defendant and I find on this issue that his adoption is not proved".

Thus, it will be seen that the real contest was once again between Sambayya and this first defendant because the grandmother Mahalakshmamma never accepted this adoption of the first

defendant as having been made and the mother and the aunt of this Sambayya did not dispute that position. On the other hand, both the daughters of Mahalakshmamma as well as Mahalakshmamma only stood to gain by denying the adoption. The scope of that suit is indicated by the following issues framed in the case:

"1. Whether the document attacked in the plaint as not genuine and valid is genuine and if so whether it is a will? and if not will, whether the 5th defendant's adoption is true in fact and valid in law?
2. Whether the suit is not maintainable on the ground that remoter reversioners, the plaintiff and the 4th defendant should be held to have been duly represented by the 1st defendant in O. S. No. 62 of 1910 on the file of this Court?
3. Whether this suit to set aside the 5th defendant's adoption is time-barred?
4. Whether the 6th defendant's adoption is true and valid?
5. To what relief, if any, is the plaintiff entitled?
6. Does not the judgment in O. S. No. 62 of 1910 bar plaintiffs' present suit for the reasons urged in plaintiff's reply statement dated 22-8-1916

That suit was for a declaration that the will reproduced above was not true and valid and secondly that the adoptions set up were false and invalid and that if they were left unchallenged they would throw a cloud over the body in 'reversion and that therefore a declaration was sought for. The learned Subordinate Judge found on the evidence on record that the will was genuine and that it was executed by late Sitaramaiah. Then as regards the prayer for a declaration he found that the suit should be dismissed on two grounds viz. limitation and 'res judicata'. On the question of limitation the learned Subordinate Judge found that the suit should have been filed within six years of plaintiff's knowledge of the adoption and not having been filed so, it was barred under Art. 118 of the Limitation Act.

On the question of 'res judicata' he came to the conclusion that there was a 'bona fide' and serious contest between Mahalakshmamma representing the estate and the adopted son and that there was neither fraud nor collusion between herself and the adopted son and that therefore the entire body of reversioners was bound by the decision in O. S. No. 62 of 1910. The learned Subordinate Judge repelled the grounds which were put forward before him for making out that Mahalakshmamma did not so represent the estate as to bind later reversioners by putting forward two pleas viz. that in the appeal in the High Court Mahalakshmamma did not seriously press the contention that the fifth defendant's adoption even if true was invalid because in making the adoption she had taken a bribe in that she got the natural father of the adopted boy to gift two acres of land to her second son-in-law Brahmandum Venkatappayya, the husband of the present plaintiff, as a condition for the 1st defendant (Mahalakshmamma) adopting the fifth defendant; and secondly that Mahalakshmamma did not contend that the will of her husband was only an authority to adopt and registrable and that therefore any adoption made thereunder is invalid. The learned Subordinate Judge has cited a number of decisions viz. — 'Vellanki Venkatakrishna Rao v. Venkata Rama Lakshmi', 1 Mad 174 (PC) (A), — 'Mahabelshwar v. Durgabai', 22 Bom 199 (B), — 'Ramachandra v. Mulji Nanabhai', 22 Bom 558 (FB) (C), — 'Bhasba Rabidat Singh v. Indar Kunwar', 16 Cal 556 (PC) (D) and — 'Murugappa Chetti v. Nagappa Chetti', 29 Mad 161-163 (E) and to which we can add the decisions of — 'Lakshminarayana v. Sundara Ramayya', reported in AIR 1950 Mad 601 (F) and —'Govinda v. Shenfad', reported in AIR 1952 Nag 199 (G) and — 'Narayan v. Gopal Rao', AIR 1922 Bom 382 (H) for holding that where the widow had proper authority to adopt and the adoption was otherwise proper the motives of the widow in making the adoption are not relevant and the fact that she accepted a consideration for giving the boy or getting the boy would not affect the adoption and the courts should not be astute to defeat adoptions on such grounds. In fact courts have gone to the extent of laying down that the fact that an adoption was made maliciously or spitefully to defeat the claims of reversioners or to spite adoptee's daughters and not on account of any consideration for the spiritual welfare of the husband would not make the adoption invalid if it was otherwise valid. — 'Bhim Rao v. Punjab Rao', 158 Ind Cas 1042 (Nag) (I), — 'Kandaswami Goundan v. Chinnammal', AIR 1933 Mad 540 (2) (J). The validity of an adoption in other words must be judged intrinsically on its own merits and not with reference to considerations extraneous to it. — 'Panyan v. Rama Lakshmamma', AIR 1932 Mad 227 (K).

In regard to the second ground that in O. S. No. 62 of 1910 the first defendant could not and did not impeach the validity of the first defendant's authority to adopt given in Ex. I (Ex. B-1 here) this was repelled by the learned Subordinate Judge on two grounds. On the one hand the position of law at that time was doubtful. It was by no means clear at that time that this question could be raised. In — Lakshmi v. Subramanya', 12 Mad 490 (L) in a well considered judgment two Judges of the Madras High Court held that a document similar to Ex. I (Ex. B-1) containing a provision for life for a widow's maintenance in case of disputes with the adopted son was a will. Subsequently in — 'Santhana Sooramma v. Santhana Mangayya', 18 Ind Cas 1006 (Mad) (M) a similar document was held not to be a will. But in this case of 1913 there was no reference to the prior case in — 'Lakshmi v. Subramanya', (L) and there was no discussion as to how a disposition of maintenance for life by a testator did not amount to a testamentary disposition. Therefore it was a very doubtful legal question at that time and this Mahalakshmamma could not legitimately be expected to raise such a plea. Secondly, as a fact she fought tooth and nail this Venkata Lakshminarasimham and asserted that notwithstanding any authority to adopt which might have been given by her husband, she did not adopt him at all. The learned Subordinate Judge in these circumstances held that the fact that the validity of the authority to adopt given by Ex. 1 was not questioned in that suit would not affect the 'bona fides' or fairness of the 1st defendant's contest of that suit. Therefore, he held that the suit of K. Sambayya was barred by 'res judicata' by reason of the decision in O. S. No. 62 of 1910. Then on that conclusion the learned advocate appearing for Sambayya had contended that it was no doubt true that a declaration could not be granted in those circumstances so far as Venkata Lakshminarasimham was concerned. But it was pressed that in the possible contingency of this Venkata Lakshminarasimham dying and Mahalakshmamma trying to make a fresh adoption on the strength

of the authority given by Ex. I, a declaration of the nature sought for by the plaintiff therein would be necessary for him. The learned Subordinate Judge has gone into this question whether Ex. 1 is a will or only an authority to adopt and came to the conclusion for reasons which will be discussed later that Ex. 1 (Ex. B1 here) is not a will but only an authority to adopt. On this conclusion he logically pursued up the adoption set up by Venkata Lakshminarasimham and denied by this Sambayya and came to the conclusion that the adoption was true but that inasmuch as Ex. I (Ex. B. 1) was not a will but an authority to adopt, it should have been registered and not having been registered the adoption made thereunder was invalid. The learned Subordinate Judge wound up his judgment by stating:

"In my finding on issue 1, I have already held that Ex. 1 is not a will and is not valid to confer a valid authority for adoption. If, however, plaintiff has needed to question Ex. I, he may rely on this finding and I do not think in view of a remote possible contingency that the declaration asked for in paragraph 10, clause (b) of the plaint about Ex. I should be given. In the result, plaintiff's suit is dismissed. Plaintiff to pay the contesting 5th defendant's costs".

This completed the second round of litigation.

(7) There is no dispute that subsequently the first defendant Venkata Lakshminarasimham has out of the patrimony devolving from Sitaramaiah kept 1-9 acres in item 2, 27 cents in item 6, 3 cents in D. No. 104 of the A schedule and alienated the rest of the properties in favour of defendants 2 to 28 herein. In this connection we may point out that these defendants have made these purchases knowing full well the complications and in fact have had indemnity bonds executed by this first defendant. These defendants state that they made no enquiries before purchasing the properties. But this point is only of importance if we find in favour of the plaintiff regarding the will and the adoption. Inasmuch as we are confirming the findings of the lower Court regarding the will and adoption and 'res judicata', we need not pursue these points further and leave the matter as they have been found by the learned Subordinate Judge.

(8) It is in these circumstances that Ramalakshmamma daughter of Mahalakshmamma and wife of Brahmandam Venkatappayya has filed this suit in the pauper form to recover possession of the plaint schedule property from the obstruction of 29 defendants and for recovery of Rs. 4500 towards past mesne profits on the footing that the will Ex. B-1 is neither true nor valid, that the alleged adoption of the first defendant is false and invalid, that the mother Mahalakshmamma did not represent the estate and that on the other hand colluded with the opposite party and that the decision in O. S. 62 of 1910 is not binding on the body of reversioners, that the alienations made by the first defendant are fraudulent and not supported by consideration and not binding upon this plaintiff, that she is entitled to recover possession of the properties and the mesne profits asked for and that the suit is in time, the widow Mahalakshmamma having died on 9-8-1934.

(9) The scope of the present suit is indicated by the following issues framed:

"1. Whether the plaintiff is the nearest reversioner of late Sitharamaiah and whether she is entitled to sue?
2. Whether the will dated 12-9-1907 alleged to have been executed by late Sitaramaiah is true and valid?
2.A Whether the plaintiff & her husband had also acted upon the same and are estopped to question it?
3. Whether the 1st defendant is the validly adopted son of Sitaramaiah and whether the plaintiff is estopped to question the adoption as her family derived benefit of 2 acres?
4. Whether the decisions in O. S, 62 of 1910 and O. S. 16 of 1916 on the file of the Sub Court, Guntur operate as 'res judicata'?
5. Whether the plaint A schedule is correct?
6. Which items are in the enjoyment of which of the defendants?
7. To what mesne profits, if any, is the plaintiff entitled and from which of the defendants?
8. Whether the defendants are 'bona fide' purchasers for value?
9. To what equities are the defendants 4 to 7, 11, 20 and 22 entitled for improvements effected by them?
10. Whether the suit is in time?
11. To what relief?"

The learned Subordinate Judge found the plaintiff to be the nearest reversioner of the late Sitaramaiah and entitled to sue, that the will dated 12-9-1907 was true and valid, that the first defendant is the validly adopted son of Sitaramaiah and that the decisions in O. S. 62 of 1910 and O. S. 16 of 1916 on the file of the Sub Court, Guntur operated as 'res judicata'. It is unnecessary to refer to the findings on the other issues because they are not relevant if we confirm the finding of the learned Subordinate Judge dismissing the suit on these grounds.

(10) The learned advocate for the appellant raised before us also the self-same three points viz. that the document dated 12-9-1907 is only an authority to adopt, secondly, that the first defendant was not adopted as a fact by Mahalakshmamma and thirdly, that the decisions in O. S. 62 of 1910 and 16 of 1916 do not operate as 'res judicata' for the present suit. We shall deal with them 'seriatim'.

(11) Point 1:— The contention that the document Ex. B-1 reproduced above is not a will is put forward on the ground that it is only an authority to adopt and in addition makes no posthumous disposition of property. The word "will" in S. 17 of the Indian Registration Act has to be construed in the light of the definition thereof in S. 3(57) of the General Clauses Act, 1897, as including a codicil and every writing making a voluntary posthumous disposition of property: —'Jagannadha v. Kunja Bihari', AIR 1919 Mad 447 (N). The question whether there is an intention to create a disposition of property posthumously is one of fact depending upon the construction of the particular document: — 'Subbamma v. Papayya', AIR 1925 Mad 748 (O). The intention of the testator has to be gathered primarily from the language of the will. But at the same time it must be recognised that documents in the vernacular are often expressed in loose and inaccurate language and thus sometimes a meaning more extended or more restricted than the literal meaning may have to be given to particular words in vernacular documents provided the context justifies doing so: — 'Rajendra Prasad v. Gopal Prasad', AIR 1930 PC 242 (P). The will must be read as a whole to ascertain the intention of the testator and where the intention is clearly expressed by unambiguous words in certain clauses, other words

in other clauses repugnant to them may be discarded: —' Kanhya Lal Missir v. Mst. Hira Bibi', AIR 1936 Pat 323 (Q). In construing the will of a Hindu it is not improper to take into consideration what are known to be the ordinary notions & wishes of Hindus with respect to the devolution of property. The predilections of the class to which the testator belongs may be kept in view: —'Sasanka Bhusan v. Gopi Ballav', AIR 1935 Cal 716 (R). Bearing these principles in mind we must examine whether this Ex. B-1 though revokable and taking effect only on the death of Sitaramaiah, in addition contained a posthumous disposition of property because a document which, notwithstandinig it is named a will, is really an authority to adopt must be registered under S. 40 of the Indian Registration Act: — 'Bheema Deo v. Behari Deo', AIR 1922 PC 162 (2) (S). In this case such posthumous disposition of property is clearly found. The testator gives to Mahalakshmamma during her life time specific property of 3 acres for her maintenance and this certainly amounts to a testamentary disposition. We need not refer to the other indicia of a will See —'Krishna Rao v. Sundara Siva Rao', AIR 1931 PC 109 (T) and — 'Ignatia Brito v. T. B. Rego', AIR 1933 Mad 492 (U) for some of the tests found in Ex. Bl viz. that it comes into effect after the death of the testator and Mahalaksmamma is appointed as the executrix and that she is given the power to discharge the debts and take a boy in adoption and making him the office-holder and get the duties done by a deputy till the boy attains majority, etc. The last portion of will wound up with the pharse "Sammathina Virayinahi Ichina Vilu". There is also authority for the position that a document of this nature would constitute a will.

In the earliest decision in — 'Bhoobun Moyee Debia v. Ram Kishore', 10 Moo Ind App 279 (PC) (V) the document was not considered to be a will because it was only a deed of permission to adopt and registered in the life time of its maker and it did not contain any words of devise and did not show that the maker of the deed had any intention to dispose of his estate by it. The present is not one such case. In 12 Mad 490 (L) where a Hindu on taking a son in adoption executed a settlement "as to what should be done by my adopted son and my wife after my lifetime", providing that on an event which happened, the wife should enjoy certain land for life in lieu of maintenance and there was a suit by the widow of the executant against the adopted son for possession of the land, it was held that the instrument was a will. The instant case falls within the terms of this decision. In 18 Ind Cas 1006 (Mad) (M) it was held that where a document gives power to a widow to adopt and contains also provision that in case of dispute between the widow and the boy the widow should take a life-interest in the property and that it should go to the adopted son after her death, authority to adopt which requires registration for it is not a testamentary disposition but is an authority to adopt which requires registration for its validity. This case no doubt is very similar to the case on hand. But we are unable to accept it as an authority binding on us for two reasons viz. that it does not refer to the previous Bench decision cited above and secondly, there is no discussion or reasoning as to how a disposition of maintenance for life by a testator did not amount to a testamentary disposition. The judgment consists of nothing more than a single sentence that the learned Judges agreed with the Subordinate Judge that the instrument Ex. II was not a will and that they were dismissing the second appeal with costs. In — Somasundara Mudali v. Duraiswami Mudaliar', 27 Mad 30 (W) the will ran as follows:

"The last will left by me Somasundara Mudaliar. as I am now in my last moments, I do hereby give you, Vanji Anni, my wife to understand as follows: I have given you authority to adopt Somasundaram, second son of Vaiyapuri Mudaliar Avargal, my brother-in-law and Village Munsif of Kumbakonam Town, and to have my obsequies and all other ceremonies performed by him. I have further hereby given you authority to put into his possession all the properties which I got under the decree in Suit No. 50 of 1899 on the file of the Subordinate Court of Kumbakonam. If you are not willing to adopt the said Somasundaram, you shall adopt anybody you please and put the properties into his possession. You shall put also all the immovable properties, etc. I have in addition, into the possession of the adopted son".

It will be noticed that it contained no dispositive words as in the present case; and the document was held to be not a will. In the last decision cited by the learned advocate for the appellant viz. — 'AIR 1922 P. C. 162 (2) (S) the will consisted of no more than the following:

"I have consented to your adopting a son at your pleasure and conducting the management of the estate in the best manner. None of my heirs shall have cause to raise disputes touching this matter. This will has been executed by my consent".

It will be noticed that this will contains no dispositive words and therefore the present case does not fall within the ambit of this decision. Therefore, we agree with the lower Court that this will is not a mere authority to adopt requiring registration and that the adoption made thereunder is a valid adoption.

(12) Point 2: On this conclusion we have to examine whether the alleged adoption did take place and this is established by the following circumstances. D. W. 1 speaks to his being adopted and he is corroborated by D. W. 2. The depositions of the attestors of the will who spoke also to the factum of adoption examined in the previous suits viz. Ex. B 4 (in the first suit) and Exs. B 8, B 9 and B-10 (in the second suit) have been marked by consent of parties in this suit. These depositions fully prove the adoption. Then we have the Arji Ex. A-3 which has been referred to already in which Mahalakshmamma has clearly admitted having adopted this first defendant. Finally, we have the findings in both the prior suits showing that the adoption alleged had been proved satisfactorily. Therefore, we hold that there can be no doubt that the 1st defendant has been adopted by Mahalakshmamma under the authority to adopt given by her husband in November 1907.

(13) Point 3: The point regarding 'res judicata' revolves round the question whether Mahalakshmamma represented the estate, in such a manner as to bind the reversioners, in O. S. 62 of 1910 by putting up a 'bona fide' and serious contest. If the answer is in the affirmative, then that decision would certainly constitute 'res judicata'. If the answer is in the negative, it would certainly not constitute 'res judicata'. These legal positions are so very free from contest that no citation is necessary. In this case, there cannot be the slightest doubt that Mahalakshmamma did put forward a 'bona fide' and serious contest and fully represented the estate.

She fought tooth and nail this first defendant and denied the adoption. If she failed, it was not for want of any diligence on her part but on account of the overwhelming evidence to the contrary. The point taken now also is that this Mahalakshmamma should have pressed in that litigation the two points now taken viz. that the will Ex. B-1 is only an authority to adopt requiring registration and that therefore even if she did adopt it was an invalid adoption and secondly, that inasmuch as Mallayya had given two acres of land to her son-in-law Brahmandam Venkatappayya for not opposing the adoption, there was a corrupt motive and this also should have been pressed for invalidating the adoption. So far as the first point is concerned, the position of law was not so clear that Mahalakshmamma could have put forward seriously this contention and secondly she went one better and denied the adoption itself in all manner of ways known to her. Then in regard to the second point, she would not have succeeded even if she had pressed this point. As a matter of fact this Mahalakshmamma put forward this transaction and pointed out how Venkatappayya concocted the whole story of adoption by reason of his having got 2 acres from Mallayya and that he was fathering the adoption upon her which was wholly untrue. Therefore, there was a 'bona fide' and full contest between Mahalakshmamma and this first defendant and by reason of Mahalakshmamma having represented the estate, this decision in O. S. 62 of 1910 is certainly binding on the reversioners. Therefore, the decision in O. S. 62 of 1910 constitutes 'res judicata'. That the decision in O. S. 62 of 1910 constitutes 'res judicata' has been affirmed in the subsequent litigation and the learned Subordinate Judge has dismissed the suit on that ground though he has gone also into the question of limitation and has given a declaration in the circumstances set out by us above. Point 3 also fails.

(14) In the result, we affirm the decree and judgment of the lower Court and dismiss this appeal with costs one set. The plaintiff-appellant must pay the court-fee due to the Government on the appeal memorandum.

B/V.S.B. Appeal dismissed.

A.I.R. 1953 MADRAS 682 (Vol. 40, C. N. 258)

BALAKRISHNA AIYAR J.

M. Narayanaswami Kone, Petitioner v. Arigonda Narayanaswami Mudaliar, and others, Respondents.

Civil Revn. Petn. No. 1128 of 1952, D/- 13-11-1952.

(a) Provincial Insolvency Act (1920), S. 54 — Date of transfer in compulsorily registered deeds—(Registration Act (1908), Ss. 75(3), 47).

In the expression "the date thereof" in S. 54 the word "thereof" relates to "transfer" so that time must be computed not from the date which the instrument bears, but from the date when the instrument becomes effective as a transfer. Where the law enjoins that before a transfer can be effective, the document in question must be registered, the transfer would become complete in the eye of the law only on the date the document is registered. Hence, if the date of the execution of the document is different from the date on which it is registered, then the date on which it is registered shall constitute the starting point for the computation of time. (Para 2)

In the case of compulsorily registered documents S. 75, Registration Act, provides that registration shall take effect from the time when the document was first duly presented for registration. It follows that in such cases the time must be computed from the date of the presentation of the document for registration. AIR 1934 Mad 637(2) and AIR 1938 Mad 801, Rel. on. (Para 5)

Anno: Pro. Insol. Act, S. 54 N. 9; Regn. Act, S. 75 N. 4; S. 47 N. 9.

(b) Registration Act (1908), Ss. 47, 75 (3) — No logical connection between these provisions — Considerations relevant under S. 47 do not apply to S. 75 (3). AIR 1938 Mad 801, Ref. (Para 4)

Anno: Regn. Act, S. 47 N. 9; S. 75 N. 4.

K. Umamaheswaram, for Petitioner; K. M. Bhashyam, M. R. Sesha Iyer, T. S. Narasinga Rao and M. Balachandrudu, for Respondents.

CASES CITED:

(A) ('34) AIR 1934 Mad 637(2): 58 Mad 166
(B) ('38) AIR 1938 Mad 801: (1938) 2 Mad LJ 362

JUDGMENT: On 5-8-1947, one Narayanaswami Mudaliar and his younger brother Ramakrishna Mudaliar executed two mortgage deeds one for Rs. 10,000 and the other for Rs. 27,500 in favour of one Sundararaja Iyengar. Both these documents were presented for registration on 19-11-1947. They were registered so far as one of the mortgagors, Ramakrishna is concerned, on 8-12-1947 and it was compulsorily registered as regards the other mortgagor Narayanaswami on 17-2-1948. On 14-4-1948, that is to say more than three months after the date on which the documents were presented for registration, but less than three months from the date on which the documents were registered as regards Narayanaswami, two creditors filed a petition under S. 9, Provincial Insolvency Act, to adjudicate Narayanaswami, Ramakrishna and three other members of their family as insolvents. This petition was dismissed by the learned Subordinate Judge on the ground that so far as Ramakrishna was concerned the petition had been presented more than three months after the date of the registration of the document. He dismissed the petition so far as Narayanaswami is concerned on the ground that he had already been adjudicated insolvent in the Sub Court of Guntur. On appeal, the learned District Judge agreed with the conclusion of the learned Subordinate Judge that the documents must be deemed to have been registered on 19-11-1947 and since, computing from that date, the petition had been presented more than three months later, it was out of time.

(2) Mr. Umamaheswaram, the learned advocate for the petitioning creditors contended that this view of the court below is wrong. According to him the date from which time must be computed is 17-2-1948 the date on which the document was registered so far as Narayanaswami the first respondent, is concerned. I shall examine how far this contention is sound. S. 54, Provincial Insolvency Act, provides:

"Every transfer of property.....made..... by any person unable to pay his debts as they become due from his own money in favour of any creditor.....shall if such a person is adjudged insolvent on a petition presented within three months after the date

thereof, be deemed fraudulent and void as against....."

Now it is obvious that before this section can be availed of, there must be a transfer which is legally complete and which the law will recognise and take notice of. It follows, therefore, that where the law enjoins that before a transfer can be effective, the document in question must be registered, the transfer would become complete in the eye of the law only on the date the document is registered. It will be noticed that in the expression "the date thereof" the word "thereof" relates to "transfer" so that time must be computed not from the date which the instrument bears, but from the date when the instrument becomes effective as a transfer. If authority were required for this position it may be found in — 'Iswarayya v. Subbanna', AIR 1934 Mad 637 (2) (A) and — 'Venkatadri Somappa v. Official Receiver, Bellary', A. I. R. 1938 Mad 801 (B). These decisions lay down that if the date of the execution of the document is different from the date on which it is registered, then the date on which it is registered shall constitute the starting point for the computation of time.

(3) The difficulty in this case arises out of the fact that the date of registration is different not merely from the date of the execution of the document but also from the date on which the document was presented for registration. In such a case from what point should time be computed? Section 75 (3), Registration Act, provides, it seems to me, clear guidance in this matter. Dealing with cases where compulsory registration is ordered by the District Registrar, this sub-section provides that such registration shall take effect as if the document had been registered when it was first duly presented for registration. The effect of this provision is that the statute fixes the date of presentation as the date of valid registration. On that date, the transfer would become complete. For purposes of S. 54, Provincial Insolvency Act, the date of the transfer referred to in it, would therefore, be the date on which the document is presented for registration, which date by force of the statute is deemed to be the date of the registration. Authority for this position is to be found in — 'AIR 1938 Mad 801' (B). In that case a mortgage was executed on 5-3-1933. The document was presented for registration on 27th of June. The mortgagor denied registration and the Sub-Registrar refused to register the document. The District Registrar directed the document to be registered and this was finally done on 11-12-1933. After referring to the provisions of S. 75 (3), Registration Act, the Court held that the mortgage deed must be deemed to have been registered on 27th June.

(4) Mr. Umamaheswaram argued that S. 47, Registration Act, provides that a registered document shall operate from the time from which it would have commenced to operate if no registration thereof had been required and not from the time of its registration. The decisions of this Court, said Mr. Umamaheswaram, have refused to apply the principle of S. 47, Registration Act, when computing the three months time referred to in S. 54, Provincial Insolvency Act. Consistently with that, he argued, this court must refuse to compute time retrospectively for the purpose of Sec. 75 also. I am unable to see any logical connection between these two provisions. Considerations which would be relevant under S. 47, Registration Act, have no application to S. 75 (3) of the same Act.

(5) The question, for decision here is this: Was the transfer complained of made within the three months preceding the date on which the insolvency petition was filed. In order to find out when the transfer was made, we have to ascertain when the transfer became complete. That date must be the date on which the document was actually registered or deemed by the law to have been registered. Section 75, Registration Act provides that registration shall take effect from the time when the document was first duly presented for registration. It follows that the time must be computed from the date of the presentation of the document for registration which in this case was 19-11-47. As the petition was filed only on 14-4-1948 it is clearly out of time. The decision of the court below is correct and this civil revision petition is dismissed with costs. Advocate's fee two sets.

B/D.R.R. Revision dismissed.

A.I.R. 1953 MADRAS 683 (Vol. 40, C. N. 259)

RAJAMANNAR C. J.
AND VENKATARAMA AIYAR J.

Vasudeva Kavu Patteri, Appellant v. Mani Naicka and others, Respondents.

Appeal No. 234 of 1948, D/- 24-10-1952.

Civil P. C. (1908), O. 21, Rr. 90, 92 — Scope — Maintainability of suit questioning validity of sale.

The breaches of the provisions of the Civil Procedure Code relating to execution against immovable properties commencing from their attachment down to their sale should all be dealt with under O. 21, R. 90 and not otherwise and the order of confirmation under O. 21, R. 92 gives the final quietus to all objections which can be raised under O. 21, R. 90. (Para 8)

Thus, where a sale is held on a date different from that notified, without an order of adjournment and without a further sale proclamation that would amount only to an irregularity and the only remedy open to the party aggrieved is to apply to set aside the sale under O 21. R. 90 on proof that substantial injury has resulted therefrom. After it is confirmed, it is not open to challenge it on this ground by an independent suit to set it aside. Case law discussed. (Para 13)

Anno: C.P.C., O. 21 R. 90 N. 23a, 45; R. 92 N. 5.

K. V. Venkatasubramania Iyar, C. K. Viswanatha Iyer and K. Vittal Rao, for Appellant; K. Y. Adiga, M. K. Nambiar, T. Krishna Rao, K. P. Adiga and M. Koteswara Rao, for Respondents.

CASES CITED:
(A) ('47) AIR 1947 Mad 213: ILR (1947) Mad 471
(B) ('35) AIR 1935 Pat 205: 14 Pat 436
(C) ('89) 16 Cal 794
(D) ('25) AIR 1925 Cal 201: 40 Cal LJ 311
(E) ('21) AIR 1921 Mad 583: 44 Mad 35
(F) ('40) AIR 1940 Mad 206: (1940) 1 Mad LJ 568
(G) ('44) AIR 1944 Nag 199: ILR (1944) Nag 584
(H) ('95) 5 Mad LJ 70

(I) ('45) AIR 1945 PC 67: ILR (1945) Mad 601: 1945-1 Mad LJ 229
(J) ('83) 10 Ind App 25: 9 Cal 656 (PC)
(K) ('23) AIR 1923 PC 93: 45 Mad LJ 403 (PC)
(L) ('94) 20 Ind App 176: 21 Cal 66 (PC)
(M) ('07) 9 Bom LR 83: 29 All 196 (PC)
(N) ('22) AIR 1922 PC 336: 1 Pat 733: 44 Mad LJ 718 (PC)
(O) ('33) AIR 1933 Cal 486: 37 Cal WN 146
(P) ('38) AIR 1938 Cal 699: 178 Ind Cas 842
(Q) ('39) AIR 1939 Cal 369: ILR (1939) 1 Cal 539
(R) ('42) AIR 1942 Cal 275: ILR (1941) 2 Cal 570
(S) ('23) AIR 1923 Mad 635: 46 Mad 583
(T) ('52) AIR 1952 Mad 582: 1951-2 Mad LJ 623
(U) ('12) 38 Ind App 200: 39 Cal 26 (PC)
(V) ('44) 1944-2 Mad LJ 352 (PC)

JUDGMENT : The plaintiff is the appellant. The facts so far as they are relevant for the purpose of this appeal are these : On 11-8-1933 one Shivakava Patteri, the father of the plaintiff, executed along with four others a promissory note for Rs. 3000 in favour of the Canara Bank. For the balance due on this promissory note the Bank filed O. S. No. 427 of 1934 on the file of the Court of the District Munsif of Kasargod; obtained an 'ex parte' decree for Rs. 1869-4-10 on 7-9-1934; and realised a sum of Rs. 350 in R. E. P. No. 1564 of 1934. The books of the bank show that on 30-7-1935 a sum of Rs. 1637-13-6 being the balance due under the decree on that date was received from Mana Naicka, the first defendant in this suit, Ex. D. 75. On the same day the bank assigned the decree to him. The first defendant brought himself on record as the assignee decree-holder and after several unsuccessful attempts to realise the decree amount in R. E. P. Nos. 1410 of 1936, 584 of 1938, 1186 of 1938 and 172 of 1939 eventually brought the suit properties to sale in R. E. P. No. 401 of 1940 and they were purchased by defendants 2 to 4 in court auction 26-1-1942. An application filed on behalf of the plaintiff who was then a minor represented by his mother as his guardian to set aside the sales under Or. 21, R. 90, C. P. C., was dismissed as no security was furnished. The sales were duly confirmed and possession taken by the respective purchasers on 29-6-1942, 17-6-1942, and 23-7-1943. Defendants 5 to 7 are purchasers of some of the suit properties from defendants 2 to 4. On 2-10-1945 the appellant filed O. S. No. 87 of 1945 on the file of the court of the Subordinate Judge, South Kanara, for a declaration that the sales held on 26-1-1942 were illegal and void on various grounds set out in the plaint and for recovery of possession of the properties with mesne profits. It was also alleged in the plaint that the father of the plaintiff had disappeared in 1935 and had not been heard of since, and must be presumed to be dead. The claim was contested by all the defendants. The Subordinate Judge of South Kanara who heard the suit held that the plaintiff had not established any grounds invalidating the sales and dismissed the suit with costs. The present appeal has been preferred against this decision.

(2) On behalf of the appellant Mr. K. V. Venkatasubramania Iyer pressed two points: (1) Sivakavu Patteri the father of the plaintiff was only a surety for the other co-executants of the promissory note dated 11-8-1938 that the payment of Rs. 1637-13-6 to the bank on 30-7-1935 was really made by Sivakavu Patteri, but that he had the decree nominally assigned in the name of the first defendant as to enable him to recover the amounts from the other judgment debtors & that in breach of this arrangement, the first defendant fraudulently executed the decree against the properties of Sivakavu Patteri taking advantage of his disappearance; and that the purchases by defendants 2 to 4 were made in collusion with the first defendant. (2) The execution sale was fixed for 24-1-1942; it was held not on that date but on 26-1-1942; there was no order adjourning the sale from 24-1-1942 to 26-1-1942; there was no further proclamation, and that the sale is therefore a nullity.

(3) On the first question the burden is heavily on the plaintiff to establish that the payment of Rs. 1637-13-6 to the bank on 30-7-1935 was really made by his father; that the first defendant was only a benamidar for him; that the execution proceedings taken by the first defendant were fraudulent; and that the purchasers were parties to the fraud.

(4) There is no reliable evidence that it was Sivakavu Patteri that paid the amount of Rs. 1637-15-6 to the bank. (After discussing the evidence, the judgment proceeds as under:) On a consideration of the materials placed before us, we agree with the Subordinate Judge that the plaintiff has failed to establish that the assignment of the decree in favour of the first defendant was benami for his father.

(5) It is the second contention that the sale held on 26-1-1942 was a nullity that has been strongly pressed on us. The facts are that the sale proclamation fixed on 24-1-1942 as the date on which the sale was to be held. The day was a penultimate Saturday and therefore, a court holiday. The sale was accordingly held on Monday, 26-1-1942 being the next working day. It is common ground that no order was passed on 24-1-1942 adjourning the sale to 26-1-1942. It is argued for the appellant that as there was no such order, the sale held on 26-1-1942 was a nullity and no title was acquired under that sale by the purchasers. It cannot be doubted that if a sale is held on a date different from that on which it was notified, it would be at least a material irregularity and if that had resulted in substantial injury, the sale would be liable to be set aside if proceedings are taken under Or. 21 R. 90. But the plaintiff seeks to impeach the sale not in proceedings taken under Or. 21 R. 90 but in an independent action. The question is whether it is open to the plaintiff to maintain an action for setting aside the sale on the grounds now put forward. In —'Swaminatha v. Krishnaswami', AIR 1947 Mad 213(A), the facts were that a Bank obtained a decree against a Hindu father on a promissory note executed by him and in execution of the decree sold the joint family properties. The sons of the judgment-debtor filed a suit for a declaration that the sale was not binding on them, on the ground, 'inter alia' that there had been no attachment of the properties and that therefore the sale was a nullity. It was held that the failure to attach the properties was only an irregularity such as would give a right to move the court under Or. 21 R.

90 and if that was not done, the purchaser obtained a title which could not thereafter be attacked by the sons. Patanjali Sastri J. delivering the judgment of the Bench observed :

"are the plaintiffs then entitled to avoid the sale to Sundararaja Pillai, so far as their shares are concerned? Their father the first defendant failed to take any steps to have the sale set aside under Or. 21, Rule 90 on account of the irregularity, presumably because no substantial injury had resulted, nor did they avail themselves of that remedy which was open to them also as persons whose interests are affected by the sale. See —'Bubaneshwar Prasad Narayan Singh v. Behari Lal', AIR 1935 Pat 205(B) ... ... If omission to attach does not affect the jurisdiction of the court to sell and is a mere irregularity, the purchaser's title cannot, as it seems to us, be displaced by any antecedent irregularity in publishing or conducting the sale, except by resort to the statutory remedy provided by Or. 21, Rule 90. That remedy not having been availed of, the purchaser's title has become unassailable and the appeals must fail."

The position, therefore, is that if what happened at the conduct of the sale was only an irregularity, it can be questioned only by an application under Or. 21, R. 90. But if that would amount to an illegality, such as would render the sale void, then a suit would be maintainable. The point for decision then is whether the sale of the properties on 26-1-1942 is void on the ground that it was notified for 24-1-1942 and there was no order adjourning it to 26-1-1942. The argument on behalf of the appellant is that a sale officer gets his authority to sell only under the orders of court, that when the sale proclamation fixes the time and place of sale, his authority is limited to a power to sell at the time and place so fixed and therefore apart from further orders of court, he has no authority to sell at a different time and place from what is mentioned in the sale proclamation. Such a sale, it is urged, is more than an irregularity, it is a nullity and the decisions in —'Basharutulla v. Umachurn Dutt', 16 Cal 794(C); —'Motahar Hossain v. Md. Yakub', AIR 1925 Cal 201(D); —'Jayarama Aiyar v. Vridhagiri Aiyar', AIR 1921 Mad 583(E); —'Natesa Pillai v. Venkatarama Aiyar', AIR 1940 Mad 206(F) and —'Fakira v. Sangidas', AIR 1944 Nag 199(G), were quoted in support of this position. In '16 Cal 794(C), the facts were that the sale was fixed to take place on 12 noon, but it was actually held and concluded before time, at 10-30 a. m. The judgment-debtor filed a suit to set aside the sale on the ground that it was illegal and void. In agreeing with this contention the court observed as follows :

"By S. 287 of the Code (now Or. 21 rule 66) it is provided that, when any property is ordered to be sold by public auction in execution of a decree, the court shall cause a proclamation of the intended sale to be made in the language of such court. Such proclamation shall state the time and place of sale and shall specify fairly and accurately certain other things. There is then a provision in the Code that, before a sale takes place, the time and place of sale shall be advertised ... ... As a matter of fact the sale in this case did not take place at the time advertised ... ... Under these circumstances, it seems to us that there was no sale within the meaning of the Code at all, and that this proclamation of the time and place of sale and the taking place of the sale at the time and place advertised are conditions precedent to its being a sale under the Code at all. Under these circumstances, it appears to us that this property never has been sold under the Code, and consequently the plaintiff is entitled to a declaration that whatever took place when the property was put up for sale has no effect as against him, and that he is entitled to recover this property."

This was followed in 'AIR 1925 Cal 201 (D)'. The learned advocate for the respondents has invited our attention to later pronouncements of the Calcutta High Court in which the correctness of these two decisions has been doubted. Considering the question on principle and apart from authorities, it is difficult to see why the prescriptions as to the time and place of sale in Or. 21 rule 66(2) should alone be held to amount to conditions precedent to a valid sale and not the others. The policy underlying the entire scheme of Or. 21 is to ensure due publicity for court auction sales so that fair price could be realised for the properties. With this end, elaborate provisions are made for attachment of the properties, R. 54; for settlement of sale proclamation, R, 66; and for its publication, R. 67. The sale is not to be held before the expiry of 30 days from the date of publication, R. 68. The decree-holder is prohibited from purchasing the properties in court auction, unless he obtains leave of the court, R. 72. All these provisions are enacted with one purpose and that is that the properties might fetch the best price possible. If there is a failure to observe any one of these rules, the sale following thereon could in no sense be said to be illegal because illegality consists in the violation of an express provision of law. For such illegalities, however, the statute provides a remedy and that is an application to set aside the sale under Or. 21, R. 90 on proof that substantial injury has resulted therefrom. Or. 21, R. 92 prohibits such matters from being made a ground of attack in collateral proceedings by way of suit.

Thus for breach of the rules contained in the Civil Procedure Code there is a special remedy provided under Or. 21 rule 90 and that, under Or. 21 rule 90, is the only remedy available to the party. Where the objection to the sale is not that a provision of the Code has been violated, but something apart from the Code, as where the sale is held without the legal representatives being on record, the limitations prescribed by Or. 21 R. 90 may not apply and other questions might arise for consideration. But in respect of the matters actually provided by the Code, it is difficult, to see why some of them viz., those relating to time and place should be regarded as fundamental conditions and not the others, which are also prescribed in language as mandatory and intended as such for the protection of the judgment-debtors as the provisions relating to time and place. It comes to this, that in respect of statutory provisions

all of them relating to the same subject-matter, some are to be regarded as matters of jurisdiction, while others not. It is true that breaches of some of these rules may be more serious in character and have more damaging effect on the sale than breaches of other rules. But that will be an element legitimately to be taken into consideration on the question of substantial injury under Or. 21, R. 90. More than that, on what principle is a distinction to be sustained between breaches of the provisions of the Code wherefore the sale is, without more, to become void, and breaches wherefore the sale could be set aside only on proof of damage. That there is no rational basis for such a distinction held by Muthuswami Aiyar J. in — 'Arunachalam v. Kulandasami', 5 Mad L. J. 70 (H), where the sale had been held in violation of S. 289 (Or. 21, R. 67). After expressing the opinion that the

"Legislature did not probably intend to differentiate between infringements of different rules of procedure relating to sales in execution of immoveable property, but intended to treat them all alike and required proof of substantial injury, notwithstanding any irregularity, before the sale is set aside,"

the learned Judge observed as follows:

"The term 'irregularity' means in ordinary parlance the state of being irregular or not being in conformity to some recognised rule and in S. 311 (Or. 21, Rule 90) it can only mean not being in conformity to some one of the rules provided by the Civil Procedure Code to regulate execution sales. If it had been the intention of the Legislature to make a distinction between illegality & irregularity & to dispense with proving of actual loss in one case & not in the other, they would have expressed that intention clearly in apt language. In one sense whatever is irregular is also illegal, as irregularity connotes want of conformity to some recognised rule of procedure. x x x I think that it is violation of an established rule of procedure regarding sales that constitutes an irregularity and it is the consequential loss that constitutes a material irregularity or ground for cancelling the sale."

(6) The question whether failure to observe the provisions of the Civil Procedure Code relating to attachment and sale of properties in execution of decrees would render the sale a nullity has, subsequent to the decision in — '16 Cal 794 (C)', come up for consideration by the Judicial Committee and by the courts in India. The trend of these decisions is clearly to establish that breaches of these rules will not render the sales void; but that they would only be material irregularities furnishing a ground for taking action under Or. 21, R. 90. In — 'AIR 1947 Mad 213 (A)', it was held by Patanjali Sastri and Bell JJ., that omission to attach the properties before sale would be a material irregularity, but that it would not render the sale void. They observed:

"The position therefore is this: Attachment is a necessary preliminary to a judicial sale. But a sale without attachment is not a nullity. Omission to attach is a material irregularity which renders the sale liable to be set aside under Or. 21, Rule 90 if substantial injury is proved."

In — 'Marudanayagam Pillai v. Manickavasagam Chettiar', AIR 1945 P. C. 67 (I), the Privy Council had to consider the effect of a failure to observe the provisions of Or. 21, R. 66. That rule provides that the sale proclamation should state the time and place of sale and specify the property to be sold and the particulars relating to it such as the revenue payable thereon, the encumbrances to which it is subject and so forth. It was found by the Privy Council that the particulars given in the sale proclamation as to the valuation of the property were incorrect and that the provisions of Or. 21, R. 66(2) had not been complied with. The legal consequence of this default is thus stated by Sir John Beaumont:

"The position therefore is that this sale took place at a serious undervalue occasioned by failure on the part of the court and of the respondent decree-holder to carry out their obligations under Rule 66, and there can be no doubt that the appellant sustained substantial injury thereby. Their Lordships are of opinion that the case falls within the language of Rule 90 and that however dilatory and unsatisfactory the conduct of the appellant may have been, he has not on the facts found debarred himself of the right to have the sale set aside."

(7) In — 'Macnaghten Olpherts v. Mahabir Persad Singh', 9 Cal 656 (P.C.) (J), and — 'Baliram Singh v. Set Narasingdas', AIR 1923 P. C. 93 (K), the Privy Council have held that the failure to state the amount of revenue as required by Or. 21 R. 66(2) is only a material irregularity. In view of the fact that the specification as to time and place as well as the specification of other particulars concerning the property are all prescribed by the same provision, what applies to one must logically apply to the others and if a breach as regards specification of value or of the revenue payable on the property is only a material irregularity, there is no reason why breaches as regards time and place should be held to be anything more than material irregularities. In — 'Tassaduk Russel Khan v. Ahmed Hussain', 21 Cal 66 (P. C.) (L), a sale was held before the 30 days prescribed under S. 20 (now Or. 21, R. 68). In holding that this was only a material irregularity such as fell within the scope of S. 311 (now Or. 21, R. 90) and that the sale could be set aside only on proof of substantial injury, the Privy Council observed as follows:

"In the present case the decree-holder failed to comply with the full requirements of S. 290, but both on principle and authority their Lordships are of opinion that the case must be treated as the respondents themselves treated it, as one of material irregularity to be redressed pursuant to the provisions of S. 311, and in the application of that section it was incumbent on the respondents to have proved that they sustained substantial injury by reason of such irregularity."

(8) In — 'Gagraimati v. Akbar Hussain', 29 All, 196 (P. C.) (M), the question arose with reference to a failure to observe the provisions of S. 291 corresponding to O. 21, R. 69. The sale which was fixed for 20th February 1897 was not held on that date, but on 23rd February without fresh proclamation. In a suit to set aside the sale on the ground that it was

illegal, the Privy Council held that it was a case of material irregularity and the only remedy of the judgment-debtor was to apply under S. 311 on proof that there was substantial injury and that a separate suit was barred. Lord Macnaghten observed:

"The Subordinate Judge held that, inasmuch as no fresh proclamation was issued, the sale was void, and therefore he pronounced a decree in favour of the judgment debtors."

The Court of appeal, assuming that a fresh proclamation ought to have been issued, held that the omission was an irregularity which had involved no loss to the debtor, that the only course open to the judgment-debtor was to object, as they did to the confirmation of the sale, and that it was not competent for them to impeach the sale by regular suit.

Their Lordships are of opinion that the decision of the High Court is perfectly right. The provisions of the Civil Procedure Code are, in their opinion, clear on the point."

In — 'Rai Radha Krishna v. Bisheshar Sahay', AIR 1922 P. C. 336 (N), it was held by the Privy Council that a purchase by a decree-holder who did not obtain permission under S. 294 (Or. 21, R. 72) did not render the sale a nullity; and that it was liable to be avoided only on an appropriate application by the judgment-debtor or some other person interested. The principle to be deduced from these authorities is that breaches of the provisions of the Civil Procedure Code relating to execution against immoveable properties commencing from their attachment down to their sale should all be dealt with under Or. 21, R. 90 and not otherwise and that the order of confirmation under Or. 21, R. 92 should give the final quietus to all objections which could be raised under Or. 21, R. 90.

(9) Turning now to the authorities cited on behalf of the respondents in — 'Gobardhan v. Saratchandra', AIR 1933 Cal 486 (O), the sale could not be held on the day fixed as it turned out to be a holiday and in consequence it was held on the next day. There being no allegation or proof that any injury had resulted by reason of the change in date, Guha and Ghose JJ. held that in view of the decisions of the Privy Council, the sale could not be treated as a nullity and the decision in — 'AIR 1925 Cal 201 (D)', was not followed. In — 'Jogendranath v. Nabi Newaj', AIR 1938 Cal 699 (P), the sale was fixed for 20-7-1935. But, it was not held on that day nor was it adjourned in accordance with Or. 21, R. 69. The sale was actually held on 19-8-1935. On the facts this case is similar to the present one. The court below having set aside the sale as a nullity for want of an order of adjournment under Or. 21, R. 69 Edgley J. set aside that order and held, relying on the decisions of the Privy Council in — '21 Cal 66 (P. C.) (L)', and — '29 All 196 (P. C.) (M)', that the sale was not a nullity, and that it could not be set aside under Or. 21, R. 90 on proof of substantial injury. The decision in — 'AIR 1933 Cal 486 (O)', was followed in preference to that in — 'AIR 1925 Cal 201 (D)'. In — 'Rangpur Loan Office Ltd. v. Tarit Bhushan', AIR 1939 Cal 369 (Q), the sale which was fixed for a particular day was adjourned by the Nazir and the sale held on the adjourned date was held not to be a nullity. As there was an actual adjournment of the sale by the Nazir, this case is not in point. But the observations in the judgment show that the court doubted the correctness of the decisions in — '16 Cal 794 (C)', and — 'AIR 1925 Cal 201 (D)'. The question was again considered in — 'Asha Lata v. Manindranath', AIR 1942 Cal 275 (R). There a sale which was fixed for 10-1-1938 was stayed by the court on that date, but the order did not adjourn the sale to a specific date. On 15-1-1938 the court dissolved the stay and ordered that the sale be held on 17-1-1938. It was held on that day and the property was purchased by the decree-holder. The judgment-debtor contended that the sale was void on the ground that there was no order adjourning the sale on 10-1-1938, as required by Or. 21, R. 69. This contention was rejected and the sale was upheld. Here again, there was an order of court dated 15-1-1938 and therefore, the question now under consideration did not arise directly for determination. But the decisions in — '16 Cal 794 (C)', and — 'AIR 1925 Cal 201 (D)', were discussed and the opinion was expressed that in view of the decisions of the Privy Council in — '21 Cal 66 (L)', and — '29 All 196 (M)', their correctness was open to doubt, and the decisions in — 'AIR 1933 Cal 486 (O)', and — 'AIR 1938 Cal 699 (P)', were approved. Thus, the weight of authority in the Calcutta High Court is decidedly against the view taken in — '16 Cal 794 (C)', and — 'AIR 1925 Cal 201 (D)'.

(10) Turning now to the decisions of this court, in — 'AIR 1921 Mad 583 (E)', the proclamation of sale stated that the sale would take place at Cuddalore before the Central Nazir. The process-server entrusted with the duty of publishing the sale proclamation announced in the village that the sale would be held in the Munsif's court, Villupuram. In fact the sale was held before the Central Nazir, Cuddalore. Appraised of the mistake made by the process-server, the court refused to confirm the sale, especially as it found that substantial injury had resulted from it. Against this order, the auction-purchaser appealed. In confirming this decision this court observed that the sale was illegal and void and not merely irregular; and that it was not even necessary to find substantial injury, as Or. 21, R. 90 had no application. Oldfield J. observed as follows:

"It seems to me that if, when a proclamation was made any of the usual and effective methods prescribed or permitted by the Code for its publication has been misleading as to details of the matter proclaimed and has been such as not merely not to give information to possible bidders, but to divert them to a place where the sale is not to be held, the result must be in the words of — '16 Cal 794 (C)', that the property had never been sold under the Code at all."

Seshagiri Aiyar J. after referring to the decision in — '16 Cal 794 (C)', stated thus:

"In that case the question was whether if a sale was held at an hour anterior to the one mentioned in the proclamation the sale was irregularly conducted or whether it was illegally held. The learned Judges came to the conclusion that there was a violation of the fundamental conditions of the sale, namely, the time of sale, and that consequently the sale was a nullity. The same argument

can be used with reference to a sale held at a place different from the one mentioned in the proclamation. I concede that it is not easy to draw the line between an irregularity and an illegality, but I am clear that where a substantial provision of law has been violated, and that has the effect of not attracting persons who could be expected to be present for the purpose of bidding at the sale, the sale should be regarded as having been illegally conducted."

The correctness of the decision in — 'AIR 1921 Mad 583 (E)', is not open to doubt. There had been a misrepresentation by an officer of court and the court had under the circumstances not merely the inherent power, but was under a duty not to confirm the sale (vide — 'Raghavachariar v. Murugesa Mudaliar', AIR 1923 Mad 635 (S)', and — 'Kandasami Mudali v. Narasimha Iyer', AIR 1952 Mad 582 (T), and this jurisdiction could be exercised whether the sale is illegal or merely irregular and whether it had resulted in substantial injury or not and as the validity of the sale had been disputed at the stage of confirmation of the sale and not in collateral proceedings by way of suit, it was strictly speaking not even relevant to consider whether the sale was a nullity or not. Moreover, the observations that conditions as to time and place of the sale are fundamental and their violation would render the sale void rest on the authority of — '16 Cal 794 (C)', and as already mentioned, that decision has not been followed in later authorities of that court. No reference was made to the decisions in — '21 Cal 66 (L)', and — '29 All 196 (M)'. There is thus considerable ground for dissenting from the reasoning on which the decision in — 'AIR 1921 Mad 583 (E)', is based. But in the present case we are not concerned with a sale held at a place different from that which was advertised, and therefore, the decision in — 'AIR 1921 Mad 583 (E)', does not directly apply. One of the cases discussed in — 'AIR 1921 Mad 583 (E)', by Seshagiri Aiyar J. is the decision of the Privy Council reported in — 'Ranglal Singh v. Ravaneshwar Parshad Singh', 39 Cal 26 (P.C.) (U). There, the sale was fixed for 13-7-1903. But as the Presiding Officer was not in station, the sale was not held on that date, it was actually held on 20-7-1903, after the Officer had returned. There was no order on 13-7-1903 adjourning the sale to a specified date. The Privy Council held that ever if there was irregularity in the conduct of sale, there was no proof of substantial injury, and the sale could not therefore be set aside. Dealing with this case, Seshagiri Aiyar J. observed:

"The people in the locality were apparently aware that in consequence of the absence of the presiding officer the monthly sales would not be held on the usual day, but would be held immediately on the return of the presiding officer. On these facts the Judicial Committee came to the conclusion that there was only an irregularity, and that it would not vitiate the sale unless substantial loss was proved. That case is no authority, for this case, where there was no proclamation relating to the place where the sale is actually held."

If this is a sound distinction, the present case will be governed by the decision in — '39 Cal 26 (P. C.) (U)', and not by — 'AIR 1921 Mad 583 (E)'.

(11) In — 'AIR 1940 Mad 206 (F)', the sale was advertised to begin on 26-7-1935 and to be concluded on 5-8-1935. But it was not closed on 5th August. The sale was continued till 12th August on which date it was concluded. In holding that the sale was illegal, Stodart J. observed:

"Its (court's) action in selling the property on a date subsequent to that date was positively illegal. A sale which is held on a day on which it has been expressly proclaimed that it shall not take place is not a valid sale at all. For that reason we must hold that this sale was vitiated by illegality, that it was a nullity, and must therefore be set aside."

(12) But this decision was reversed on appeal by the Judicial Committee (Vide — 'Venkataramana Ayyar v. Natesa Pillai', (1944) 2-Mad L. J. 352 (P. C.) (V). The Board observed:

"In view of the agreement and the order of the court their Lordships are unable to see that there was any material irregularity in the proceedings, still less any illegality."

Finally reliance was placed on the decision in — 'AIR 1944 Nag 199 (G)'. There, it was held that when an adjourned sale is held at a different place without a fresh proclamation, it is not merely irregular but null and void. The court observed:

"In the absence of any proof that notice of the change of date and place had actually been published on the 16th April to the assembled intending purchasers at Bori Adgaon it must be held that the sale which was held five days later at Khamgaon was a nullity, not having been held in accordance with the provisions of the Code, and in the absence of any proclamation whatever that the sale was to take place on that date and at that place. It is not merely an irregularity when a sale is postponed and held at some other place without any actual new proclamation."

There is no discussion of the authorities and the decision is not of much assistance.

(13) On a consideration of the authorities, we have come to the conclusion that when a sale is held on a date different from that notified, without an order of adjournment and without a further sale proclamation that would amount only to an irregularity and the only remedy open to the party aggrieved is to apply to set aside the sale under Or. 21, R. 90 on proof that substantial injury has resulted therefrom. Such an application was in fact filed on behalf of the plaintiff, but it was dismissed as no security was furnished as required by the rules. The sale having been confirmed, the title of the purchasers becomes indefeasible and it is not open to challenge on any of the grounds now put forward. This contention therefore, fails.

(14) It remains only to state that while the appeal was pending. the second and third defendants entered into a compromise with the plaintiff and a decree has been passed in terms of the compromise. The rights of defendants 1, 4, 5, 6 and 7 will be governed by this decision. As against them the appeal is dismissed with costs, one set to be divided in proportion to their interest.

B/D.R.R. Appeal dismissed.

A.I.R. 1953 MADRAS 689 (Vol. 40, C. N. 260)

RAGHAVA RAO J.

Coimbatore Municipality represented by its Commissioner, Appellant v. G. S. Govindayyar, Respondent.

Second Appeal No. 1411 of 1947, D/- 11-7-1950.

(a) Municipalities — Madras District Municipalities Act (5 of 1920), S. 354 and Sch. 4 — Right of suit — (Civil P. C. (1908), S. 9).

Quite apart from the right of appeal provided for by Schedule 4 a suit does lie where in fact the provisions of the Act have not been in substance and effect complied with. The circumstance that the right of appeal was exercised is immaterial. Case law discussed. (Para 9)

Anno: C.P.C., S. 9 N. 53.

(b) Municipalities — Madras District Municipalities Act (5 of 1920), S. 354 — Compliance with.

The action of the Municipality in disregard of the order of the Deputy Inspector of Municipal Councils based upon the fair rent fixed by the Collector under the House Rent Control Order is capricious and arbitrary. The provisions of the Act cannot in terms of the proviso to S. 354 be accordingly held to have been complied with by the Municipality in substance or in effect. (Para 4)

K. Kuttikrishna Menon and Vasudeva Mannadiar, for Appellant; K. V. Ramachandra Aiyar, for Respondent.

CASES CITED:

(A) ('50) AIR 1950 Mad 222: 1949-2 Mad LJ 629
(B) ('49) AIR 1949 Mad 189: 1948-2 Mad LJ 111
(C) ('29) 113 Ind Cas 560 (Mad)
(D) ('01) 10 Mad LJ 401: 24 Mad 205
(E) ('04) 27 Mad 547
(F) ('40) AIR 1940 PC 105: ILR (1940) Mad 599
(G) (1859) 141 ER 486: 6 CB (NS) 336
(H) ('36) AIR 1936 Mad 269: 69 Mad LJ 695
(I) ('41) AIR 1941 Mad 530: ILR (1941) Mad 850 (FB)

JUDGMENT : The interesting question argued in this second appeal is the maintainability of a suit by the owner of a house in a Municipality questioning the assessment in respect thereof by the municipality and seeking a refund of the amount collected by the Municipality on the basis of such assessment. The plaintiff is the owner of a house property bearing door No. 5/7 in the Imperial Bank Road, Coimbatore. The defendant is the municipality of Coimbatore represented by its Commissioner. The case of the plaintiff is that the property is liable to a house-tax only of Rs. 124-14-0 per half year on the basis of an annual rental value of Rs. 1665. That was the value fixed by the Deputy Inspector of Municipal Councils on the basis of the monthly rental of Rs. 150 fixed as the fair rent for the house by the District Collector of Coimbatore under the House Rent Control Order. The plaintiff attacks the value of Rs. 4440 adopted by the Municipality for determining the house-tax as being capricious and unreasonable in view of the orders of the Deputy Inspector of Municipal Councils and of the District Collector of Coimbatore aforesaid. The defendant pleaded that it was not bound by such orders and that the levy was justified under S. 82 of the Madras District Municipalities Act, which will hereinafter be referred to as the Act. It also raised the contention that since the provisions of the Act had been complied with the jurisdiction of the court stood excluded, and that the plaintiff had accordingly to be non-suited. The learned Subordinate Judge of Coimbatore by whom the suit was tried upheld the pleas of the Municipality and dismissed the action. The learned District Judge on appeal has reversed him and decreed the suit.

(2) It is argued for the Municipality in this second appeal that however erroneous the levy of tax under S. 82 of the Act may be, S. 354 interposes a bar in the way of a suit to question it. It is also contended that the only remedy of the plaintiff was to appeal against the assessment under the Act.

(3) S. 82 of the Act so far as material provides in sub-sec. (2) that the annual value of buildings shall be deemed to be the gross annual rent at which they may reasonably be expected to let from month to month or from year to year, S. 354 so far as material provides as follows :

"(1) No assessment ... ... under the authority of this Act shall be impeached or affected by reason of any clerical error or by reason of any mistake ... ... in respect of the amount assessed ... ... provided that the provisions of this Act have been in substance and effect complied with;

(2) No suit shall be brought in any court to recover any sum of money collected under the authority of this Act or to recover damages on account of any assessment, or collection of money made under the said authority.

Provided that the provisions of this Act have been, in effect, complied with."

The learned District Judge in appeal held that in view of the order of the District Collector under the House Rent Control Order the amount of assessment charged by the defendant was not on the basis of the annual rent at which the premises could reasonably be expected to let from month to month or from year to year within the meaning of S. 82 (2) of the Act, and that in view of the order of the Deputy Inspector of Municipal Councils based upon the fair rent fixed by the Collector the annual value of the lands for the purpose of that section and that subsection could be what the Municipality adopted in disregard of that order. It followed in the opinion of the learned District Judge that the civil court "has jurisdiction to entertain the suit as the action of the defendant was arbitrary and capricious." S. 354 of the Act did not, according to the learned District Judge, create a difficulty in the way of the plaintiff apparently because the provisions of the Act relating to assessment were not, in substance and effect, complied with and the proviso to the section did not accordingly stand satisfied.

(4) Whether in terms of S. 82(2) of the Act the annual rent adopted by the Municipality is such as the premises may reasonably be expected to let at from month to month or from year to year is a question of fact. Unless vitiated by any error of principle that finding of the learned District Judge in regard to this matter cannot be challeng-

ed in second appeal. It was not as if there was no evidence to support his conclusion. On the other hand, the material in support of it is ample. Prima facie, the orders of the Collector & the Deputy Inspector of Municipal Councils should have been accepted by the Municipality, and the District Judge rightly held that the action of the Municipality in disregard of those orders was something capricious and arbitrary. The provisions of the Act cannot in terms of the proviso to S. 354 be accordingly held to have been complied with by the Municipality in substance or in effect.

(5) There being no bar of suit under the terms of S. 354 of the Act, the question is whether 'de hors' the section there is any such bar. I am not satisfied that there is any. The mere fact of the existence of a right of appeal under the provisions of the Act against the assessment by the Municipality does not, in my opinion, necessarily oust the jurisdiction of the civil court to entertain a suit in challenge thereof. Reliance is placed by Mr. Kuttikrishna Menon appearing for the Municipality in support of his contention on a recent decision of a single Judge of this court (Viswanatha Sastri J.) reported in —'Udipi Municipal Council v. Vasudevacharya', AIR 1950 Mad 222(A). There it was held in respect of the property in question that the assessment under S. 81(3) of the Act was rightly made and that, in any event, where the Municipal Council determined the question of fact (whether the site assessed was or was not used exclusively for agricultural purposes) on the evidence and materials available, the civil court cannot assume the powers of the assessing authority and investigate the facts afresh to find out whether its conclusion on the facts is correct.

The passage in the judgment in that case on which stress has been laid by the learned advocate for the appellant is to be found at page 224 as follows:

> "If the land was used exclusively for agricultural purposes, the assessing authority had to proceed under S. 81(4) and if not, under S. 81(3). It had power to determine and determined the question of fact on the evidence and materials available and its conclusion was that the land in question was not used exclusively for agricultural purposes. It may be that a different view on the facts is possible. All that can be said for the respondents is that the executive authority of the Municipal Council came to a wrong conclusion on a matter of fact which it was within its competence to decide. 'If so, their remedy was by way of an appeal to the Municipal Council.' The civil court cannot assume the powers of the assessing authority and investigate the facts afresh to find out whether its conclusion on the facts is correct. If on the facts found, assumed or admitted by the assessing authority, the assessment is found to have proceeded on an erroneous basis, the civil courts can step in and declare the invalidity of the assessment on the ground that the provisions of the Act have not been in substance and effect complied with. No statutory body can give itself power to impose a tax on citizens by an erroneous interpretation of the taxing provisions in the statute and if it does so, the aggrieved tax payer has a right to get redress in the ordinary courts. In the present case, however, I am of the opinion that the assessment cannot be assailed on this ground. The error, if any, related to the appreciation of the materials available for arriving at a conclusion on a question of fact which the assessing authority had to determine in the course of making an assessment."

(6) The distinction drawn in this passage between cases of an erroneous basis adopted by the Municipality and cases of an erroneous conclusion reached in regard to the existence of the right on statutory basis on the facts found, assumed or admitted by the assessing authority is certainly 'prima facie' in favour of the appellant's contention, and the respondent on the basis of this passage read literally is confined only to the remedy of an appeal to the Municipal Council under the Act and debarred of a suit in the ordinary courts. I am, however, with respect not prepared to accept this decision as correct if it should be taken as meaning that however arbitrary, capricious or perverse the assessment of the Municipality on the statutory basis may be, the assessee must content himself with an appeal under the Act and cannot resort to a suit for relief. S. 9 of the Civil Procedure Code provides that,

> "The courts shall (subject to the provisions herein contained) have the jurisdiction to try all suits of a civil nature excepting suits of which their cognizance is either expressly or impliedly barred."

The question is whether in respect of a suit of the kind with which we are concerned in the present case, there is any provision of law anywhere which operates as a bar thereto either expressly or impliedly. No bar derived from any other enactment has been suggested, and the only bar in the Act is what is gatherable from S. 354 itself, which comes into being only where the provisions of the Act relating to assessment have been, in substance and effect, complied with. The maintainability of such a suit where there has been no such compliance with the provisions of the Act which is the necessary implication of the section cannot be treated as whittled down or eviscerated by the mere existence of a right of appeal provision in Schedule IV of the Act. While there is on the one hand, the rule in the schedule which confers on the assessee the right of appeal, we have on the other the plain language of S. 354 in the body of the Act itself which leaves no doubt but that where the provisions of the Act have not been in substance and effect complied with an assessment can well be challenged by reason of a mistake in respect of the amount assessed and that a suit can well be brought to recover any money collected on the basis of such assessment.

(7) Reference is next made by the learned counsel for the appellant to a decision in — 'the Commissioner, Municipal Council, Vizagapatam v. Siddeswara Devi', AIR 1949 Mad 189(B), also of a single Judge. The facts there were that upto 1940 a house and site of about 4 acres had been assessed as if the whole of the 4 acres was adjacent and appurtenant to the house, that in 1940 however on the report of a special officer some 3 acres out of the 4 were excluded from the site held to be appurtenant to the house and were separately taxed, and that when a suit to recover the

tax in respect of this land was brought by the Municipality the defendants maintained that they were not liable to pay the tax as the site was appurtenant to the house. It was held by the learned Judge (Happell J.) that where there was a mistake of fact on the part of the Municipality the remedy was by way of an appeal to the Municipal Council, and that the civil court had no jurisdiction, provided the provisions of the Act had been in substance and effect complied with. It will be seen that so far the ruling does not carry the learned counsel the whole length required, because it lays down that the civil court has no jurisdiction on the facts, provided the provisions of the Act have been in substance and effect complied with. That as much as to suggest that where they have not been in substance and effect complied with, the civil court may well have jurisdiction. The ruling of the learned Judge proceeds further to the effect that even if the site in question should have been held to be appurtenant to the house, that is merely an error of fact in making the assessment which the Municipality had the power to make. But then again the learned Judge proceeds to hedge in his decision in the winding up of the discussion by the remark,

> ".....and it seems to me clear that there has been no contravention of any express provisions of the Act and no mistaken view of the provisions of the Act. In this view it was not open to the lower courts to go into the question whether the assessment was correct or not."

If one is to regard this ruling — as I am not prepared to do— as going the whole length of laying down that in view of the existence of a right of appeal under the Schedule to the Act the remedy of a suit in cases of non-compliance by the Municipality with the provisions of the Act in substance and in effect stands excluded, I must say that I consider this ruling to be erroneous like the ruling in — 'AIR 1950 Mad 222 (A)'.

(8) Stress has also been laid by the learned advocate for the appellant upon a case in — 'Purnachendra Mala v. President, Taluk Board, Chicacole', 113 Ind Cas 560 (Mad) (C), referred to by Happell J. in — AIR 1949 Mad 189 (B)'. In that case a suit was brought to recover the amount collected on the ground that the person practised a profession within the limits of the Taluk Board whereas in fact she had not done so. It was held that the civil court had no jurisdiction. That again is a decision of a single Judge (Jackson J.) which, as the headnote bears, lays down that under S. 228(2) of the Madras Local Boards Act, where the provisions requisite for the collection of the tax have been followed, and there is merely a mistake of fact committed 'bona fide' by the assessing authority, the remedy of the aggrieved party is that provided by and confined to the Statute, namely, an appeal to the Local Board itself. In his judgment the learned Judge, it may be noticed, points out:

> "If the Local Board substantially comply with these provisions no suit will lie and whether it has complied is a question of fact. This is clearly laid down in the leading Madras Case. — 'Municipal Council of Cocanada v. Standard Life Assurance Co.', 24 Mad 205 at p. 213 (D).
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> In the —'Municipal Council, Mangalore v. Codial Bail Press', 27 Mad 547 (E), it was held that a civil court can intervene when the Municipality has deliberately acted upon a wrong basis in contravention of the clear provision of the Act. In that case it was not an insolated mistake but a fundamental departure from the meaning of the Statute."

I consider that the test laid down by this decision for the civil court's interference — namely. a fundamental departure from the meaning of the statute—stands fulfilled in the present case.

(9) The true test that must be applied to cases of this description is in my opinion what the Privy Council have laid down in — 'Secretary of State v. Mask & Co.', AIR 1940 P. C. 105 (F), Lord Thankerton in delivering the judgment of the Board of the Judicial Committee in that case observes at p. 110:

> "It is settled law that the exclusion of the jurisdiction of the civil courts is not to be readily inferred,, but that such exclusion must either be explicitly expressed or clearly implied. It is also well settled that even if jurisdiction is so excluded, the civil courts have jurisdiction to examine into cases where the provisions of the Act have not been compliied with, or the statutory tribunal has not acted in conformity with the fundamental principles of judicial procedure."

That case no doubt related to an altogether different enactment, namely, the Sea Customs Act (Act 8 of 1878) and in particular to the provisions of Ss. 188 and 191 thereof. Whether in regard to cases under that Act, where the right of appeal provided for by the Act had been actually exercised by the party aggrieved he would still be entitled to have recourse to a suit is a question on which their Lordships do not express any final opinion. The circumstance that in the case before me the right of appeal provided for by the schedule IV to the Act was exercised is immaterial, in view of my interpretation of S. 354 of the Act as yielding the plain result on its language that quite apart from the right of appeal a suit does lie where in fact the provisions of the Act have not been in substance and effect complied with. The principle laid down by Lord Thankerton in — 'AIR 1940 P. C. 105 (F)', which I have referred to above is in my opinion a principle of general application which must be held to govern the present case. Then, it is pointed out that by the learned Lord at p. 110 of the report, referring to a decision of Willes J. in — 'Wolverhampton New Waterworks Co. v. Hawkesford', (1859) 6 C. B. (N. S.) 336 at p. 356 (G), that the question in such class of cases is whether the case falls under the third class stated by Willes J. namely:

> "Where the statute creates a liability not existing at common law, and gives also a particular remedy for enforcing it ..... With respect to that class it has always been held that the party must adopt the form of remedy given by the statute."

That makes no difference to the view I am taking, as it is perfectly clear to my mind on a scrutiny of S. 354 of the Act that in addition to the right of appeal provided for by and in Schedule IV of the Act the right of suit stands saved in all cases in which the provisions of the Act have not in substance and effect been complied with. After all, in the language of Varadachariar J. in — 'Kamaraja

Pandiya Naicker v. Secretary of State', AIR 1936 Mad 269 at p. 272 (H), the appeal in such a case is only to a body acting as part of the Executive machinery and not to an independent body acting as a special tribunal for settling a dispute between the tax payer and the taxing authority. For this reason, the Full Bench ruling of this court in — 'Secretary of State v. Allu Jagannadham', AIR 1941 Mad 530 (J), too can be of no assistance to the appellant.

(10) I am accordingly of opinion that the suit in this case was competent, and that this second appeal must fail with the costs of the respondents right through. No leave.

B/D.H. Appeal dismissed.

A.I.R. 1953 MADRAS 692 (Vol. 40, C. N. 261)

SATYANARAYANA RAO AND RAJAGOPALAN JJ.

D. Chakravarthi Iyengar, Appellant v. Gangadara Mudaliar and others, Respondents.

Second Appeal No. 2038 of 1948, D/- 6-11-52.

(a) Civil P. C. (1908), O. 33 R. 10 — Priority of charge.

Pauper suit on mortgage — Compromise decree providing for payment of Court-fee to Government by defendant — Inspite of decree being silent regarding priority of charge in favour of Government, charge in favour of Government has priority over mortgage in favour of plaintiff. (Para 3)

Anno: C.P.C., O. 33 R. 10 N. 4.

(b) Civil P. C. (1908), O. 33, R. 10 (before introduction of R. 14 in 1942) — Sale subject to encumbrances.

Pauper suit on mortgage — Compromise decree providing for payment of Court-fee to Government by defendant — Sale of property by government must be taken to be subject to mortgage in favour of plaintiff. (Para 4)

Anno: C.P.C., O. 33 R. 10 N. 4.

(c) Transfer of Property Act (1882), S. 52 — Sales in pursuance of same decree.

Properties brought to sale by both parties in pursuance of same compromise decree — Principle of 'lis pendens' cannot be applied to earlier sale. AIR 1933 Mad 583 (FB), Foll. (Para 5)

Anno: T. P. Act, S. 52 N. 8, 9.

R. Gopalaswami Aiyangar, for Appellant; Subramaniam and Rajagopal, for Respondents.

CASE CITED:

(A) ('33) AIR 1933 Mad 583: 56 Mad 846 (FB)

SATYANARAYANA RAO J.: The plaintiff is the appellant in this second appeal. The only question that falls to be decided in this second appeal, is, whether the title of the fourth defendant who claims the suit properties should prevail over the title of the plaintiff. The first and second defendants in the action are brothers. The second defendant mortgaged his undivided half share in the family properties to his brother, the first defendant. As the second defendant did not pay the mortgage amount, the first defendant as plaintiff instituted a suit 'in forma pauperis' (O. S. No. 361 of 1948) on the file of the Chingleput District Munsif's Court for enforcing the mortgage. There was a compromise decree in that suit on 18th March 1939. Under the compromise, the parties agreed to a decree for Rs. 1545 with subsequent interest to be paid by the first defendant to the plaintiff. As the suit was instituted in 'forma pauperis', the compromise provided also for the payment of the court-fee due to the Government. Under clause (6) of the decree, it was provided that

> "the plaintiff do pay Rs. 41-3-9 and the defendant do pay Rs. 123-11-3 to the Government on account of court-fee due to them and that the respective shares of the parties in the suit properties do stand a charge for the Court-fee due to the Government."

The suit properties are described in two schedules which were attached to the plaint and also to the decree. The suit property was, according to the schedules, the undivided half share of the defendant in the survey numbers whose particulars were given in the two schedules. Under this decree, however, the mortgagee's right to bring the properties to sale was restricted to a few items which are described in detail in schedule IV attached to the decree.

The plaintiff in that action, i.e., the present first defendant paid the court-fee due to the Government. But the present second defendant who was the sole defendant in that action did not pay his share of Rs. 123-11-3. The Government, therefore, brought to sale the interest of the present second defendant in 3 items of property which constituted items 4, 6 and 7 of the schedule II attached to the decree in O. S. No. 361 of 1938. The items sold were survey No. 238/2 (17 cents), Survey No. 213/2 (36 cents), Survey No. 214/1 (35 cents), in all 88 cents and the fourth defendant in the present suit purchased them on 22-3-1941. The sale by the Government was through court and was not a revenue sale. The mortgagee, i.e., the present first defendant, executed his decree for sale and the hypotheca which was permitted to be sold under the compromise decree was purchased by the decree-holder himself on 26-11-1941. The present first defendant who was the decree-holder in his turn conveyed the property so purchased by him to the present plaintiff under Ex. P. 6 dated 10-5-1943. The first defendant who owned the other undivided half in all the properties in his turn sold away his interest in the properties on 6-10-1939 under Ex. D. 2 to the third defendant. The plaintiff who became the ultimate purchaser of the interest of the second defendant in the items which were directed to be sold under the compromise decree instituted the present suit for partition and separate possession of the properties impleading as parties to the action the two brothers the first and the second defendants, the mortgagee and the mortgagor and the third defendant who purchased the interest of the first defendant and the fourth defendant who purchased the three items in the sale brought about by the Government to recover the court-fee.

(2) The plaintiff obtained a decree for partition and separate possession of all the items except the three items which the fourth defendant purchased in the sale by the Government. The courts below held that the title of the fourth defendant to these three items should prevail over that of the plaintiff.

(3) The correctness of this decision was vigorously canvassed before us by Mr. Gopalaswami Aiyangar, the learned advocate for the appellant, on various grounds. In the first

place, he raised the question that in view of the language of the decree in O. S. No. 361 of 1938 the charge in favour of the Government has no priority because the decree did not expressly state so. It is no doubt true that the decree is silent regarding the priority of the charge in favour of the Government. But under the Code, the charge in favour of the Government is declared to be the first charge on the subject matter of the suit. We must, therefore, take it that notwithstanding this omission in the decree, the charge in favour of Government for the court-fee payable by the second defendant would undoubtedly be a first charge and would have a priority over the mortgage in favour of the first defendant. The language of the decree which refers to the respective shares of the parties in the suit properties and creates a charge for the amount apportioned between the two brothers no doubt creates some little difficulty because in the suit property which is only the undivided half share of the second defendant the present first defendant who was the plaintiff in the action had no share or interest. He was the owner of the other undivided half which was not the subject-matter of the suit. It was contended on behalf of the respondent that we should interpret the word "shares" as really meaning the "interest" of the respective parties in the hypotheca, i.e., the interest of the plaintiff as mortgagee and the interest of the defendant as mortgagor. We think that it would be inapt to describe the intention of the mortgagee in the properties as a share in the property and therefore, it is difficult to accept the contention urged on behalf of the respondent. The intention under the decree which is a compromise decree is clearly to create a charge on the undivided half share of the defendant in all the items of properties described in the two schedules and that charge, in view of the language of Or. 33 rule 10 C. P. C., would undoubtedly have priority over the mortgage in favour of the present first defendant.

(4) The next question is, whether the sale was free of encumbrances or could only be subject to the mortgage in favour of the present first defendant. The sale in the present case was through court and was not a revenue sale. In 1942 this court amended Or. 33 by introducing R. 14 enabling the Government to realise the unpaid Court-fee in pauper suits by bringing the property to sale as if it were an arrear of land revenue. If there was of course a revenue sale, the further question whether, by virtue of the language that the liability should be enforced as if it were an arrear of land revenue, it would attract also all the provisions of the Revenue Recovery Act, including the section which annuls the prior encumbrances may have to be considered. But that question does not arise in this case, as the sale was in 1941 before the amendment was introduced in 1942. The sale must, therefore, be taken to be subject to the encumbrances and not free from encumbrances. This position was not disputed by the respondent.

(5) The only other question is as between the two purchasers, whether the prior purchase by the fourth defendant should prevail over that of the plaintiff's predecessor in title. On the principle of the Full Bench decision in —'Nagendran Chettiar v. Lakshmi Ammal', AIR 1933 Mad 583 (F. B.) (A), the title of the fourth defendant should undoubtedly prevail. But the learned Judges in that case stated that the principle would apply, only if there is no complication of 'lis pendens'. Taking advantage of this observation, an argument was founded in this case that the sale in favour of the fourth defendant was subject to 'lis pendens', as the mortgage decree in favour of the present first defendant in the earlier suit was not satisfied by that date. This contention, however, cannot be accepted, as there is no question of any 'lis pendens' in this case as the rights of both parties flow from sales which have been brought about under the provisions of the compromise decree. There was no independent proceeding which was initiated by the plaintiff's predecessor during the pendency of which the sale in favour of the fourth defendant took place. When the properties were brought to sale in pursuance of the same decree, it is difficult to apply any principle of 'lis pendens' to the earlier sale.

(6) It was then claimed by Mr. Gopalaswami Aiyangar, the learned advocate for the appellant, that his client should at least be given an opportunity to redeem the first charge and recover possession of the property for, according to him no such opportunity was ever given to him in the proceedings for the sale of the properties by the Government. This argument also cannot be accepted. The necessity for the charge was the pauperism of plaintiff's predecessor-in-title, the first defendant, who was mainly liable to pay the court-fee to the Government. But by compromise there was an apportionment of that liability. It is the compromise decree that created the charge on the undivided half share of the second defendant in all items of the property covered by the two schedules attached to the decree for the portion of the liability which was thrown on the second defendant under the said compromise. The plaintiff, the present first defendant, did not provide for himself any right of redemption and he was aware throughout that under the decree and in view of the provisions of the Civil Procedure Code contained in Or. 33 Rr. 10 and 12 in enforcement of the charge in favour of the Government, the property of the second defendant could be sold in default of payment by him and it was up to him to have claimed the right of redemption if he was so minded and not to wait until after the sale had taken place and then claim it in the present action. He had ample opportunity from the beginning to pay the Government the sum of Rs. 123 and odd for which a charge was created and he never availed himself of that opportunity, but allowed the properties to be sold in pursuance of this very decree. He cannot, therefore, be given a further opportunity to redeem the fourth defendant, the auction purchaser, in pursuance of the charge decree in favour of the Government.

(7) For all these reasons, we think that the decision of the lower court is correct and the second appeal is dismissed with costs.

B/D.H. Appeal dismissed.

A.I.R. 1953 MADRAS 694 (Vol. 40, C. N. 262)

RAJAMANNAR C. J.
AND VENKATARAMA AIYAR J.

India Sugars and Refineries Ltd., by its Director, V. T. Padmanabhan, Appellant v. Estate of the late V. Ramalingam, represented by executors, Rukh-Ul-Mulk S. Abdul Wajid and others, Respondents.

Appeals Nos. 766 and 767 of 1948, D/- 31-10-1952.

(a) Limitation Act (1908), Art. 36 — Scope.

Article 36 contemplates an action for compensation for a wrong in the nature of a tort. Secondly, the suit to which the article would apply is a suit for compensation. If the suit is for the recovery of a particular property or sum of money as such, then the suit cannot fall within the article. AIR 1917 Pat 260; 3 Cal WN 202 and AIR 1938 Mad 353 (FB), Rel. on. (Para 5)

Anno: Lim. Act, Art. 36 N. 1, 3.

(b) Limitation Act (1908), Art. 90 — Neglect and misconduct.

Article 90 is the residuary article dealing with claims of a principal against an agent. The neglect or misconduct contemplated by the article is neglect or misconduct in the course of and intimately connected with the agency duties, qua agent. It is in this view that this article has been applied to cases where a principal sues the agent to recover the secret profits made by the agent. (Para 7)

Anno: Lim. Act, Art. 90 N. 2.

(c) Trusts Act (1882), S. 88 — Claim by principal against agent for advantage gained by latter — Limitation — (Limitation Act (1908), Arts. 90, 120).

A was one of the directors and also the sole managing agent of certain company and was thus bound in a fiduciary character to protect the interests of the company. But availing himself of this character and utilising the premises and staff of the company as well as his credit with the company by reason of the position which he occupied, A gained for himself a pecuniary advantage in the sum of Rs. 8510. The company sued to recover the amount claiming that A must hold the advantage so gained for the benefit of the company.

Held that in view of the nature of the claim, Art. 90, Limitation Act did not apply. This was a case where the basis of the claim was not neglect or misconduct, but the advantage taken by a person in a fiduciary capacity of his position to make a gain. Under S. 88, Trusts Act A was bound to give it up to the person to whom he owed the fiduciary duty. To such a suit there was no other article applicable and therefore Art. 120 applied. AIR 1938 Mad 353 (FB), Rel. on. (Para 7)

Anno: Trusts Act, S. 88 N. 4, 7, 10; Limitation Act, Art. 90 N. 1, 2; Art. 120 N. 4, 19.

The Advocate General, N. V. B. Shankar Rao & G. Vasantha Pai, for Appellant; Short Bewes and Co. and K. R. Venkatarama Sarma, for Respondents.

CASES CITED:
(A) ('17) AIR 1917 Pat 260: 38 Ind Cas 525
(B) ('99) 3 Cal WN 202
(C) ('38) AIR 1938 Mad 353: ILR (1938) Mad 586 (FB)

RAJAMANNAR C. J.: These two appeals arise out of two suits filed by the appellant, the India Sugar Refineries Ltd., by its director & Managing Agent, T. Padmanabhan, for recovery of sums of money from the estate of one V. Ramalingam, who was a director of the company and also its sole managing agent from 16-11-1936 till the date of his death 18-12-1942. The plaintiff company was incorporated under the Indian Companies Act with the principal object of manufacture of sugar at Hospet. By its memorandum of association, Messrs. Ranganathan & Co., a partnership firm, were appointed managing agents of the company. The firm continued to hold that office till they resigned that office in or about July 1935. Subsequent to this, an agreement was entered into by the company with V. V. Ramalingam under which the latter was appointed its sole managing agent on terms set out in the agreement. V. Ramalingam as the managing agent was entitled to receive a salary of Rs. 800 per mensem together with a commission of 7½ per cent per annum on the total net annual income of the company. Besides these, he was also entitled to a commission in respect of work done by him in capacities other than that of a Managing Agent. More detailed reference will be made to the material terms in due course in this judgment.

(2) In the two suits out of which these appeals arise, the company claimed various amounts on the ground that Ramalingam had wrongfully been paid those amounts or had drawn those amounts or was otherwise liable to pay the company the amounts which he had received. The learned District Judge of Bellary who tried both the suits dismissed them with costs. There was another suit which was tried along with these two, claiming more or less similar reliefs, and that too was dismissed.

(3) In the two appeals, the learned Advocate General who appeared for the appellant company pressed before us only certain items among the several items claimed by the company in the suits originally.

(4) (After dealing with certain items claimed in appeals Nos. 766 of 1948 and 767 of 1948, the judgment proceeds as under:—) The last item pressed upon as relates to a sum of Rs. 8510 which is the profit earned by Ramalingam on certain transactions which we shall now mention. The Sugar Control Order came into force in April 1942 and the prices of sugar were fixed both ex-factory and in the open market. What Ramalingam did was, he got himself appointed as a sugar dealer, purchased large quantities of sugar at Rs. 31-15-0 the controlled price ex-factory, and sold it to outsiders at Rs. 32-8-0 the controlled price for outside sales, and pocketed the difference of nine annas per bag. The learned Judge has found on the evidence that the sugar purchased by Ramalingam continued to remain in the company's factory premises and Ramalingam used the company's staff & premises for his own business as a sugar dealer. The ledger folio of Ramalingam in the company's accounts shows that on 13-6-1942 Ramalingam purchased 15128 bags of sugar for over Rs. 4,83,000. But he never paid the amount to the company. His account was debited with this amount. This quantity of sugar which remained in the company's premises was being sold over several days and the amounts fetched by the sales were being credited in his account. The sum of Rs. 8510/- represents the difference between the price at which Ramalingam purchased calculated at Rs. 31-15-0 and the price at which he sold in the market, namely,

Rs. 32-8-0 The learned trial Judge observed that he would have had no hesitation in giving the company a decree for this amount on account of the fact that Ramalingam had utilised the office staff for his own business but ultimately dismissed the company's claim on the ground that it was barred by limitation. We agree with the District Judge that the company was entitled to this amount. Therefore, the question of limitation remains to be considered.

(5) The learned Judge was inclined to hold that Art. 36 or Art. 90 would apply. The amount of Rs. 8510 was earned sometime in 1942, and the suit was instituted on 14-12-1945. It was contended by the learned Advocate General that neither Article applies and the proper article to apply was Art. 120. Art. 36 runs as follows:

"Description of suit	Period of limitation	Time from which period begins to run
For compensation for any malfeasance, misfeasance or non-feasance independent of contract and not herein specially provided for.	Two years	When the malfeasance, misfeasance or non-feasance takes place."

If this Article were to apply, clearly the claim is barred, but in our opinion, it is not the appropriate article. In the first place, it may be mentioned that this article contemplates an action for compensation for a wrong in the nature of a tort. Secondly, the suit to which this article would apply is a suit for compensation. If the suit is for the recovery of a particular property or sum of money as such, then the suit cannot fall within Art. 36. In — 'Raja Kumar v. Fateh Bahadurlal', AIR 1917 Pat 260 (A), dealing with this Article, Atkinson J. of the Patna High Court observed as follows:

> "In my opinion, it (Art. 36) has no application whatsoever to the present case. We have only to read the terms of the article to see that it is an article referable to damages for some tortious act. This is not a case of damages at all. This is a case in which plaintiff seeks to recover a specific sum of money, her property, which has been applied by the defendant in the action for his own use, benefit and enjoyment."

In — 'Rajah Khatter Kristo Mitter v. Kumar Binendra Narain Roy', 3 Cal W. N. 202 (B). Maclean C. J. takes the same view of Art. 36. The learned Chief Justice says:

> "It seems to me that the first answer to the contention that the case comes within that Article (36) is that this is not a suit for compensation in the true acceptation of the term. What compensation, 'qua' compensation does the suit ask for? I received no answer from the appellant's vakil to that question. If it be not for compensation, that alone would be sufficient to exclude the case from the operation of Art. 36."

The learned Chief Justice, Leach C. J. in the Full Bench decision in — 'Subbiah Thevar v. Samiappa Mudaliar', AIR 1938 Mad 353 (C), dealing with this Article observed:

> "Art. 36 applies to torts not specially provided for .....In the first place, in Art. 36 the word 'compensation' is used, which is the appropriate word to apply in connection with a suit to remedy an injury to a person or a person's property."

The learned Chief Justice was dealing with a case of a suit filed against a trustee to make good the loss sustained by the trust by reason of his omission to collect moneys due to the trust. It was held by the Full Bench that neither Art. 36 nor Art. 62 applied to the case, but it was Art. 120 that applied.

(6) An analysis of the nature of the plaintiff's claim for this amount of Rs. 8510/- would clearly show that Art. 36 has no application. Obviously, this amount is not claimed as compensation for any tortious act on the part of Ramalingam. The basis of the company's claim is really to be found in the well known equitable principle now embodied in Sec. 88 of the Trusts Act, which is as follows:

> "Where a trustee, executor, partner, agent, director of a company, legal adviser or other person bound in a fiduciary character to protect the interests of another person, by availing himself of his character, gains for himself any pecuniary advantage, or where any person so bound enters into any dealing under circumstances in which his own interests are, or may be, adverse to those of such other person and thereby gains for himself a pecuniary advantage, he must hold for the benefit of such other person the advantage so gained."

Ramalingam was one of the directors of the company. He was also the sole managing agent. He was bound in a fiduciary character to protect the interests of the company. Here, the finding is that he availed himself of this character and utilised the premises and staff of the company as well as his credit with the company by reason of the position which he occupied and gained for himself a pecuniary advantage in the sum of Rs. 8510. The company now claims that Ramalingam must hold the advantage so gained for the benefit of the company.

(7) Art. 90 would not in this view of the nature of the claim apply to the case. That Article is the residuary article dealing with claims of a principal against an agent. We are inclined to hold that the neglect or misconduct contemplated by the article is neglect or misconduct in the course of and intimately connected with the agency duties, 'qua' agent. It is in this view that this article has been applied to cases where a principal sues the agent to recover the secret profits made by the agent. In the present case, it would not be accurate to speak of the sum of Rs. 8510 as secret profit made by the agent. It is not as if Ramalingam was appointed an agent of the company to sell at a particular rate and Ramalingam sold at a higher rate and secretly pocketed the difference. As the learned trial Judge observed, it cannot be said that Ramalingam was doing anything 'per se' illegal, to use the language of the learned trial Judge. Ramalingam's actions were all 'intra vires'. To such a case Art. 90 would not have application. This is a case where the basis of the claim is not neglect or misconduct, but the advantage taken by a person in a fiduciary capacity of his position to make a gain. The law says that such a person shall not keep that gain to himself but shall give it up to the person to whom he owes a fiduciary duty. To such a suit there is no other article applicable and therefore Art. 120 must apply. The decision of the Full Bench of this court in — 'AIR 1938 Mad 353 (C)', supports us in this view. The suit was filed in 1945 and is well within the time of six years provided by Art. 120. We therefore do not agree with the learned Judge that the claim is barred by limitation. To this extent we allow this appeal and

pass a decree in favour of the company for Rs. 8510. From this amount of Rs. 8510 will be deducted a sum of Rs. 2406-1-0 which is the amount debited against Ramalingam towards godown rent. The decree will bear interest at six per cent per annum from the date of suit. In this appeal, the appellant and the contesting respondents will pay and receive proportionate costs.

B/D.R.R. Order accordingly.

A.I.R. 1953 MADRAS 696 (Vol. 40, C. N. 263)

GOVINDA MENON AND
BASHEER AHMED SAYEED JJ.

Annasami Mudaliar, Appellant v. Ekambari Ammal, Respondent.

A. A. O. No. 29 of 1952, D/- 23-1-1953.

Civil P. C. (1908), S. 151 and O. 23, R. 3 — Order setting aside compromise decree under S. 151.

An order setting aside a compromise decree under the inherent powers under S. 151 on the ground that the decree was unjustifiable and without jurisdiction is not appealable. The mere fact that the application to set aside the decree also mentions O. 23, R. 3 cannot make such provision applicable. (Para 7)

Anno: C.P.C., S. 151 N. 2, 9; O. 23, R. 3 N. 8.

A. Sundaram Iyer, for Appellant; S. Muthiah Mudaliar and M. Chokkalingam, for Respondent.

CASES CITED:

(A) ('15) AIR 1915 Cal 473: 27 Ind Cas 242
(B) ('24) AIR 1924 Cal 80: 75 Ind Cas 319

GOVINDA MENON J.: A preliminary objection is raised by Mr. Muthiah Mudaliar who appears for the contesting respondent that the order of the lower court is not appealable; and in order to appreciate the point raised by the learned counsel it is necessary to set forth a few facts.

(2) Original Suit No. 71 of 1947 on the file of the Court of the Subordinate Judge, Vellore, is a suit by one Ekambari Ammal, daughter of one Lokanatha Mudaliar, for partition and recovery of possession of her share in the properties which belonged to her father. Defendants 1 to 3 are the surviving brothers of Lokanatha Mudaliar and the fourth defendant, Manikkammal, is a sister of the plaintiff and a daughter of Lokanatha Mudaliar. According to the plaintiff, it was stated that before the death of Lokanatha Mudaliar there was a division in status of the joint family properties between Lokanatha Mudaliar and his three brothers but that there was no separation by metes and bounds and the property remained joint on that score. The plaintiff therefore stated that in the properties which were the joint family properties, Lokanatha Mudaliar had a one-fourth share and plaintiff as one of the two daughters of Lokanatha Mudaliar is entitled to 1/8th in the whole of the properties.

(3) The suit was contested mainly by the first defendant on the ground that before the death of Lokanatha Mudaliar he executed a will by which a fair proportion of his properties was bequeathed in favour of the first defendant. The first defendant admitted that there was a division between Lokanatha Mudaliar and the three brothers and further stated that the division had been completed by metes and bounds with the result that properties were handed over to Lokanatha Mudaliar who had bequeathed them under the will.

(4) The suit went to trial; and the first defendant who propounded the Will examined a witness or two. At that stage, a compromise was entered into which was signed by the plaintiff and the first defendant as well as by the advocates appearing for them. It is also seen from the original compromise that the second defendant has signed the compromise. When that was filed in court, the court passed an order to the effect that as the plaintiff and defendants 1 and 2 appeared at the time of the petition coming on for hearing, a decree in terms of the compromise has been passed. No mention has been made of the fourth defendant in the compromise or of her rights. Subsequently, the fourth defendant filed an application under Or. 9, R. 13, C. P. C. to set aside the decree passed ex parte against her and the plaintiff filed another application purporting to be under Or. 23, R. 3 and S. 151, C. P. C. praying that the decree passed in terms of the compromise filed in court should be set aside. Various grounds are alleged in the application for setting aside the compromise by the plaintiff but it is unnecessary to restate them in this appeal. Had it become necessary for us to find out whether a valid compromise had been entered into by the plaintiff and the first defendant, we would probably have gone deeper into that question but then the course which this litigation has taken has rendered it unnecessary for us to delve deep into that matter.

(5) The learned Judge holding that in a partition suit every defendant must be deemed to be a plaintiff and every plaintiff reciprocally must be deemed to be a defendant, on the ground that all the parties entitled to a share in the joint family properties had not signed the compromise, set aside the decree against the fourth defendant on her application. Whether that order is correct or not it is unnecessary for us to determine now because that has become final and no revision or appeal has been filed against the setting aside of the 'ex parte decree. On the petition filed by the plaintiff to set aside the compromise decree, the learned Judge purporting to act under Ss. 151 and 153 C. P. C. set aside the compromise decree and directed the suit to be tried on the merits. Against that order of the learned Judge in I. A. No. 245 of 1951, the first defendant preferred the above appeal as well as the alternative civil revision petition.

(6) At the time of the admission the learned Judge before whom it came up dismissed the civil revision petition on the ground that no question of jurisdiction arose; and the question of appealability was then left to be decided later on.

(7) Now, it is clear that the learned Judge in the court below purported to act under S. 151. C. P. C. though in the application by the plaintiff, Or. 23, R. 3, C. P. C. was also mentioned. We have doubt whether Or. 23, R. 3 C. P. C. can have the remotest application to the facts of the present case. Under that provision of law, where it is proved to the satisfaction of the court that a suit has been adjusted wholly or in part by a lawful agreement or compromise, then the court shall pass a decree in accordance therewith so far as it relates to the suit. Therefore, what this rule provides is that if the parties come to court with a compromise petition and either both of them pray that a compromise decree be passed or one of them prays that a compromise decree be passed, while the other disputes the validity of

the compromise, in such a case it is open to the court, if it is satisfied that the parties have entered into a lawful compromise, to pass a decree. How this provision of law can be made applicable to an act of the court by which it sets aside a decree passed, it is difficult to understand. The learned Judge does not in so many terms explicitly or by necessary implication say that he has invoked Or. 23, R. 3, C. P. C. in passing the order under appeal. On the other hand, the learned Judge refers to two decisions of the Calcutta High Court namely — 'Gobind Chandra Sardar v. Bhagbat Sardar', AIR 1915 Cal 473 (A), a decision of Sir Asutosh Mukerjee Kt. and Beechcroft JJ. and — 'Taraprasanna Sarkar v. Kalikamohan', AIR 1924 Cal 80 (B), another decision of Sir Asutosh Mukerji and Rankin JJ. where the learned Judges have held that it is open to a court to set aside a compromise for valid reasons by applying Ss. 151 and 153 C. P. C. The decision in 'AIR 1924 Cal 80 (B)' is very instructive because in that case specific mention is made of Ss. 151 and 153, C. P. C. We have no doubt whatever that the Subordinate Judge here purported to set aside the decree passed in terms of the compromise by the application of the inherent power vested in him under S. 151, C. P. C. Mr. A. Sundaram Iyer contends that we must read into the order of the learned Judge the importation of the application of Or. 23, R. 3, C. P. C. But it seems to us that when that provision of the law cannot have any kind of application, by the mere fact that it is stated in the petition, it cannot be said that such a provision will be applicable. As an example, if in a petition to pass a decree in terms of the compromise, the party by design or inadvertence also puts a section of the Criminal Procedure Code, it cannot be said that a criminal revision lies to the High Court or to any other court. We are therefore satisfied that what has happened in this case is that the learned Judge on being satisfied that the decree passed by him on the footing of the compromise was unjustifiable and without jurisdiction invoked the inherent powers vested in him and thereby set it aside. When once we come to the conclusion that the order of the learned Judge in the court below was passed under S. 151, C. P. C. it is clear that no appeal lies to this court.

(8) This civil miscellaneous appeal is therefore dismissed. As we feel that the appellant has misconceived his remedy we make no order as to costs in this appeal.

K/K.S.

Appeal dismissed.

A.I.R. 1953 MADRAS 697 (Vol. 40, C. N. 264)

RAMASWAMI J.

Public Prosecutor, Appellant v. Pattu Narasimhulu A., Respondent.

Criminal Appeal No. 378 of 1952, D/- 12-1-53.

Madras Prevention of Adulteration Act (3 of (1918), S. 5 (b) and (d) — Accused working in shop on behalf of his father — Accused is person coming within meaning of S. 5 (b) and (c). **(Para 4)**

Public Prosecutor, for Appellant; G. Gopala swami, for Respondent.

CASES CITED:

(A) (1895) 64 LJMC 218: (1895) 1 QB 918
(B) ('51) AIR 1951 SC 204: 1951 Mad WN Cr 102 (SC)
(C) ('53) AIR 1953 Mad 156: 1952 Mad WN Cr 277 (2)

JUDGMENT: This is an appeal preferred by the State against the acquittal by the learned Sub Magistrate, Badvel in C. C. No. 1811 of 1951.

(2) The facts are: On information received the Health Inspector, P. W. 1 went to the bazar at Badvel on 29-6-1951 at about 9 a.m. and inspected the house and shop of the accused and his father and on finding the accused there asked him to keep open the godown which is situated a little away from the shop and he among other things found there smooth pea flour with which we are now concerned here. The Health Inspector took sample of the pea flour and sent it to the Public Analyst for analysis & it was declared as adulterated with 'lak dhall' flour (kesari dhall). It was a mixture of 'lak dhal' of about 80 per cent with Bengal gram flour of 20 per cent and it also contained an artificial water-soluble yellow colouring matter derived from coal tar. Inasmuch as sale or possession for the purpose of sale under any description of artificially coloured Bengal gram flour and red gram flour is an offence punishable under R. 29 read with R. 28-A, Madras Prevention of Adulteration Rules issued in G. O. No. 680 P. H. dated 24-2-1950 as amended in G. O. No. 1613 Health dated 5-5-1950 this accused was charged for an offence punishable under R. 29 read with R. 28-E, Madras Prevention of Adulteration Rules issued in G. O. No. 3082 Health, dated 1-9-1950.

(3) The two points taken before me for sustaining the acquittal are that the father of the accused was the owner of the shop and not the accused and that the proper person who should be proceeded against is the father and not the son.

(4) In my opinion this contention cannot be accepted, because under sub-cl. (d) of S. 5, Madras Prevention of Adulteration Act every person who offers for the sale any food which is not up to the standard of purity prescribed by the (Provincial Government) is punishable. So what we have to see in the present case is whether this accused stored or offered for sale this substance in controversy. A person who is working in a shop on behalf of the owner as his employee is certainly one who will come within the meaning of the "person offering for sale the articles exhibited there". It is not stated that the accused was there for his health. On the other hand he must have been in the shop for the purpose of carrying on sales on behalf of his father and as his servant.

It has been laid down in a long line of decisions the most notable of which is the English decision of —'Sherras v. De Rutzen', (1895) 1 Q. B. 918 at p. 921 (A), in which Wright J. has collected and classified the interesting English decisions on the subject and the S. C. decision of —'Hariprasada Rao v. The State', AIR 1951 S. C. 204(B). The entire case law on the subject has been set out by me in —'Kasi Rajah v. State', AIR 1953 Mad 156(C). See also —'Barker v. Levinson (Goddard C. J.)'. A servant is equally liable because if the law were otherwise every master would try to keep himself out of the way and escape liability. The argument that the accused has passed his school final examination and that there are differences between him and his father in private life are neither here nor there. On the particular

date in question this accused was working in the shop on behalf of his father. Therefore the accused is certainly a person coming within the meaning of sub-cls. (b) and (d) of S. 5 of the Act.

(5) Therefore the acquittal by the Sub-Magistrate cannot be supported and is hereby set aside and the accused is convicted as charged. Taking into consideration the various mitigating circumstances the accused is sentenced to pay a fine of Rs. 35. Time for payment of the fine is six weeks from the date of the receipt of this order in the lower Court.

B/V.R.B. Acquittal set aside.

A.I.R. 1953 MADRAS 698 (**Vol. 40, C. N. 265**)

GOVINDA MENON J.

S. Rangaraju Naidu, Petitioner v. D. S. Kamesan, Respondent.

Civil Revn. Petn. No. 525 of 1951, D/- 14-11-1952.

(a) **Civil P. C. (1908), S. 115 — Case decided — Order impounding document under S. 33, Stamp Act — (Stamp Act (1899), S. 33).**

The action of a Subordinate Judge in impounding a document and forwarding the same to the Collector with an accompanying letter amounts to a decision of a case as contemplated under S. 115, Civil P. C., as the Judge, when he comes to the conclusion that the document in question has not been properly stamped, decides the case and that decision, so far as the Judge is concerned, is final. The finality that attaches to the view taken by the Judge makes it a case decided by him. AIR 1942 Lah 265 and AIR 1943 Nag 97, Ref. (Paras 1, 3)

Anno: C.P.C., S. 115 N. 4, Stamp Act, S. 33 N. 12.

(b) Stamp Act (1899), S. 33 (1) — 'Is produced or comes in the performance of his functions.'

A mere handing over of a document, even if it is as a result of a summons from Court, cannot be said to be production. There must be a volition on the part of the person bringing it to Court to use it for some purpose. The mechanical act of carrying the document as a result of an order of Court and handing it over to an officer of Court would not be production. But such an act would come within the meaning of the term "comes before the Court in the performance of its judicial functions". 25 Mad 525, Foll.; Case law discussed. (Para 13)

Anno: Stamp Act, S. 33 N. 4.

T. R. Srinivasan, for Petitioner; N. S. Srinivasan, for Govt. Pleader and B. V. Subramaniam, for Respondent.

CASES CITED:

(A) ('42) AIR 1942 Lah 265: 203 Ind Cas 7
(B) ('43) AIR 1943 Nag 97
ILR (1943) Nag 520
(C) ('02) 2 Weir 670: 25 Mad 525
(D) ('18) AIR 1918 Cal 1026: 35 Ind Cas 415
(E) ('32) AIR 1932 Lah 495: 13 Lah 745 (FB)
(F) ('40) AIR 1940 Lah 315:
ILR (1940) 21 Lah 637 (FB)
(G) ('36) AIR 1936 Lah 985: 163 Ind Cas 560
(H) ('47) AIR 1947 Lah 319: 49 Pun LR 70

JUDGMENT: Mr. N. S. Srinivasan appearing for the learned Government Pleader raises a preliminary objection that S. 115, Civil P. C. will not apply to the present case. What happened was that when a document came into the possession of the Court below a question was raised as to whether it was properly stamped. On that arguments were heard by the Subordinate Judge who finding that the document had not been properly stamped impounded the same and sent it to the District Collector under S. 38 (2), Stamp Act. In doing so, the learned Judge did not give any definite finding as to the quantum of the stamp to be collected and left the decision on this matter to the Collector and if the Collector cannot decide that question, the Subordinate Judge suggested, that the matter might be referred to the Chief Controlling Revenue authority, namely, the Revenue Board, for referring the matter to the High Court under S. 57 of the Act. What is contended very strenuously by Mr. Srinivasan is that the action of the Subordinate Judge in impounding the document and forwarding the same to the Collector with an accompanying letter does not amount to a decision of a case as contemplated under S 115, Civil P. C. Prima facie this argument seems to be correct but on examining the matter and probing into the legal aspects of the forwarding of the document one has to say that the Subordinate Judge, when he came to the conclusion that the document in question has not been properly stamped has decided the case and that decision, so far as the Subordinate Judge is concerned, is final. It is not open to the party when once the Subordinate Judge reached that conclusion to get back the document or to proceed with the case as if the document has been validly tendered for purposes of letting in evidence. The finality that attaches to the view taken by the Subordinate Judge makes it a case decided by him. Therefore, it seems to me that apart from any authority, on first principles it can be said that the action of the Subordinate Judge is a case decided within the meaning of S. 115, Civil P. C. but the matter does not rest here.

(2) Mr. T. R. Srinivasan for the petitioner has brought to my notice two decisions, one of the Lahore High Court and the other of the Nagpur High Court. In — 'Uttamchand v. Permannand', A. I. R. 1942 Lah. 265 (A) Din Mohammad J. had to deal with a similar case. There also a document which was produced before the Subordinate Judge was found to be insufficiently stamped and the Court determined the stamp duty payable before impounding and forwarded the document to the Collector. This action of the Court was sought to be revised in revision and on the objection taken that it was not a case decided within the meaning of the provisions of S. 115. Civil P. C., the learned Judge held that "it is a case decided within the meaning of S. 115, Civil P. C. inasmuch as the matter which was disputed, between the parties 'qua' this aspect of the case has, so far as the parties are concerned, been finally set at rest and no stage will ever arise later at which this order of the Subordinate Judge would be liable to be attacked".

(3) The learned Judge, therefore, held that it was a case decided within the meaning of S. 115, Civil P. C. This decision has been followed later by the Nagpur High Court in — 'In re Narayanadas Nathuram', A. I. R. 1943 Nag. 97 (B), where Vivian Bose J. following the decision in — 'AIR 1942 Lah. 265 (A)', and other cases came to the conclusion that the order of the lower Court impounding the document is revisable. In

view of the decisions cited above I have no hesitation in coming to the same conclusion. In the absence of any decision in Madras to show that the action of the Subordinate Judge is not a case decided within the meaning of S. 115, Civil P. C. I have to conclude that the Subordinate Judge has finally decided the matter so far as he was concerned. The preliminary objection is, therefore, overruled.

(4) Now that the preliminary objection has been overruled the merits of the case have to be gone into. The petitioner in the revision petition is the defendant in O. S. No. 8 of 1947 on the file of the Sub-Court, Salem. The suit was to recover a sum of nearly Rs. 2,00,000 with interest and the allegations are that the plaintiff respondent conveyed to the defendant petitioner half the right in a patent for manufacturing a particular kind of wood preservative, by means of an indenture dated 9-4-1945. This indenture was stamped in Mysore and according to the Stamp law in force there the value of the stamp paper used was Rs. 4687-8-0, whereas at that time if a similar document were to be executed in what was then British India but now the Indian Union, the stamp duty would be more than Rs. 7400 and odd. According to S. 18, Stamp Act such instruments may be stamped with proper stamp duty under the statute within three months after it has been first received in India. But no such thing was done. Along with the plaint, a duplicate of the document in question was produced; but in the written statement the present petitioner raised an objection in para. 15 that the deed of assignment is inadmissible and unenforceable in the Indian Courts as it is not validly stamped according to the law prevailing in India. The plaintiff respondent, therefore, summoned the defendant for the production of the original which was in his possession. In obedience to this summons issued by the Court, the defendant brought the indenture into Court and kept it in Court custody on 24-6-1949. It has to be remembered in this connection that the defendant does not want to enforce the document, whereas the plaintiff's title and justification for the claim is dependent upon the validity of the document in question. Therefore a compelling process from the Court resulted in the document coming into its custody. Thereafter, the Subordinate Judge, as stated already, impounded the document and under S. 38 (2), Stamp Act sent the same to the District Collector without giving a definite finding as to what should be the stamp duty to be collected on this instrument.

(5) Mr. T. R. Srinivasan for the petitioner contends that the order impounding the document is illegal and 'ultra vires' because the same was not "produced" nor has it come into the possession of the Court in performance of its judicial functions and such being the case the provisions of S. 33 (1), Stamp Act cannot be attracted. S. 33 (1) reads:

> "Every person having by law or consent of parties authority to receive evidence and every person in charge of a public office, except an officer of police, before whom any instrument, chargeable in his opinion, with duty, is produced or comes in the performance of his functions, shall, if it appears to him that such instrument is not duly stamped, impound the same".

The important portion of this section is "is produced or comes in the performance of his functions." According to the learned counsel production is a voluntary act and not the result of any compulsion from a Court of law. In order that the document should be deemed to have been produced in Court, it must be brought into the custody of the Court by a person of his own accord and as a result of his volition in order that he might use it for his purpose or to secure some advantage by a legal process. Where, as a result of summons issued by Court, or seizure under a distraint or attachment warrant, a document comes into the possession of the Court it cannot be held that the instrument in question has been produced; so argues the learned counsel. For finding out the correctness of this argument, we should have a bird's eye view of the relevant provisions of the statute in question. S. 3 defines what instruments are chargeable with duty and there is no doubt that the present document is chargeable with duty in accordance with the provisions of that section. S. 17 lays down that all instruments chargeable with duty and executed by any person in India except Part B States shall be stamped before or at the time of execution. As already stated, S. 18 lays down that if a document is executed in the territory which has now become a Part B State, when it is first received in India it must be stamped within three months. With regard to the liability of the person who has to pay the stamp duty, we have the provisions of S. 29(c) which say that in the case of a conveyance, the stamp duty shall be borne by the grantee and here the stamp duty, if the document had been executed in what was then British India, should have been paid by the defendant petitioner. Ss. 33 and 38 deal with impounding. When we come to S. 44, we find that in certain cases a person paying duty or penalty may recover the same from the opposite party and S. 44(3) says that such amount may be included in the costs. Finally there is S. 48 which is to the effect that all duties and penalties under the Act can be collected as if they are land revenue. How the penalty ought to be charged is laid down in S. 35 where it is provided that it is open to the Court to levy a penalty to the extent of ten times the duty. So far as the Collector is concerned there is no such obligation.

(6) In view of the above provisions of the Stamp Act, the action of the Court in impounding the documents and forwarding it to the Collector for finding out the stamp duty and ascertaining as to who is to pay the same would be correct if the document is 'produced in Court or comes into Court in the performance of the Court's functions'. Mr. B. V. Subramaniam for the respondent invites my attention to the distinction between S. 33 and S. 35 of the Act. Whereas S. 33 contemplates the production or coming into possession of the Court of the document, S. 35 comes into operation only when it is tendered in evidence. S. 33 is an all-embracing one whereas S. 35 is limited to special instances. What he argues is that the moment the petitioner, even if it as a result of a process of Court, brings the document and lets it into the possession of Court, it should be deemed as if he has produced it. In any event, the document has come into the possession of the Court, in the discharge of its judicial functions. In either event, according to the learned counsel for the respondent the provisions of S. 33 have been attracted and it cannot be said that the order of the lower Court is illegal.

(7) Though there is paucity of recent cases of this Court on this aspect of the case, there are few cases of other Courts which have been brought to my notice. The only Madras case so far as my attention has been drawn is that contained in — 'King Emperor v. Balu Kuppayan', 25 Mad 525 (C) where the word "comes" in S. 33 is held

to have sufficiently wide connotation as to include the production of documents under a search warrant. The facts of that case are as follows: There had been complaints made to judicial authorities that offences under Ss. 64 (c) and 68 (c), Stamp Act of 1899 were being committed and therefore the Magistrate issued a search warrant and when that was executed certain documents were seized and impounded under S. 33(2) of the Act. Before the High Court it was contended that when a document came into the custody of the Magistrate as a result of the execution of a search warrant, it did not come before the Magistrate in the performance of his functions within the meaning of S. 33(1). The contention was repelled by the learned Judges, Benson and Bhashyam Aiyangar JJ. with the remark:

"The word 'comes' is sufficiently wide to include the production of documents under a search warrant issued by the Magistrate."

I have not been shown any authority which dissents from this observation and I am, therefore, bound by it. It cannot be said that the document did not come into the possession of the Court. It was brought and handed over to an officer of court by the defendant as a result of a summons issued to him to produce the document. "Comes into possession" is a widely known legal term and its import is sufficiently wide as to include cases where documents are handed over. All that is required is that the custody of the document must rest with the Court. How it came into the custody is not a crucial factor. Therefore it is difficult to say in the present case that there is no operation of the phrase "comes into possession". Order 11, R. 14, Civil P. C. empowers the court at any time during the pendency of the suit to order the production by any party of such documents in his possession or power relating to any matter in question in such a suit and it is in pursuance to the provisions of this rule that the summons had been issued to the defendant to bring the document into Court.

(8) The next case cited before me is reported in — 'Sashishi Mohan Saha v. Kumud Kumar Biswas', AIR 1918 Cal 1026 (D). When a suit was filed before a District Munsif for the recovery of a sum of money due on what is known as hatchita, the plaintiff produced in Court a book containing not only the hatchita on which the suit was based but also a number of hat-chitas bound together as a book. The trial Court on examining the book found that not only the hat-chita in question but other hat-chitas also were not properly stamped. Therefore the entire book was impounded under S. 33, Stamp Act. The High Court held in revision that the District Munsif had no jurisdiction to impound the hat-chitas other than the one which formed the basis of the plaintiff's claim because they were not produced, nor came before him in the performance of his functions; and in doing so, the learned Judges Sir Asutosh Mookerjee and Cuming JJ. distinguished the case in '25 Mad 525 (C)'. According to that decision the mere physical possession of the hat-chitas, which have no relevancy so far as the suit was concerned, would not be sufficient to hold that they were produced or came into possession in the discharge of the District Munsif's functions. The observations relevant to the present case are at pp. 1026-1027 and I may extract them hereunder:

"The case for the petitioners is that they did not produce before the officer any hat-chita other than the one upon which their claim was founded. The Munsif took action at a stage when there was no material to enable him to question the correctness of this allegation. Consequently, the case is not covered by the first of the two alternatives mentioned in S. 33. Nor can we say that the other hat-chitas came before the Munsif in the performance of his functions. In the performance of his functions as a judicial officer the only hat-chita which came before him at that stage was the hat-chita whereon the claim was founded. We cannot speculate whether if the trial had proceeded, the plaintiffs might not have possibly relied upon the other hat-chitas in support of their case. If they had done so, it could well as maintained that those hat-chitas were produced before the Munsif or came before him in the performance of his functions. But that stage was never reached. In our opinion, on the materials placed before us, it is impossible to say that the Munsif had jurisdiction to impound the hat-chitas other than the one which formed the basis of the claim. Reference has been made by the Senior Government Pleader to the case of '25 Mad 525 (C)' which is clearly distinguishable. There a search warrant was issued by a Magistrate with a view to the discovery of a register kept by the accused, containing documents not stamped in accordance with the provisions of the Stamp Act. The register was seized in the course of the search and brought in the Court. It is clear that the register was produced before the Magistrate or came before him in the performance of his functions as a Magistrate."

It is clear from the passage quoted above that with reference to the hat-chita which formed the subject matter of the particular suit, the learned Judges were of opinion that it came into the possession of the Court in the performance of its judicial functions, though it is doubtful whether at that stage it might be said that there was any production of the other hat-chitas.

(9) As against these two cases other decisions bearing on the question regarding the meaning of the expression "produced or comes into possession" have been relied upon. In — 'Thakardas v. Emperor', AIR 1932 Lah 495 (E) a Full Bench of the Lahore High Court, on a reference to it by the Financial Commissioner, held that where a Sub Registrar registered a document as a deed of dissolution and it was later on found by the Registrar that it should be stamped and registered as a deed of partition and he directed the party to produce the document, and holding that it was not duly stamped made a reference to the Collector who held that the document was a deed of partition and called upon the executants to make good the deficiency in stamp together with the penalty, that the Registrar was not acting in the performance of his functions in requiring the production of the document and therefore the document was neither produced nor came into the possession of the Registrar in the performance of his functions. This decision makes it clear that mere custody is not sufficient to attract the operation of S. 33 (1), Stamp Act.

(10) That the person presenting the document in Court must be the person legally liable to pay the deficient stamp duty is decided by another Full Bench of the Lahore High Court in — 'Mohamed Hussain v. Emperor', AIR 1940 Lah 315 (FB) (F). The person who was liable to be charged with stamp duty had died and the document insufficiently stamped was produced by one of his sons in a civil suit. In that case the learned Judges held that the son cannot be made liable to pay the penalty. Though this decision does

not explain the meaning of the phrase "produced in Court or comes into possession" it is useful in this respect viz., that the duty can be levied only from the person liable initially to pay the same. We do not think that this decision would carry the case any further at all.

(11) Jai Lal J. in — 'Ujjal Singh Sundersing v. Ahmed Yarkhan', AIR 1936 Lah 985 (G) held that mere presentation of a document or its transliteration without any attempt to prove it or without an attempt to tender it formally in evidence does not amount to production of the document before the person concerned nor does the document under such circumstances come before the person concerned in the performance of his functions so as to attract the provisions of S. 33, Stamp Act. This decision is in favour of the petitioner's contention. But the learned Judge does not refer to any authority in support of his conclusion. Observations of this Court in '25 Mad 525 (C)' have not been referred to in this case. The trend of decisions in Lahore seems to be that mere presentation is not enough in order to attract the operation of S. 33. In 'AIR 1942 Lah 265 (A)' there are observations of a similar nature. Din Mohammad J. interprets the word "produced" in S. 33 as produced in the ordinary course of law and not produced under compulsion. Therefore if the document is produced by a party as a result of a process issued by the Court it cannot be said that he has produced it unless he tenders it in evidence and wants to sue it for his benefit. The learned Judge further goes on to add that if compulsory production can be understood as production within the meaning of the section, then it will be competent for a Court to conduct a search in the house of a party and seize all documents insufficiently stamped for the purpose of impounding the same. Such being the case it is highly improper for a Court to compel a party to produce an original document with a view to impound because the Court has been informed that it is insufficiently stamped. The facts of this case show that the original document was compelled to be produced into Court by the Subordinate Judge before it was impounded. Here there was no compulsion but a voluntary presentation. In a more recent case — 'Harjimal & Sons v. H. S. Palta & Sons', AIR 1947 Lah 319 (H), a single Judge of the Lahore High Court was of the opinion that if a party simply presented a document in Court it cannot be said that it is production of the document as there was no attempt to tender it in evidence and where one of the parties does not issue a notice to the other party to admit or deny such a document and the Court 'suo motu' and for its own facility calls upon the parties to admit or deny the documents produced by the other party, this act of the Court cannot be regarded as an implied tender by the party of the document in evidence. In such a case the party who presents the document cannot be called upon to pay the stamp duty and penalty, on the document if he is not otherwise the person by whom the stamp duty is payable under the Act. It seems to me that the result of the three Lahore cases referred to above is that mere bringing into Court of a document would not be sufficient to make it a production. In order that there should be production it must be with the object of tendering it in evidence and using it for the benefit of the party himself.

(12) An instructive case in point is to be found in 'AIR 1943 Nag 97 (B)', which contains observations helpful for deciding the present case. Vivian Bose J. was of the opinion that the word "produced" has a technical meaning and means either produced in response to a summons or produced voluntarily for some judicial purpose such, for instance, as evidence. A document which falls accidentally or incidentally into a Judge's hand cannot be said to be produced. The word "produce" carries with it, when used in this connection, a mental element. The mere physical act of production is not enough when there is no intention to "produce". The learned Judge, therefore, held that when a party who was asked to produce one document produces another by mistake and hands it over to the Court and it is found that the mistaken document is insufficiently stamped it does not come before the Judge in the performance of his functions. The principle underlying this judgment is that if a party as a result of the summons produces the document, it must be deemed to be produced within the meaning of the section. The observations of the learned Judge cannot be said to be exactly in concurrence with the views expressed in the Lahore cases.

(13) A consideration of these authorities leads me to the conclusion that a mere handing over of a document, even if it is as a result of a summons from Court, cannot be said to be production. There must be a volition on the part of the person bringing it to Court to use it for some purpose. The mechanical act of carrying the document as a result of an order of Court and handing it over to an officer of Court would not be production. But such an act would come within the meaning of the term "comes before the Court in the performance of its judicial functions" as laid down in '25 Mad 525 (C).' In the present case it cannot be said that the document has not come before the Court in performance of its functions, though it may be that it has not been produced by the petitioner. Mr. T. R. Srinivasan for the petitioner contends that the letter forwarding the document to the Collector has decided that the production was by the petitioner. I do not think that there has been any decision by the lower Court as to whether the document was produced by the defendant. The question as to who was liable to pay the penalty has been left undecided. It is open to the collector, or to the Revenue board, to decide which party is liable to pay the penalty, and such being the case, I cannot say that the liability of any of the parties has been finally determined in these proceedings. With these observations the civil revision petition is dismissed, but in the circumstances without any order as to costs.

B/D.R.R. Revision dismissed.

A.I.R. 1953 MADRAS 701 (Vol. 40, C. N. 266)

CHANDRA REDDI J.

Kannaganti Suryanarayanamurthi and others, Appellants v. Pidugu Rama Rao and another, Respondents.

Second Appeal No. 949 of 1948, D/- 7-3-1952.

Civil P. C. (1908), S. 9 Explanation — Suit for office.

Right to hold the lighted torch inside the Chariot during the Rathotsavam of a certain deity is a religious honour or dignity, which is excluded from the purview of the civil Courts and is not an 'office' within the meaning of S. 9. Case law discussed. (Para 12)

Anno: Civil P. C., S. 9 N. 35.

N. V. B. Sankara Rao, for Appellants; R. Venkatasubba Rao and A. Rangarayakulu, for Respondents.

CASES CITED:

(A) ('88) 11 Mad 450
(B) ('17) AIR 1917 Mad 903: 31 Mad LJ 758
(C) ('39) AIR 1939 Mad 886: ILR (1940) Mad 40
(D) ('99) 9 Mad LJ 355
(E) ('33) AIR 1933 Mad 264: 143 Ind Cas 104

JUDGMENT: The respondents herein filed a suit in the Court of the District Munsif of Tenali for a declaration that they have exclusive right to hold the lighted torch, Sannidhikola inside the Chariot during the Radhotsavam of Sri Agastheswara Swami at Nandivelugu and for a permanent injunction restraining the defendants from interfering with their right. The basis of the suit was that, ever since the inauguration of the car festival, the ancestors of the plaintiffs & the plaintiffs have been exercising exclusive right of holding the lighted torch inside the chariot and that this right was being exercised till they were obstructed by the defendants in the year of 1945.

(2) The suit was resisted by the defendants, who are the trustees of the temple mainly on two grounds. The exclusive right of the plaintiffs to hold the Sannidhikola was denied; and it was also pleaded that the suit was not cognisable by a civil Court as the right claimed related only to a religious honour or dignity.

(3) The trial Court, while holding that the plaintiffs have proved their exclusive right to hold the lighted torch, though for a few years before the institution of the suit they did not exercise this right, dismissed the suit on the ground that the right claimed by them was a mere religious honour and, as such, could not be enforced in a civil Court. On appeal, the Subordinate Judge, while confirming the judgment of the Court of the first instance with regard to the right of the plaintiff to hold the lighted torch, reversed it on the point whether the right claimed was not cognisable by a civil Court. In the opinion of the lower appellate Court, the right to hold the lighted torch can be deemed to be attached to a service or an office and that it was, in any event, a mode of worship, which could be enforced through a Court of law. In the result, he decreed the suit.

(4) The defendants, who are dissatisfied with this judgment of the Subordinate Judge, have preferred this second appeal. In this appeal, the conclusion of the learned Subordinate Judge is challenged by Mr. Sankar Rao for the appellants as being erroneous. He urges that the view of the lower appellate Court that the right to hold the lighted torch inside the chariot is one that is attached to a service or an office is not correct and secondly that the lower appellate Cdurt erred in holding that it was a mode of worship when the plaintiffs did not seek to enforce the right as a mode of worship.

(5) The sole question for determination in the second appeal is whether the right claimed is one that could be agitated in a civil Court. To appreciate this question, it is necessary to refer to the terms of S. 9, Civil P. C. S. 9, Civil P. C., lays down that

> "the Courts shall (subject) to the provisions herein contained) have jurisdiction to try all suits of a civil nature excepting suits of which their cognizance is either expressly or impliedly barred.
>
> Explanation: A suit in which the right to property or to an office is contested is a suit of a civil nature notwithstanding that such right may depend entirely on the decision of questions as to religious rites or ceremonies."

(6) I have, therefore, to see whether the present suit is a suit of a civil nature within the meaning of S. 9, Civil P. C. As I have already stated, the lower appellate Court rests its decision on two grounds (i) that it is a right attached to a service or office and (ii) that it is a mode of worship. First I will dispose of the second ground of decision as it does not present any difficulty. It must be observed that the plaintiffs did not claim the right as a mode of worship. They stated categorically that it was an office to which they have been entitled from time immemorial. This question was not raised in the pleadings nor was an issue raised about it. So, the lower appellate Court could not base its judgment on a ground, which was not raised in the pleadings. It is, therefore, unnecessary for me to consider whether the right to hold the lighted torch inside the chariot is a mode of worship.

(7) Turning now to the question whether the right amounts to an office within the meaning of the explanation to S. 9, Civil P. C., I will first consider whether there is any support for the view of the learned Judge, in the two decisions cited by him. In — 'Srinivasa v. Tiruvengada', 11 Mad 450 (A), the suit was for an injunction to prevent the trustees of a temple from interfering with the right to distribute sacred water and serving satagopam, i.e., gold crown to 'Adyapakas' during a particular festival. A Bench of this Court consisting of Collins C. J. and Parker J. held that the right claimed by the plaintiffs was cognizable by a civil Court. The learned Judges propounded the following test for deciding whether the suit is of a civil nature or not.

> "The ordinary test is whether there is any specific pecuniary benefit attached to the office claimable in the nature of wages however small that benefit may be. If there be, the right to such benefit is a question which the Courts are bound to entertain."

'Thirumalai Alwar v. Lakshmi Sadagopa Aiyangar', AIR 1917 Mad 903 (B), is an instance of a right to conduct worship in a particular mode claimed by the Mandapamdars and upheld by a Court of law. Spencer and Krishnan JJ. held that such a right comes within the ambit of S. 9, Civil P. C., as, in their opinion, it was an act of worship in a particular mode and with particular incidents attached to it. The learned Judges classified cases relating to religious services into four kinds, which come within the purview of S. 9, Civil P. C.

In the language of the learned Judges,

> "One class of cases comprises those in which a plaintiff sues to establish his individual right of public worship from which he has been wrongfully excluded .....With these are closely associated cases in which a right of access to religious objects is sought to be established as these generally involve questions of caste status and as that is a matter of civil right..... In a different category fall suits brought by worshippers under Act 20 of 1863 to compel the performance of acts

of worship in which there has been neglect of duty on the part of a trustee or manager of a temple or other religious institution... .....The next class includes suits to establish a claim to an office with emoluments. It has always been held that such suits will lie because the right to emoluments is a civil right connected with property, although the determination of it may involve the decision of questions of religion .....An extension of this principle appears in certain cases when what is claimed is not emoluments of any pecuniary value but honours attached to an office in lieu of emoluments."

(8) The reason why according to the learned Judges civil Courts will not take cognizance of suits in which the claim relates merely to receive religious honours and emoluments unconnected with any office is

"The duty of individuals to submit to and perform certain religious observance in accordance with the ritual or conventional practice of their race or sect is, in the absence of express legal recognition and provision, an imperfect obligation of a moral and not a civil nature."

(9) Applying the test propounded by the learned Judges to that case, I am afraid the right claimed by the plaintiffs should be held to be outside the scope of S. 9, Civil P. C. It is thus seen that the two decisions relied on by the learned Judge, far from lending any support to the conclusion, go to show that such a right, as claimed in the present case, is not a right attached either to an office or a mode of worship.

(10) The case very much in point is — 'Ramaswami Goundan v. Lakshmana Reddi', AIR 1939 Mad 886 (C). There a person claimed the right to lead a horse on a particular festival day in a temple whenever that festival was performed, the festival being performed only whenever the funds of the temple permitted it. It was found that the plaintiff could not be compelled either to bring the horse or to lead it if he did not choose to do so. It was decided by Leach C. J. and Somayya J. that the right claimed was not an office within the meaning of S. 9, Civil P. C., as it was a mere honour. The 'ratio decidendi' was that the right claimed would not amount to an office as there was no corresponding obligation to perform duties. The learned Judges quoted with approval a passage from — 'Srinivasathathachariar v. Srinivasa Iyengar', 9 Mad L. J. 355 (D):

"The term 'office' in the sense with which we are concerned, implies, of course, a duty in the office-holder to be discharged by him as such—see if authority were necessary, Kent's Commentaries — where it is pointed out, offices consist in a right and correspondent duty, to execute a public or private trust and to take the emoluments belonging to it."

With respect I am in entire agreement with the principle laid down by the learned Judges in this case.

(11) To the same effect are the observations of Madhavan Nair J. in — 'Chitti Babu v. Venkatasubbu', AIR 1933 Mad 264 (E),

"To constitute an office, I think it will be essential to have some duties attached to it which the office holder will be under a legal obligation to perform, the non-performance of which will be visited with penalties."

(12) Applying the principles enunciated in the case above, I must hold that the right claimed in this case is not an office, which could be enforced in a Court of law as there is no corresponding compellable duty. On their own showing, the plaintiffs cannot be compelled to hold the torch. It was argued by the learned counsel for the respondent that the trustees were at liberty to have the Sannidhikola carried by someone else whenever the plaintiffs or any member of their family was unwilling to do it and thus indirectly compel them to perform the duty. I do not think that this can in any way amount to a compellable duty. The plaintiffs' witnesses admitted that the plaintiffs could not be compelled to hold the lighted torch if they are not willing to do so. In view of the several admissions by the P. Ws. I do not think that the holding of the torch can be held to be a compellable duty. In my opinion, the right such as the one claimed in this case is a religious honour or dignity, which is excluded from the purview of the Civil Courts and not an office within the meaning of S. 9, Civil P. C. This is a case in which no emoluments are attached to the office or at least any honours in lieu of the emoluments, however trifling they might be. As such, I fail to see how such a right can relate to an office or to a service. It follows that the decision of the lower appellate Court is wrong and ought to be set aside & the judgment and decree of the trial Court restored.

(13) In the result the appeal is allowed and the suit is dismissed. I direct each party to bear their own costs throughout. (No leave).

B/D.H. Appeal allowed.

A.I.R. 1953 MADRAS 703 (Vol. 40, C. N. 267)

RAMASWAMI J.

Public Prosecutor, Appellant v. Sarisetti Venkatasubbiah, Respondent.

Criminal Appeal No. 384 of 1952, D/- 12-1-53.

Sales Tax — Madras General Sales Tax Act (9 of 1939), S. 16-A — Dealer.

The term 'dealer' will take in a commission agent also. AIR 1952 Mad 718 (FB), Foll. (Para 2)

Public Prosecutor, for Appellant.

CASE CITED:

(A) ('52) AIR 1952 Mad 718: 1952-1 Mad LJ 494 (FB)

JUDGMENT: The respondent is a dealer in chillies in Sulurpet taluk. He was assessed to sales-tax by the Deputy Commercial Tax Officer for the year 1948-49, that is to say, for the transaction from 1-4-1948 to 31-3-1949 on a turnover of over Rs. 30515/5/1. Ex. P. 1 is the assessment order. Ex. P. 2 is the demand notice served on the respondent on 10-2-1950. Ex. P. 3 is the return in form A submitted by the respondent. The respondent, accused not having paid the assessment as per the demand he has been charge-sheeted for an offence under S. 15 (b), Madras General Sales-tax Act, 1939. On these facts being affirmatively proved by the prosecution the accused, respondent, stated that he was never a dealer purchasing and selling chillies, that he had no business of his own and that he was doing the business on behalf of the ryots and that he did not commit any offence as charged.

(2) The learned Sub Divisional Magistrate in this particular case, and this is not the first instance of this kind, has taken upon himself the supererogatory task of deciding that the observations of the Appellate Commercial tax authority are binding on the Deputy Commercial Tax Officer whereas these observations are absolutely irrelevant in a prosecution for non-payment of tax and with which alone the Sub-Divisional Magistrate was concerned. In order to get over S. 16A the accused alleged that he was not a dealer but a commission agent and the Sub-Divisional Magistrate came to the conclusion that the accused is not therefore a dealer and that he is not liable to pay the tax and so he cannot be prosecuted. In coming to this conclusion he committed an error because it has been held by a Full Bench of this Court in — 'Radhakrishna Rao v. Province of Madras', AIR 1952 Mad 718 (FB) (A) that the term dealer will take in a commission agent also as in the instant case.

(3) Therefore, the Court below ought to have found that the accused is an assessee falling within the scope of the Act and that he is liable to pay the tax.

(4) In the result, the order of acquittal of the lower Court is set aside and the accused is convicted as charged and he is fined in a sum of Rs. 50. The tax is also made recoverable from him as if it were a fine. Time to pay the fine and the tax amount three weeks from the date of the receipt of this order in the lower Court.

B/D.H. Order accordingly.

A.I.R. 1953 MADRAS 704 (Vol. 40, C. N. 268)

SUBBA RAO J.

Madepalli Sanyasappanna and others, Appellants v. Siripurapu Appalaswami and others, Respondents.

A.A.A.O. No. 122 of 1951, D/- 18-11-1952.

Debt Laws — Madras Agriculturists' Relief Act (4 of 1938), S. 9-A (7) (ii) (a) — Construction.

In order that a transaction may be hit by S. 9-A (7) (ii) (a) it should have been a transfer 'inter vivos' from the original mortgagor between 30-9-1937 and 30-1-1948. The clause does not apply if the transfer effected between the aforesaid dates is from a transferee from the original mortgagor prior to 30-9-1937. (Para 3)

E. Venkatesam and E. L. Bhagiratha Rao, for Appellants; C. V. Dhikshitulu, for Respondents.

JUDGMENT: The only question in this civil miscellaneous second appeal is whether the usufructuary mortgage deed dated 16-4-1908 has been completely discharged under the provisions of S. 9-A, Madras Agriculturists' Relief Act. One Audinarayana executed a usufructuary mortgage deed, Ex. D-1, dated 16-4-1908, in favour of Suryanarayana, Appalanarasimhulu, Narasiah and Chiranjeevulu. The sons of the mortgagor sold the equity of redemption to one Appalanarasimhulu and Venkata Narasimhulu under Ex. P. 3 dated 24-2-1920. The heirs of Venkata Narasimhulu sold their interest in the mortgage to Appalaswami under Ex. P. 2 dated 28-10-1945. Venkataramanayya is the heir of Appalanarasimhulu. Appalaswami and Venkataramanayya have therefore become the owners of the equity of redemption. Appalaswami filed O. P. No. 33 of 1948 on the file of the District Munsif, Vizianagaram under S. 19-A of the Madras Act 4 of 1938 to declare the sum due under the mortgage deed dated 16-4-1908. To that application Venkataramanayya, the owner of the half share in the equity of redemption was made respondent 5. The original mortgagees having died, their legal representatives were impleaded as respondents 1 to 4. The learned District Munsif, and in appeal, the learned District Judge, Vizagapatam, held that the mortgage-debt was completely discharged under S. 9-A of the Act. The respondents, i.e., the legal representatives of the original mortgagees, prefer the above appeal.

(2) Learned counsel for the appellants contended that as the petitioner purchased the interest of Venkata Narasimhulu on 28-10-1945, so far as he was concerned, the debt is not discharged under the provisions of S. 9-A. The relevant provisions of S. 9-A may now be read:

"S. 9-A (3): Where a usufructuary mortgagee has been in possession of the property mortgaged to him for an aggregate period of thirty years or more, then, notwithstanding anything contained in Ss. 8 and 9 or the fact that the time, if any, fixed in the mortgage deed for redeeming the mortgage has not arrived, the mortgage-debt shall be deemed to have been wholly discharged, with effect from the expiry of such period, or where such period expired before the commencement of the Madras Agriculturists' Relief (Amendment) Act, 1948, with effect from the commencement of that Act."

"S. 9-A (7): Nothing contained in this section except sub-s. (1) shall apply to any usufructuary mortgage—

(ii) in respect of property situated in any other area in the cases mentioned below:

(a) Where during the period after 30-9-1937 and before 30-1-1948, the equity of redemption in the property subject to the usufructuary mortgage has devolved either wholly or in part on a person by or through a transfer 'inter vivos' either from the original mortgagor or from a person deriving title from or, through such mortgagor otherwise than by a transfer 'inter vivos', then, to the whole or such part, as the case may be."

If a transaction conveying the equity of redemption is effected between 30-9-1937 and 30-1-1948 in the manner prescribed in S. 9A(7)(ii)(a), the mortgage is taken out of the operation of S. 9-A, i.e., such a mortgage will not be deemed to be discharged under the section. But the section has not been artistically drafted and has lent ample scope for conflicting arguments. The discussion in the Legislative Assembly at the time of enacting of the aforesaid clause does not afford any clue and it is also not permissible to search for any light in that quarter. I would therefore construe the provisions of the section strictly in accordance with the plain meaning of the words used therein. Omitting that part of the clause which is irrelevant for the present purpose, it reads:

"the equity of redemption x x x x has devolved either wholly or in part on a person by or through a transfer 'inter vivos' from a person deriving title from or through such mortgagor otherwise than by a transfer 'inter vivos'."

Devolution of a property otherwise than by a transfer 'inter vivos' may include court-sales, succession, survivorship, etc. To get an exemption, therefore, a person should have acquired a title to the equity of redemption by a transfer

'inter vivos' from another person who in his turn acquired a right to the same by one of the modes mentioned above, namely, succession, survivorship, court-sale etc. To illustrate, A is the owner of the equity of redemption. A dies and B succeeds to him. B sells the equity of redemption to C between 30-9-1937 and 30-1-1948. C comes directly under this exception and therefore his usufructuary mortgage-debt will not be deemed to have been discharged wholly or in part under the provisions of S. 9 (A) of the Act. To take a different illustration, if B sells the equity of redemption to D before 30-9-1937 and D sells it to C between the aforesaid two dates, can it be said that the equity of redemption has devolved on C through a transfer 'inter vivos' during the aforesaid period from B, the heir of A? In the second illustration, the equity of redemption has not devolved during the prescribed period on a person through a transfer 'inter vivos' from a person who acquired the property otherwise than by a transfer 'inter vivos'. The first transfer from the heir, i.e., the sale of B to D, may come within the terms of the clause; but that took place prior to 30-9-1937. The second sale which took place between the aforesaid two dates would only be by a transfer 'inter vivos' from a person who himself got it by transfer 'inter vivos'. That is what happened in this case.

(3) From the aforesaid facts it will be seen that petitioner 1 purchased the equity of redemption from the heirs of Venkata Narasimhulu and that Venkata Narasimhulu purchased the same from the sons of the original mortgagor in the year 1920. The petitioner therefore purchased the equity of redemption from the heirs of a person who in his turn purchased from the heirs of the original mortgagor in 1920. The purchase of the petitioner therefore between the aforesaid two dates was not from a person deriving title through the mortgagor otherwise than by transfer 'inter vivos'. He purchased it not from the mortgagor's heirs but from the heirs of the purchaser from the mortgagor's heirs. The transaction therefore does not strictly fall within the terms of the clause. It was said there is no apparent principle for making a distinction between a purchase from an heir of a mortgagor and a purchase from a purchaser from the heir of a mortgagor. The same anomaly may also be pointed out in the case of a devolution of the equity of redemption on a person by or through a mortgagor, dealt with in the first part of the clause. There too the transaction to be hit by the section should have been a transfer 'inter vivos' from the original mortgagor between the aforesaid two dates. The clause would not apply if the transfer effected between the aforesaid dates is from a transferee from the original mortgagor prior to 30-9-1937. If it be permissible to read the mind of the Legislature, it may be suggested that the clause is intended to affect transfers 'inter vivos' of an equity of redemption from the original mortgagor or his heirs etc. directly between the aforesaid two dates. The section was presumably enacted to hit at speculators who might have purchased the property after 30-9-1937 hoping to get relief under the Madras Agriculturists' Relief Act. If a mortgagor or his heir or a person who acquired the property from the mortgagor otherwise than by a transfer 'inter vivos', transferred the interest in the equity of redemption to another before 30-9-1937, the Legislature presumed that a purchase during the aforesaid period from the first purchaser would be 'bona fide'. But as I have already said, this is only a surmise and it is not necessary to make one if the terms of the clause are otherwise clear, as I have held them to be. I therefore hold that Ex. P. 2 dated 28-10-1945 is a transfer not covered by the provisions of S. 9-A (7) (ii) (a). The learned District Judge was therefore right in applying the provisions of S. 9-A (3) of the Act. In the result the appeal fails and is dismissed with costs.

B/V.S.B. Appeal dismissed.

A.I.R. 1953 MADRAS 705 (Vol. 40, C. N. 269)

GOVINDA MENON J.

Munagala Venkateswara Rao, Petitioner v. Mohammad Mohibulla Saheb, Respondent.

Civil Revn. Petn. No. 1495 of 1951, D/- 9-1-1953.

Houses and Rents—Madras Buildings (Lease and Rent Control) Act (15 of 1946), Ss. 5 and 6 — Agreement to pay enhanced rent.

The language of S. 5 is peremptory and permits an increase in rent only where some addition, improvement or alteration such as is described in that section has been carried out at the landlord's expense after the fixation of the rent. That section applies even though the parties have contracted to the contrary. Hence, an agreement executed in favour of the landlord for enhancement of rent cannot be enforced. AIR 1948 Mad 346, Foll. (Para 4)

I. Vishnu Rao, for Petitioner; Ch. Sankara Sastri, for Respondent.

CASE CITED:
(A) ('48) AIR 1948 Mad 346: 1948-1 Mad LJ 51

JUDGMENT: The suit out of which this revision petition arises was for a sum of money said to be the excess rent which the petitioner had agreed to pay to the respondent in accordance with a rent chit executed by him. The agreement was that the petitioner should pay Rs. 9 per month as rent for the premises from 1-7-1947 till 30-6-1949 and vacate the premises thereafter. If, on the other hand, he continued to remain on the premises, a higher rent at the rate of Rs. 14 per mensem was to be paid. The present suit is for recovery of the difference in rent from 1-7-1949 to 12-1-1951 at the rate of Rs. 5 per mensem. The defendant contested the suit on the ground that the agreement was null and void and was against the provisions of the Madras Buildings (Lease and Rent Control) Act, 1946, and therefore the agreement could not be enforced. There is a further contention that since the plaintiff had received without protest the rent at the rate of Rs. 9 per mensem even after 1-7-1949, he had waived the claim for the increased rent. The lower Court rejected both these contentions and decreed the suit. The question for consideration is whether the agreement pleaded can be enforced or not.

(2) In — 'Moses Pillai v. Govindan', AIR 1948 Mad 346 (A)', Govindarajachari J. in construing cl. 7 (a), Madras House Rent Control Order, which was one of the predecessors of the present Act, held that the language of Cl. 7 (a) of that order is peremptory and permits an increase in rent only where some addition, improvement or alteration such as is described in that clause has been carried out at the landlord's expense after the fixation of the rent. In that case also there was an agreement dated 4-2-1942 which provid-

ed that the tenancy shall be for a period of one year from that date and during the period the rent was fixed at Rs. 40 per month. After the expiry of the period the tenant was to deliver possession of the house to the landlord but if he failed to deliver possession then the tenant agreed to pay a rent at the rate of Rs. 45 per mensem till possession was delivered over to the landlord. The landlord filed a suit to recover the higher rate of rent and it was contended that the stipulation for the payment of increased rent was not enforceable. Accepting that contention the learned Judge held that the provisions of cl. 7 (a) of the Order would apply even though the parties had contracted to the contrary. The result was that the landlord was held entitled only to the lower rate of rent as agreed to. It is contended for the petitioner that this decision would apply even under the present Act, because under S. 6 a landlord is not entitled to claim anything in excess of the fair rent. Section 6 runs as follows:

"6. When the Controller has determined the fair rent of a building—

(a) the landlord shall not claim or receive any premium or other like sum in addition to fair rent or any rent in excess of such fair rent, but the landlord may stipulate for, and receive as advance an amount not exceeding one month's rent;

(b) any agreement for the payment of any sum in addition to rent or of rent in excess of such fair rent except in cases falling under Section 5 clause (a) of this section shall be null and void in respect of such addition or excess and shall be construed as if it were an agreement for payment of the fair rent;....."

(3) Learned counsel for the respondent wants to escape from the effects of this section by saying that such an agreement can be declared null and void only where the fair rent of the building has been fixed under S. 4 of the Act, and an increase in such fair rent has been allowed under S. 5 of the Act. Section 4 deals with the determination of fair rent on an application by the tenant or the landlord; and how the same has to be arrived at is set forth in detail in that section. Section 5 lays down that when the fair rent of a building has been fixed under Section 4, no further increase in such fair rent shall be permissible except in cases where some addition, improvement or alteration has been carried out at the landlord's expense and if the building is then in the occupation of the tenant, at his request. From this it is argued that unless the fair rent of a building has been fixed under S. 4, it is open to a landlord to increase the rent whenever he pleases. His argument is that if there is a tenancy and rent has been fixed by agreement of parties, even after the coming into operation of Madras Act 15 of 1946 it is open to the landlord to increase the rent if there has been no fixation of the same by the Controller. It is relevant to quote S. 5 of the Act which says:

"When the fair rent of a building has been fixed under S. 4, no further increase in such fair rent shall be permissible except in cases where some addition, improvement or alteration has been carried out at the landlord's expense and if the building is then in the occupation of a tenant at his request".

What is contended on behalf of the respondent is that the decision in — 'A. I. R. 1948 Mad. 346 (A)', was given under the provisions of the Madras House Rent Control Order, 1941, and not on the interpretation of Act 15 of 1946, and that these two enactments are not in 'pari materia' but differ in important particulars. On a comparison of the various sections of the Act with the clauses of the Madras House Rent Control Order, I am not able to find any material difference which would justify my holding that the circumstances under which — 'AIR 1948 Mad. 346 (A)', came to be decided were different. Clause 6 of the Madras House Rent Control Order is in the following terms:

"When the Controller has determined the fair rent of a house

(a) the landlord shall not claim or receive any premium, advance or other like sum in addition to rent or any rent in excess of such fair rent:

(b) Any agreement for the payment of any sum in addition to rent or of rent in excess of such fair rent shall be null and void in respect of such excess and shall be construed as if it was an agreement for payment of the said fair rent;....."

(4) Clause 6 of the Madras House Rent Control Order corresponds to S. 6 of Madras Act 15 of 1946. Whereas Cl. 6 opens by saying "When the Controller has determined the fair rent of a house", S. 6 of Act 15 of 1946 also opens with the words "When the Controller has determined the fair rent of a building", I am not able to find any distinction in essence between the two openings; and if cl. 6 of the Madras House Rent Control Order is compared to, and contrasted with Section 6 of the Act, there can be no material difference discernible. Likewise, there cannot be much difference between Clause 7 of the House Rent Control Order and S. 5 of Act 15 of 1946. Clause 7 says that after the commencement of this order an increase in the rent fixed under cl. 5 shall be permissible only in cases where some addition, improvement or alteration not included in necessary repairs or repairs which are usually made to house in that area has been carried out at the landlord's expense. Section 5 says that when the fair rent of a building has been fixed, an increase in rent cannot be permitted. Sub-clause (b) of Cl. 6 of the Madras House Rent Control Order when compared with Cl. (b) of S. 6 of the Act leaves one with the impression that there was no material change. In these circumstances, I am unable to find any distinction between the present case and that decided in — 'AIR 1948 Mad. 346 (A)'. The order of the lower Court is therefore not sustainable and is set aside. The civil revision petition is allowed with costs throughout.

B/V.S.B. Revision allowed.

A.I.R. 1953 MADRAS 706 (Vol. 40, C. N. 270)

CHANDRA REDDI J.

Anganna Thevan, Appellant v. Ayyasami Thevan and another, Respondents.

Second Appeal No. 1910 of 1948, D/- 3-11-52.

Hindu Law — Alienation — Time-barred debt — AIR 1937 Pat 40, Dissented — (Contract Act (1872), S. 25).

A mother succeeding to the estate of her son is not competent to alienate the property in order to discharge the time-barred debt of her son. AIR 1921 All 163, Rel. on. (Para 9)

Anno: Contract Act, S. 25 N. 10.

P. S. Balakrishna Iyer and P. S. Ramachandran, for Appellant; A. Balasubramaniam and V. S. Mylerum Perumal, for Respondents.

CASES CITED:
(A) ('37) AIR 1937 Pat 40: 16 Pat 45
(B) ('46) AIR 1946 Pat 120
(C) ('21) AIR 1921 All 163: 43 All 604

JUDGMENT: This second appeal arises out of a suit instituted in the Court of the District Munsif of Tirupur for a declaration that the sale-deed Ex. B-7 executed by defendant 2 on 7-6-1945 in favour of defendant 1 is not binding on the plaintiff after defendant 2's lifetime. The plaintiff filed the present suit claiming to be reversioner to the estate of one Kandaswami who died in or about August 1936 and whose estate devolved on his mother, defendant 2. The suit properties were sold for a sum of Rs. 400 in favour of defendant 1. The consideration was made up of Rs. 272 to be paid to the mortgagee Subbakkal under Ex. B-3 dated 14-6-1941 for Rs. 200 and Rs. 128 to be paid in discharge of the mortgage, Ex. B-6 dated 15-4-1941, both the mortgages having been executed by defendant 2 in discharge of the debts incurred by the last male-holder himself in connection with his marriage. Two promissory notes were executed by Kandaswami one on 9-5-1936 for Rs. 200 evidenced by Ex. B-1 in favour of a person called Kandaswami Tevan and another for a sum of Rs. 200 on 25-5-1936 evidenced by Ex. B-4 in favour of defendant 1. Defendant 2 executed Ex. B-2 in renewal of Ex. B-1 on 9-6-1939 while Ex. B-4 was renewed by her by Ex. B-5 on 15-5-1939. It was to discharge the debt due under Ex. B-2 that Ex. B-3, the morgage in favour of Subbakkal, was executed while Ex. B-6 was executed in favour of Kandaswami Tevan, in discharge of Ex. B-5. The plaint proceeded on the footing that the mortgages in discharge of which the sale-deed Ex. B-7 was executed were nominal and that nothing was really due and payable by Kandaswami, the 1st male holder. According to the plaint all these documents were brought into existence with a view to defraud the reversioner.

(2) The suit was resisted on the ground that the mortgages were really supported by consideration and the sale-deed brought about for the purpose of discharging the mortgages was a valid and binding one. The trial Court went into the question whether the debts were really in existence during the lifetime of Kandaswami or not and came to the conclusion that the sale-deed Ex. B-7 and the mortgages in discharge of which the sale-deed was executed were fully supported by consideration and the sale-deed Ex. B-7 was binding on the reversion. In the result, the District Munsif dismissed the suit.

(3) On appeal by the plaintiff the lower appellate Court while holding that both Ex. B-7 the sale-deed and the mortgages were genuine transactions, reversed the decision of the trial Court as it thought that the major portion of the consideration for Ex. B-7 was in discharge of a time-barred debt. According to the learned District Judge, Ex. B-2 in renewal of Ex. B-1 was executed after Ex. B-1 was time barred and Ex. B-3 the mortgage in favour of Subbakkal was created for the purpose of discharging the time-barred debt evidenced by Ex. B-1. In the opinion of the learned District Judge the mother of the last male holder was under no pious obligation to renew a time-barred debt and therefore Ex. B-3 which was executed for the purpose of discharging the debt, under Ex. B-2 could not bind the reversion and therefore to the extent that the consideration of Ex. B-7 was utilised for the discharge of Ex. B-3, it would not bind the plaintiff. The result was that he decreed the suit subject to payment of Rs. 128 which was the amount paid by defendant 1 to discharge Ex. B-6. Evidently, the learned District Judge, in coming to the conclusion that Ex. B-2 was a renewal of a time-barred debt, relied on the deposition of defendant 2 that on the date on which Ex. B-2 was executed the debt under Ex. B-1 was already barred and that she did not make any payment to the payee towards interest.

(4) I think the lower appellate Court should not have granted a decree on a point not taken by the plaintiff in the pleadings. It may be stated that it was not pleaded in the plaint that as a portion of the consideration for Ex. B-7 covered a time-barred debt, the sale-deed would not bind the reversion to that extent nor was any issue raised on that question. If the lower appellate Court wanted to base its decision on the question of limitation, in fairness to the parties concerned it ought to have framed an issue whether Ex. B-2 was in renewal of a time-barred debt and sent it back to the trial Court to determine that issue after giving opportunities to both sides to let in evidence on that point. It is not desirable that some stray statements made by the parties in the witness-box should be made the basis of a finding when it had no relation to any issue that was raised in the suit. Since the lower appellate Court has based its decision on the question of limitation without giving an opportunity to the parties concerned to agitate this matter fully in the trial Court, I think I have to ask the trial Court to consider the issue afresh on the material to be placed before it and submit a finding on the question whether Ex. B-2 was in renewal of a time-barred debt. Finding to be submitted within two weeks of the reopening of that Court after summer recess. The parties are at liberty to adduce evidence on this point. Objections, if any, within two weeks thereafter.

(5) The question whether the mother can renew a time-barred debt of her son will be considered after the submission of the finding..... .... (After the return of the finding, the Court delivered the following judgment.)

(6) The finding submitted by the learned District Munsif is that Ex. B-2 was executed in renewal of time-barred debt. The question therefore arises for consideration whether a mother succeeding to the estate of her son, can alienate property to discharge the time-barred debt of her son. Mr. Ramachandran appearing for the appellants contends that it is the duty of the mother, to discharge the son's debt, as the Hindu Law recognises no limitation, so far as the discharge of the debts is concerned. In support of this contention he relied on a decision of a Bench of the Patna High Court in — 'Darogi Rai v. Basdeo Mahto', A. I. R. 1937 Pat. 40 (A). There the daughters during the lifetime of their mother who succeeded to that estate of her husband borrowed some monies for performing the Shradha of their father. In order to discharge these debts which became barred, they alienated a portion of their father's estate. This alienation was attacked by the ultimate reversioners on two grounds, viz., (1) that the daughters were not competent to contract debts during the lifetime of the widow so as to bind the reversioners, and (2) that they could not alienate property for payment of debts incurred for legal necessities which had become barred. The learned Judges construed the borrowing as one on behalf of the widow. On the second point the learned Judges held that since it was open to the daughters to keep the debts alive

by renewing them so as to bind the reversion, there is no reason why they should not be allowed to pay off the debts which they could have kept alive merely because they became time-barred. No doubt this decision lends support to the position taken up by Mr. Ramachandran.

(7) But another Bench of the same High Court was inclined to doubt the correctness of this ruling in — 'Sunderbali v. Sukhdeo', AIR 1946 Pat 120 (B). The learned Judges thought that the case in — 'AIR 1937 Pat 40 (A)', required reconsideration.

(8) A case on the point is to be found in — 'Sheoram v. Sheoratan', AIR 1921 All. 163 (C). There it was laid down that a Hindu mother succeeding to her son's estate could not validly alienate a part of the property in order to pay off the time-barred debts of her husband. Referring to cases in which the opinion was expressed that the debt contracted by the husband could be discharged by the widow, if sonless, or if her husband enjoined on her to do so on the death-bed, the learned Judges stated that they were not authorities for the proposition put forward in that case. The case in — 'AIR 1921 All. 163 (C), is quoted with approval in Mayne's Hindu law and Usage, 11th End. page 771. This is referred to also in "Principles of Hindu Law" by Mulla at page 187 (11th Edn.).

(9) In my opinion, this decision if I may say so with respect is sound and I express my respectful accord with the reasoning adopted in that case. Applying this principle, I must hold that a mother succeeding to the estate of her son is not competent to alienate the property in order to discharge the time-barred debt of her son. In these circumstances I must uphold the decision of the lower appellate Court subject to this modification that the appellant will get Rs. 128 with interest at 6 per cent. per annum from the date of sale. The parties will bear their own costs throughout.

B/D.H. Appeal dismissed.

A.I.R. 1953 MADRAS 708 (Vol. 40, C. N. 271)

MACK J.

Pethayya Pillai, Appellant v. Karuppiah Nadar and others, Respondents.

A. A. O. No. 571 of 1949, D/- 17-12-1952.

(a) Oaths Act (1873), S. 8 — Oath affecting third person.

For a person to be challenged or to make an offer to take an oath on the head of his son is to give evidence on oath not contemplated by S. 8. Oaths Act, which specifically requires that the oath should be one not purporting to affect any third person. AIR 1925 All 604 and 18 All 46, Ref. (Para 2)

Anno: Oaths Act, S. 8 N. 1.

(b) Oaths Act (1873), S. 8 — Binding nature of oath.

Where one of the plaintiffs is not conducting the suit under any power of attorney he has no right to bind the other plaintiffs by oath contrary to the provisions of S. 8, Oaths Act. AIR 1938 Mad 385, Disting. (Para 3)

Anno: Oaths Act, S. 8 N. 1.

(c) Civil P.C. (1908), O. 3, R. 4 — Power of advocate to make admission — (Oaths Act (1873), S. 8).

An advocate cannot bind the absent plaintiffs by signing the oath petition which is not contemplated by S. 8 of the Oaths Act and is in fact contrary to law. (Para 3)

Anno: C.P.C., O. 3, R. 4 N. 5; Oaths Act, S. 8 N. 1.

S. V. Venugopalachari and S. Venkatesan, for Appellant; C. K. Viswanatha Sastry; Sundararajan and Sivaswami, for Respondents.

CASES CITED:
(A) ('25) AIR 1925 All 604: 88 Ind Cas 448
(B) ('95) 1895 All WN 158: 18 All 46
(C) ('38) AIR 1938 Mad 385: 1938-1 Mad LJ 368

JUDGMENT: This is an appeal which arises out of the Oaths Act. A suit was filed by four undivided Hindu brothers, one of whom was a minor against defendant 1 and some tenants for a declaration of their title to certain immoveable property and for recovery of possession. At the trial of the suit, plaintiff 2, the younger brother of plaintiff 1, was in Court, conducting the litigation and instructing their learned advocate. Plaintiff 2 issued a challenge to defendant 1, which was accepted to take an oath on the head of his eldest son. The other plaintiffs were not present in Court. The challenge was made on 12-12-1947 and the suit adjourned for the taking of this very unusual oath to 16-12-1947. On that day, the other adult plaintiffs appeared and protested against the challenge made by plaintiff 2 from which they resiled. Despite their resiling, this oath was administered in Court on 16-12-1947 and the suit dismissed with costs by the learned District Munsif. In appeal, the learned Subordinate Judge held that the oath was not binding on plaintiffs 1, 3 and 4, who were entitled to resile from it and set aside the dismissal of the suit only as against them and remanded it for fresh disposal. The learned Advocates agree that that suit has now been decreed after contest and that an appeal against that decision is now pending. The position created by the learned Subordinate Judge's judgment is no doubt anomalous in that one of the plaintiffs has been non-suited, the oath being held to be binding on him only and that the suit has been retried only as regards plaintiffs 1, 3 and 4. In this particular suit, the anomaly does not result in any practical inconvenience or impossibility, seeing that in the event of plaintiffs 1, 3 and 4 ultimately succeeding, they will get a decree for 3/4th share of the suit property and that the oath being binding on plaintiff 2, he becomes deprived of his share.

(2) No decision has been placed before me, which covers the somewhat extraordinary facts in the present case. The learned Judge referred to two Allahabad decisions, — 'Tulshiram v. Dayaram', AIR 1925 All 604 (A) and — 'Ram Narayan Singh v. Babu Singh', 18 All 46 (B), in which two learned Benches deprecated an extraordinary oath of this kind as being improper. For a person to be challenged or to make an offer to take an oath on the head of his son is, as it appears to me, to give evidence on oath not contemplated by S. 8, Oaths Act, which specifically requires that the oath should be one not purporting to affect any third person. In — 'AIR 1925 All 604' (A), the oath was not in fact taken as the plaintiff did not produce his son into Court. In that case, the Court proceeded to judgment under O. 17, R. 3, Civil P. C. on the available material. In appeal a trial on the merits after allowing the parties opportunity to produce all evidence was ordered. In — '18 All 46' (B) the oath agreed on was one by the defendant holding the arm of his son. In that

case, the oath was administered that very day. The learned Bench made this observation:

"We have no hesitation in saying that the oath proposed should never have been administered. It was an oath understood and purporting to affect a third person and such an oath under Act 10 of 1873 is not an oath which could under any circumstances be lawfully administered."

Since, however, it was in fact administered, it was however considered conclusive proof of the matters stated.

(3) My attention has been drawn to a number of decisions, which are not in point. In — 'Valliammal v. Arunachala Moopanar', A I R 1938 Mad 385 (C), it was held that once a challenge to take an oath was accepted, the challenger should not be permitted to resile after his offer has been accepted by the other party unless good ground is shown by the challenger to satisfy the Court. This decision is relied on for the position that the other plffs. in this case were legally precluded from resiling from the oath petn. filed by plff. 2. This was signed by plaintiff 2 and by the advocate. Plaintiff 2 was not conducting the suit under any power of attorney. He is said to have merely been in charge of the litigation. So far as he is concerned, I have no hesitation in holding that he had no right to bind the other plaintiffs by oath contrary to the provisions of S. 8, Oaths Act. The position may have been perhaps different if the other plaintiffs have not appeared on the scene and resiled even before the oath was administered. So far as the advocate is concerned, I entirely fail to see how he of all persons could bind the absent plaintiffs by signing the oath petition which was not contemplated by S. 8, Oaths Act and was in fact contrary to law. On the facts of this peculiar case, I have no hesitation in dismissing this appeal with costs, upholding the view of the learned Subordinate Judge that plaintiffs 1, 3 and 4 were in the circumstances entitled to resile from the oath petition filed on their behalf by plaintiff 2 and their learned advocate. Leave refused.

B/V.S.B. Appeal dismissed.

A.I.R. 1953 MADRAS 709 (Vol. 40, C. N. 272)

RAJAMANNAR C. J. AND
VENKATARAMA AIYAR J.

Visakapatnam Co-operative Motor Transport Ltd., Visakapatnam, Appellant v. G. Bangaruraju and others, Respondents.

Letters Patent Appeals Nos. 6, 52 and 146 of 1952, D/- 21-1-1953, from judgment of Subba Rao J. in C. M. P. Nos. 7184 and 7185 of 1951, D/- 9-1-1952.

† (a) Motor Vehicles Act (1939), S. 44 (2) — Person having financial interest.

The Collector of a district is not disqualified from being appointed as a member of the Regional Transport Authority, merely because he happens to be the ex-officio president of a Co-operative Society which has applied for the issue of a bus permit. (Para 4)

(b) Tribunal — Constitution.

Irrespective of the possibility or otherwise of actual partiality being proved, the constitution of a tribunal entrusted with judicial or quasi-judicial functions is deemed to be bad if and when it deals with any case in which it can be said that one of the members of that body is among the suitors or litigants before the body. (Para 4)

(c) Constitution of India, Art. 226 — Application against Regional Transport Authority — (Motor Vehicles Act (1939), S. 44).

A Regional Transport Authority acts in the exercise of judicial or quasi-judicial functions and therefore its action can be called in question before the High Court on an application under Art. 226. C. A. No. 16 of 1952 of Supreme Court Disting. (Para 6)

(d) Motor Vehicles Act (1939), Ss. 44 and 57 — Collector member of Regional Transport Authority — Collector also chairman of Co-operative Society — Society one of applicants for issue of bus permit — Order of Regional Transport Authority granting permit to society held was liable to be quashed. (Para 7)

Anno: Motor Vehicles Act, S. 57 N. 1.

Govt. Pleader, for Appellant (in No. 52 of 1952) and for Respondent (in Nos. 6 and 146 of 1952); D. V. Reddi Pantulu and U. Somasundaram, for Appellant (in Nos. 6 and 146 of 1952); Advocate General, M. K. Nambiar, C. F. Louis, N. Sundaram Iyer, D. Narasaraju, K. B. Krishnamurthy, K. Mangachary, T. K. Rajagopalan and S. S. Rajagopalan, for Respondents.

CASES CITED:
(A) ('52) AIR 1952 All 74
(B) ('53) AIR 1953 SC 79: (C. A. No. 16 of 1952 SC)

RAJAMANNAR C. J.: The same question of law is involved in these three Letters Patent Appeals against the judgments of Subba Rao J. in three applications for the issue of writs of 'certiorari' and 'mandamus' against proceedings under the Motor Vehicles Act. The question arises on the following facts which are substantially common to all the three petitions though they related to different districts in the State. There were applications to the concerned Regional Transport Authorities for the issue of bus permits. One of the applicants was the District Co-operative Society for Ex-servicemen. It is common ground that the Collector of the concerned district is the President of the respective Co-operative Society. It is also common ground that the Collector of the district is a member of the Regional Transport Authority which has to adjudicate on the comparative claims of the applicants and which is under a duty to decide as to who should be granted the permit.

In all the three cases, a permit was granted to the respective Co-operative Society in the district. In all the three cases, the Collector happened to be the President of the respective Regional Transport Authority and took part in the proceedings in which the permit was granted. Two objections 'inter alia' were taken by and on behalf of the other applicants, namely, (1) that the District Collector was disqualified from being appointed as a member of the Regional Transport Authority, because he had a financial interest in a Transport undertaking, and (2) the order of the Regional Transport Authority was contrary to the principles of natural justice because the Collector who was a member of the Regional Transport Authority was also the President of the Co-operative Society which was one of the applicants.

Subba Rao J. overruled the first objection which was based on S. 44 (2) of the Motor Vehicles Act. Under that provision, no person who has any financial interest whether as proprietor, employee or otherwise in any transport undertaking shall be appointed or continue as a

member of a Provincial or Regional Transport Authority. The learned Judge held that the Collector of the District did not have any financial interest in the Co-operative Society of which he was 'ex officio' the President and therefore he was not disqualified under that provision.

(2) The learned Judge however upheld the second objection. He held that the order of the Regional Transport Authority issuing a permit to the Co-operative Society in each of these cases was not valid, because the President of the Society, namely, the Collector took part in the proceedings of the Regional Transport Authority, as one of its members. The reasoning of the learned Judge which was based on several decisions of English Courts to which reference was made before him was shortly this: Members of the Regional Transport Authority performed a judicial or quasi-judicial function in deciding on the applications made to the Authority for the grant of a permit and the member of such a body should not have a bias which is likely to affect his impartiality. It is not necessary that actual partiality should be established before the proceedings of that body are vitiated. The presence of a member having a bias vitiates 'ab initio' the constitution of the body itself. On this ground, the learned Judge quashed the orders of the Regional Transport Authority granting the permits to the respective Co-operative Societies.

(3) In the three appeals before us, in one of the appeals the Government is the appellant, and in the other two, the parties affected by the decision of Subba Rao J. are the appellants.

(4) We agree with the learned Judge that the Collector of the District was not disqualified from being appointed as a member of the Regional Transport Authority under S. 44 (2) of the Act, merely because he happened to be the 'ex officio' president of the respective Co-operative Society for ex-servicemen. We are also in agreement with the learned Judge on the second point. It is not necessary to discuss at length the legal principles which have been well established in dealing with the proceedings of inferior tribunals entrusted with judicial and quasi-judicial functions. One of the great principles of civilised jurisprudence which is a part of the law in Britain and which has been adopted in this country is that no man shall be a judge in his own cause.

Closely allied to this principle is the other salutary principle that it is of fundamental importance that justice should not only be done but manifestly and undoubtedly seem to be done. The combined result of these two well established principles is that irrespective of the possibility or otherwise of actual partiality being proved, the constitution of a tribunal entrusted with judicial or quasi-judicial functions is deemed to be bad if and when it deals with any case in which it can be said that one of the members of that body is among the suitors or litigants before the body. See Halsbury's Laws of England, 2nd Edn., Vol. IX, page 883 et seq.

(5) Reference was made to a recent decision of the Allahabad High Court in — 'Jagat Bus Service v. State Transport Authority', AIR 1952 All 74 (A), in which it was held that merely because the Government owns an undertaking its servants and officials as such are not disqualified from being appointed as members of the State or Regional Transport Authority. We agree. But this decision was not concerned with facts like what we have before us in these appeals. The decision related to an interpretation of S. 44 (2), Motor Vehicles Act, and we are in entire agreement with the construction placed by the learned Judge on this provision. But it is of interest to note that in the judgment of Agarwala J. the following observations occur:

"I cannot part with this case, however, without observing that although I have held above that Government servants who are not servants in the Government Roadways undertaking may be lawfully appointed as members of the State or Regional Transport Authorities, the Government should in the larger interest of the State consider how far it will be desirable or advisable to appoint such persons to those bodies. Having regard to the scheme of the Motor Vehicles Act, the State or the Regional Transport Authorities are intended to be independent statutory bodies with quasi-judicial functions. They are expected to bring an independent mind to bear upon the problems presented to them for solution.

When the Government itself was not running any transport undertaking and was not competing with the private individuals in the business of transport, there could have been no objection to Government servants directly or indirectly connected with the Roadways being appointed to these quasi-judicial tribunal's. But now that the Government itself has become one of the interested parties, such of its servants as are directly or indirectly connected with the Roadways department cannot in the nature of things, inspire confidence in the minds of the public that they would get justice from the tribunals composed entirely or partially of the employees of one of the parties to the dispute. It has been said that justice must not only be done but seem to be done. I would say that the rule is equally applicable to all officers of law or statutory bodies called up to perform functions which are either judicial or quasi-judicial."

These observations so far as they go, do not run counter to the view which we have expressed.

(6) Our attention was drawn to a recent decision of the Supreme Court of India in — 'Ibrahim v. Regional Transport Authority, Tanjore', AIR 1953 SC 79 (B). That case related to the fixing of a place for a bus stand. The Regional Transport Authority was entrusted with this function and the Collector of the District presided over a meeting of the Transport Authority which duly notified the Municipal bus stand in the place of a private bus stand which existed previously. The owner of the private bus stand applied for a writ under Art. 226 of the Constitution to quash the order of the Regional Transport Authority, and one of the grounds on which he attacked the order of the Authority was that the District Collector who presided over the meeting of the Transport Authority had himself opened the new municipal bus stand sometime earlier. The suggestion was that he did not bring to bear upon the question an impartial and unbiassed mind. This objection was overruled by the Supreme Court with the following observations:

"The District Collector was not acting in the exercise of judicial or quasi-judicial functions so that his action can be subjected to the scrutiny which is permissible in the case of a judicial officer. He was acting purely in his executive capacity and his conduct in presiding over the meeting of the Transport Authority in the exercise of his normal functions and also opening the Municipal stand which he was entitled to do as the head of the District, does not affect the validity or fairness of the order complained against."

It must not be overlooked that their Lordships of the Supreme Court in that case were dealing

with an order of the Transport Authority fixing a particular place for a bus stand. It cannot be said that the said action was done in the exercise of judicial or quasi-judicial functions. But it cannot surely be denied that the Regional Transport Authority in dealing with applications for permits are acting in a judicial or quasi-judicial capacity. It has been held over and over again in England that licensing justices who perform exactly similar functions as the Regional Transport Authority act judicially in granting or refusing licences and their orders are subject to the writ of 'certiorari'. With great respect we do not think that the observations of the Supreme Court can be relied on in this case to support an argument that the Regional Transport Authority of which the District Collector was a member was not acting in the exercise of judicial or quasi-judicial functions and that therefore its action could not be called in question before this Court on an application under Art. 226 of the Constitution.

(7) In our opinion, in this case, the Collector was a member of the Regional Transport Authority and was also one of the applicants before that authority. The fact that the Collector has this dual capacity 'ex officio' is neither here nor there. It is the same official capacity because of which he happens to be a member of the Regional Transport Authority as well as chairman of the Co-operative Society for ex-serviceman. He cannot be a judge in his own case. The order of the Regional Transport Authority in each of these cases was therefore rightly quashed by Subba Rao J.

(8) The appeals are therefore dismissed. In L. P. A. No. 6 and 146 of 1952, the contesting respondent will be entitled to his costs from the appellant.

A/V.R.B. Appeals dismissed.

A.I.R. 1953 MADRAS 711 (Vol. 40, C. N. 273)

RAJAMANNAR C. J. AND VENKATARAMA AIYAR J.

S. M. Abdul Azeez and Sons, Applicants v. Paruchuri Subrahmanyam and others, Respondents.

Referred Cases Nos. 33, 39 and 40 of 1951, D/- 2-1-1953.

(a) Vegetable Oils and Oilcakes (Forward Contracts Prohibition) Order (1944), Cl. 4 — Validity — (Defence of India Rules (1939), R. 81(2)(a), (b) and (f)).

The provisions of clause 4 of the Order do not go beyond the power conferred by Cls. (a), (b) and (f) of sub-rule (2) and none of the provisions of the Order is void or 'ultra vires'. (Paras 4 and 6)

(b) Defence of India Rules (1939), R. 81(2)(f) — "With a view to secure compliance with the order." AIR 1951 Nag 320, Dissented from.

The words "with a view — the order" related to particular subject matter only namely "the entering, search and inspection of premises". It is only in respect of these things that it is necessary that they should be for securing compliance with the order. So far as the main general power is concerned, it is found in the opening words of clause (f) which are not qualified by the later provision contained in the phrase "with a view to secure compliance with the order." AIR 1951 Nag 320, Dissented from. (Para 5)

Y. G. Krishnamurthi, M. S. Ramachandra Rao and M. Krishna Rao, for Applicants; D. Narasaraju, K. B. Krishnamurthi and T. R. Srinivasan, for Respondents; The Advocate-General, for Govt. Pleader, for the State.

CASE CITED:
(A) ('51) AIR 1951 Nag 320:
1951 Nag LJ 150

RAJAMANNAR C. J.: These three cases have been referred to this Court by the First Additional Subordinate Judge of Vijayawada under the proviso to S. 113, Civil P. C. recently inserted by Act 24 of 1951. These references arise out of three suits pending in the Court of the Subordinate Judge in which the validity of the Vegetable Oils and Oilcakes (Forward Contracts Prohibition) Order, 1944, was questioned.

(2) The particular provision whose validity is challenged in these three suits is that contained in clause 4 of the Order. Clause 3 provides that no person shall, after a specified date, enter into any forward contract in certain articles. Clause 4 runs thus:

"Notwithstanding any custom, usage or practice the trade, or the terms of any contract or any regulation of an Association relating to any contract:

(1) every forward contract in any article to which this order applies outstanding at the close of business on the specified date shall be deemed to be closed out at such rate as the Central Government may by notification in the Official Gazette fix in this behalf, and different rates may be fixed for different classes of contracts;

(2) All differences arising out of any contract so deemed to be closed out shall be payable on the basis of the rate fixed as aforesaid and the seller shall not be bound to give, and the buyer shall not be bound to take, delivery;

(3) payment of all difference legally due from a member of an association to another member of such association in respect of any forward contract closed out under this clause shall be made to the clearing house of the Association and for the purposes of calculating such differences, the rate fixed by the Central Government under sub-cl. (1) shall be deemed to be the settlement rate fixed by the Association under its by-laws or other regulations which shall, for the relevant purpose, continue to have effect subject to the provisions of this order."

(3) It is common ground that the order was issued in purported exercise of the powers conferred by sub-rule (2) of rule 81 of the Defence of India Rules. The following clauses of that sub-rule are material for the consideration of the question which falls now for our decision:

" (a) for regulating or prohibiting the production, treatment, keeping, storage, movement, transport, distribution, disposal, acquisition, use or consumption, of articles or things of any description whatsoever and in particular for prohibiting the withholding from sale, either generally or to specified persons or classes of persons, of articles or things kept for sale to be sold either generally or to specified persons or classes of persons or in specified circumstances.

(b) for controlling the prices or rates at which articles or things of any description whatsoever may be sold or hired and for relaxing any maximum or minimum limits otherwise imposed on such prices or rates....

(f) for any incidental and supplementary matters for which the Central Government or the Provincial Government thinks it expedient

for the purposes of the order to provide, including, in particular, the entering, search and inspection of premises to which the order relates with a view to securing compliance with the order, the seizure subject to the provisions of sub-rule (3-C) by a person authorised to make such search of any articles in respect of which such person has reason to believe that a contravention of the order has been, is being or is about to be committed, the grant of issue of licences, permits, certificates and other documents, and the charging of fees therefor; and an order under this rule may be made so as to apply either to persons or undertakings generally or to any particular person or undertakings or class of persons or undertaking, and so as to have effect either generally or in any particular area."

(4) The argument of Mr. Narasaraju is that the provision for payment of differences on the footing that forward contracts outstanding on the date specified in accordance with the terms of the order shall be deemed to be closed out at such rates as the Central Government may, by notification fix in this behalf, is not a provision which can be said to fall within the scope of either clause (a), (b) or (f) of sub-rule (2). He concedes that the total prohibition of forward contracts in future which is provided in clause (3) of the order as well as the provision in clause 4 (2) of the Order discharging the seller and the buyer from their respective obligations to give and take delivery, would fall within clause (a) of sub-rule 2. That would be prohibiting the distribution and disposal of articles. But he contends that the provision for payment of differences on the basis of the rates fixed by the Government cannot be deemed to be a provision for regulating the production, treatment, distribution, disposal, acquisition, or use of the articles.

The contention is not without some force. The language is not for regulating contracts of sale. The regulation or prohibition is only in respect of distribution and disposal of articles or things. But, in our opinion, the provision for payment of differences in respect of forward contracts entered into before the coming into force of the Prohibition Order falls within cl. (f) of sub-rule (2) as either an incidental or supplementary matter for which the Central Government thinks it expedient for the purpose of the Order to provide. The position in respect of contracts subsisting on the date of the coming into force of the Order is this: They are deemed to be closed out at a particular date. The seller is not bound to give and the buyer is not bound to take delivery. In other words, the contract is being compulsorily closed and the parties are being prevented from performing it.

As incidentally to this prohibition or performance of contracts already entered into and subsisting, the Central Government evidently thought it expedient to provide for payment of differences. It was evidently thought that it was equitable that in cases where contracts which were perfectly legal when they were entered were being interfered with and the performance under those contracts was being prohibited, to provide for some compensation. Any adjustment of the rights of the parties on the basis of the compulsory closing out of the contract would certainly be either an incidental or a supplementary matter within the meaning of that expression under cl. (b) of sub-rule (2). It is not necessary to decide whether it is an incidental or supplementary matter. The two terms taken together practically exhaust all contingencies. We, therefore, hold that the provisions of cl. 4 of the Order in question do not go beyond the power conferred by cls. (a), (b) and (f) of sub-r. (2).

(5) The learned Subordinate Judge who has referred the case to us was impressed by the decision of a learned Judge of the Nagpur High Court in — 'Kissen Lal v. Vithal Nagayya', AIR 1951 Nag 320 (A). The learned Judge took the view that a provision similar to cl. 4 of the Order before us in effect provided for the substitution of one kind of contract between the parties thereto to an entirely different contract. The learned Judge says:

"No doubt, power there is under clause (a) to prohibit the doing of a certain specified thing or regulate it. But where, acting under that power, the doing of a thing is forbidden, no further question of regulating it arises..... True, there would be a scope for regulating the manner of performance of pre-existing contracts. But even there, if the actual performance of the contract is forbidden, what is there to be regulated? It is said that the rights of the parties remain to be adjusted and that the provision in that regard would amount to regulating the contract. The "regulating" can, however, be of the things specified in clause (a). Adjusting rights of parties to a contract pertaining to 'disposal or acquisition' of an article is not regulating the 'disposal or acquisition' of that article."

So far, we are also inclined to take a more or less similar view. The learned Judge then deals with clause (f). He was inclined to place a very narrow construction on the words "incidental and supplementary" in that clause. He observes:

"It seems to me that having closed out a contract, it was wholly unnecessary to provide for the adjustment of the rights of the parties if the purpose of so doing was merely to secure 'compliance' with the order closing out the contract."

The learned Judge places reliance on the words "with a view to secure compliance with the order". With respect to the learned Judge we must point out that those words related to particular subject matter only namely "the entering, search and inspection of premises". It is only in respect of these things that it is necessary that they should be for securing compliance with the order. So far as the main general power is concerned, it is found in the opening words of cl. (f) which are not qualified by the later provision contained in the phrase "with a view to secure compliance with the order". It is sufficient if we are able to hold that the language of the provision is to provide for an incidental or a supplementary matter for which the Central Government thinks it expedient for the purpose of the Order to provide. That we are prepared to hold to be in this case. We are unable to follow the reasoning of the learned Judge of the Nagpur High Court, in his construction of cl. (f) of sub-rule (2).

(6) In the result, we answer the references as follows: None of the provisions of the Vegetable Oils and Oilcakes (Forward Contracts Prohibition) Order, 1944, is void or 'ultra vires'.

A/V.R.B. References answered.

A.I.R. 1953 MADRAS 712 (Vol. 40, C. N. 274)

KRISHNASWAMI NAYUDU J.

Sidda Setty, Appellant v. Muniamma, Respondent.

A. A. O. No. 405 of 1950, D/- 8-1-1953.

(a) **Hindu Married Women's Right to Separate Residence and Maintenance Act (1946), S. 2(7) — Justifiable cause — Meaning.**

Though the use of the general words "justifiable cause" in S. 2 (7), following specific cases in cls. (1) to (6), need not be confined to matters which arise from the cases mentioned in the other clauses, the words cannot be extended so as to bring within it any and every cause however trivial and inconsequential.

"Justifiable cause" must be some cause which should be considered to be real and serious by reason of which the position of the married woman becomes miserable and cannot be invoked for temporary bickerings, which are common in every Hindu family but are of a fleeting nature. In any event, sentimental incompatibility of the woman with the husband cannot be treated as "justifiable cause" for claiming rights under the Act.

The contingency of the incompatibility of two wives living together has already been provided under the Act and a further extension of the principle covered under clause (4) could not be sought for under the general words "justifiable cause".

Even if there is some kind of unsympathetic treatment at the hands of her co-wife, that alone will not be a 'justifiable cause'. AIR 1950 Mad 356, Disting. (Para 8)

(b) Interpretation of Statutes — Intention of legislature — (Civil P. C. (1908), Pre).

In construing the words of a statute effect must be given to the intention of the legislature as gathered from the object and the circumstances under which the enactment came to be introduced. (Para 8)

Anno: Civil P. C., Pre. N. 7.

(c) Hindu Married Women's Right to Separate Residence and Maintenance Act (1946), S. 2(4) — 'Marries again'.

The wife who is married subsequently cannot rely on S. 2(4), as, under that clause, it is the first wife who is entitled to claim separate residence and maintenance when her husband marries again. (Para 6)

†(d) Hindu Married Women's Right to Separate Residence and Maintenance Act (1946), S. 2(4) — Applicability to marriages prior to Act — AIR 1950 Mad 321, Dissented. (Obiter).

Obiter: On a proper construction of the language in clause (4) of S. 2, the words "marries again" could only refer to a future marriage, that is, marriage after the Act. This would be the reasonable and natural construction to be put upon the words without doing violence to the language or even to the spirit of the statute. The language does not admit of any ambiguity and is plain. To do otherwise would be to lead to inconvenient and unjust results which should always be avoided in judicial interpretation of the words of a statute. AIR 1950 Mad 321, Dissented. (Para 7)

(e) Hindu Married Women's Right to Separate Residence and Maintenance Act (1946), S. 2(2) — Habitual cruelty of first wife towards second wife.

If there is habitual cruelty from the first wife which the husband is not able to prevent, the second wife would be entitled to allege it as a ground for claiming the rights under S. 2(2) of the Act, as it is immaterial whether cruelty should proceed from the husband alone; cruelty may proceed from any person in the house which the husband is unable to prevent and may sometimes passively be allowing such cruelty against the second wife. (Para 7)

(f) Hindu Married Women's Right to Separate Residence and Maintenance Act (1946), Preamble — Interpretation of the Act.

In construing the provisions of this Act, it must be borne in mind that the law is to be applicable to Hindu married women and one could not get away from principles governing Hindu marriages that marriage among Hindus is not a contract, but is a sacrament and that a Hindu wife has to be with the husband, for marriage is a holy union for the performance of religious duties also and her presence with the husband in the performance of such duties is essential and separation of such a union, though for purposes of separate living cannot be countenanced except for valid reasons. (Para 8)

K. K. Gangadhara Iyer, for Appellant: Sankara Iyer, for Respondent.

CASES CITED:
(A) ('50) AIR 1950 Mad 356: 1950-1 Mad LJ 85
(B) ('50) AIR 1950 Mad 321: 1950-1 Mad LJ 63
(C) ('49) A. S. No. 596 of 1949 (Mad)

JUDGMENT: The husband in a suit by the second wife for separate residence and maintenance is the appellant in the civil miscellaneous appeal. He had already married one Pattammal as his first wife. There were disputes between him and his first wife. The first wife obtained a decree for maintenance against the defendant. Subsequently, there was a rapprochement between the first wife and the defendant and the first wife came and joined her husband, while the plaintiff was living with him. The plaintiff's case is that the defendant joined his first wife Pattammal and drove her out of the house after treating her cruelly and removing the jewels from her and this incident happened on the Sivarathri day in 1944, and that she was threatened that she would be beaten if she came and joined. The defendant denied any cruel treatment or refusal to maintain the plaintiff and stated that the suit was instituted as he had patched up his differences with his first wife and she had come and joined him and that the suit was at the instance of the plaintiff's father, who is stated to be a wealthy man and who was insisting that the defendant should settle some property on his daughter as the defendant had done for his first wife.

(2) One of the issues raised in the suit was whether the alleged ill-treatment of the plaintiff by the defendant was true. The learned District Munsif held against the plaintiff on this issue and he believed the defendant's version as more probable that on account of the defendant taking back his first wife, the plaintiff's father resented his action and took away his daughter. In appeal, the learned Subordinate Judge of Coimbatore, while agreeing with the finding of the first Court that the allegations of cruelty were not proved, found, however, that there were quarrels in the house between the two wives and consequently the plaintiff was not able to live in her husband's household with peace and honour due to a wedded wife, that the plaintiff was the victim of systematic unkind and unsympathetic treatment at the hands of her co-wife resulting in mental cruelty to her and that the defendant had been guilty of not protecting the plaintiff from the cruelty of his senior wife, all of which may be considered sufficient under clause (7) of S. 2 of the Hindu Married Women's Right to

Separate Residence and Maintenance Act 19 of 1946 to constitute "justifiable cause" entitling her to separate residence and maintenance.

(3) The evidence in the case does not support the finding of the learned Subordinate Judge that the plaintiff has been the victim of systematic unkind and unsympathetic treatment at the hands of her co-wife and the defendant did not protect the plaintiff from the senior wife's cruelty. The plaintiff, who was examined as P. W. 5, speaks to the incident of her being driven out of the family on a particular occasion after removing the jewels and states that in respect of the jewels there was a panchayat. In cross-examination, she says that she filed a suit because the defendant had settled properties on Pattammal, that if similar property was given to her she would agree to it and that the occasion referred to was the first occasion the defendant had assaulted her, and prior to that they were on good terms. Her charge is against her husband for assaulting her; but there is nothing in her evidence to show that she was treated cruelly by the co-wife. The first wife has borne two children to the defendant and there is nothing in the plaintiff's evidence as to any ill-treatment by the co-wife. It may be that after the first wife came and lived with the defendant his affection to the second wife might have waned, especially as the first wife had given birth to children. On the evidence, therefore, apart from the plaintiff not establishing any cruelty on the part of her husband towards her, she has also not specifically alleged, much less proved, that she has been subjected to cruelty by the first wife, or that she has been the victim of systematic unkind and unsympathetic treatment at her hands resulting in mental cruelty. Those findings of the learned Subordinate Judge are not supported by the evidence and therefore cannot stand.

(4) The position is that the plaintiff was married as the second wife to the defendant when his first wife was living and it will not be open to her to urge that being the second wife she should be allowed to live alone with her husband and that the first wife should not join the defendant. It is needless to point out that, except in very exceptional circumstances, co-wives do not generally live in good terms. There are bound to be petty quarrels and jealousies between them, which are the natural consequences of marrying one who has already a wife. Not only Hindu law but Hindu society recognise the right of a husband to take more than one wife and the taking of a second wife happens ordinarily in cases where the husband has no issue by the first wife or where by reason of her health or mental condition she is incapable of affording the husband the pleasure and happiness which the husband could expect from his wife. Hindu society however never favoured a plurality of wives and in all cases where there has been such plurality of wives, there would have been some justification for the subsequent marriage for any of the grounds specified above, mostly to satisfy the desire of the husband to have a son to perpetuate his lineage, which is considered to be necessary for the spiritual benefit of the members of the family.

(5) The learned Subordinate Judge relied on a decision of Panchapagesa Sastri J. reported in — 'Lakshmi Mancharamma v. Satyanarayana', AIR 1950 Mad 356 (A), for holding that the facts of the present case could be brought under clause (7) of S. 2 of Act XIX of 1946 as "justifiable cause" entitling the plaintiff to relief for separate residence and maintenance. In that case, the husband after marrying a third wife sent her away to her father's house and recalled his second wife to live with him. The third wife instituted the suit for separate residence and maintenance. But it was held that clause (4) of S. 2, which provides that if the husband marries again, a Hindu married woman would be entitled to separate residence and maintenance, would not apply as the marriage there was not subsequent to the marriage with the lady who was asking for separate residence and maintenance. In that case, however, the third wife alleged that at the time of her husband marrying her he had given a solemn undertaking that he would have nothing more to do with the second wife, that contrary to that arrangement he brought her back and that therefore she was entitled to relief under Act 19 of 1946. The learned Judge stated that he was of the opinion that if the facts alleged by the third wife were true, that would be sufficient to enable her to claim separate residence and maintenance, that the husband could not be compelled contrary to his solemn pledges and understanding at the time of the marriage with the third wife to resile from that and compel her to live with him along with his second wife, that it was no longer the law that cruelty or something like that should be proved to justify separate residence and maintenance and that sub-cl. (7) was very wide in its language and was designedly intended to take in various circumstances in relation to the particular case before the Court which might make it unjust to compel the lady to live with the husband. The learned Judge however observed that "advantage should not be taken of the generality of language to claim a right of separate residence and maintenance merely on the ground of domestic bickerings or incompatibility of temper or minor differences as are not unusual in the married lives of parties & nothing more serious is made out". The suit was remanded for a finding as to whether the alleged understanding pleaded by the third wife was true.

(6) In the instant case the plaintiff cannot rely on S. 2, clause (4), that is, she cannot claim separate maintenance on the ground of her husband having married again, since Pattammal was married before the marriage of the plaintiff, she being the first wife. The claim for separate residence and maintenance is not based in the plaint on S. 2, clause (4) but is specifically founded on allegations of cruelty, which must be shown to be such cruelty as renders it undesirable for her to live with him, as provided under clause (2) of S. 2.

(7) How far and to what extent a subsequent marriage would entitle the first wife to separate maintenance under the Act was dealt with by Viswanatha Sastri J. in a judgment of his reported in — 'Lakshmi Ammal v. Narayanaswami Naicker', AIR 1950 Mad 321 (B), where the words "marries again" in S. 2 (4) of the Act were held to be merely descriptive of the position of the husband as a twice married man at the date when the wife's claim for separate maintenance is made under the Act and do not exclude a husband who had taken a second wife before the Act from its operation. The words "marries again" have been construed as applicable to all subsequent marriages contracted by the husband, whether before or after the Act, and the words are not confined to marriage contracted after the Act. The result is that a husband, who married more than one wife before the Act quite in conformity with the Hindu law, which permitted such marriages without any obligation on the husband's part to provide for separate residence and maintenance except in cases where

it is established by evidence that the husband has been habitually cruel so as to endanger her personal safety or is suffering from any loathsome and contagious disease as leprosy, would now, in view of the decision in — 'AIR 1950 Mad 321 (B)', be liable to provide for separate maintenance, even though he could not have contemplated any such liability or obligation at the time of his contracting the subsequent marriage. This is only to point out the hardship and the injustice that would result by the interpretation of the words "marries again" as referring to marriages before the Act of Hindu husbands, though they have not contravened any provision of the law applicable to them on the date of the marriages.

I had occasion to refer to this decision in — 'A. S. No. 596 of 1949 (C)', and expressed my inability to agree with the view taken in this case and I observed that in view of the importance of the question, this matter has to be finally settled by a decision of a Bench. It appears to me that on a proper construction of the language in clause (4) of S. 2, the words "marries again" could only refer to a future marriage, that is, marriage after the Act. This, in my view, would be the reasonable and natural construction to be put upon the words without doing violence to the language or even to the spirit of the statute, and the language does not admit of any ambiguity and is plain. To do otherwise would be to lead to inconvenient and unjust results which should always be avoided in judicial interpretation of the words of a statute. With respect to Viswanatha Sastri J., I am unable to agree with his conclusion. But as the question does not directly arise for decision in this suit, I cannot refer it to be decided by a Bench. However, as and when such a question arises for consideration, it will be eminently necessary that this important question as to the scope of the Act with particular reference to the classification of the cases of marriages which come under cl. (4) of S. 2 should be considered and finally decided.

(8) The question that remains to be determined in this case is, as to whether, on the facts of this case, the plaintiff could claim separate maintenance relying on cl. (7) of S. 2. The use of the general words "justifiable cause" following specific cases in cls. (1) to (6), though need not be confined to matters which arise from the cases mentioned in the other clauses, could not however, be extended so as to bring within it any and every cause however trivial and inconsequential. It may be urged that they should be considered as 'ejusdem generis'; but in view of the category of cases mentioned in cls. (1) to (6) being different, the words "justifiable cause" may receive the plain and ordinary meaning and no limitation may be imposed upon them. However, in construing them effect must be given to the intention of the legislature as gathered from the object and the circumstances under which the enactment came to be introduced. It cannot be denied that there has been a growing feeling in Hindu society that the rights of Hindu married women to separate residence and maintenance should statutorily be recognised and not dependent on judge-made law and they should be at liberty to free themselves from cruel and undesirable husbands and should not be compelled to live with their husbands when it becomes impossible for them to live without sacrificing their health and happiness. Realising that judicial decisions did not afford sufficient protection to married women in such cases, the enactment was rightly brought into the statute book enumerating the cases in which a Hindu married woman can be allowed to separate residence and maintenance. The categories mentioned in clauses (1) to (6) are themselves expressive of the justifiable causes, where a married woman could insist on her being provided separately, most of the cases having already been considered to be reasonable and just by judicial decisions, excepting the case in clause (4), where remarriage was added as a ground to entitle the married woman to separate rights. In construing the words "justifiable cause", it must be borne in mind that it should be such a cause as will make it impossible for the woman to live with the husband, as where he is suffering from a loathsome disease or where she is treated cruelly or deserted, or where he brings a concubine in the house or habitually resides with her thus depriving the wife of her husband's company, or where he ceases to be a Hindu. In these cases, a Hindu married woman cannot be expected to live with her husband. But could that be applied to a case, where she has to live with another woman married as she is to her husband such marriage being legal and recognised by the community? The mere fact that her husband who is permitted under law to have more than one wife, desires to live with all the wives together, which he would be entitled to do and which is the object with which he marries more than one wife, would not be sufficient to justify her to live separately or claim separate rights. That is obviously the justification for the enacting in S. 2 clause (4) that if the husband "marries again", the woman who was married earlier would be entitled to claim the rights under the Act. The contingency of the incompatibility of two wives living together has already been provided under the Act and a further extension of the principle covered under clause (4) could not be sought for under the general words "justifiable cause".

If the Legislature had intended that not only a subsequent marriage would entitle the earlier married woman to separate maintenance but also all cases where there have been more than one marriages and it would be open to every one of the married wives to leave her husband and claim separate residence and maintenance, and if such was the intention the language of clause (4) would have been made more clear and explicit. In any event, the words "justifiable cause" could not bring in such cases. In construing the provisions of this Act, it must be borne in mind that the law is to be applicable to Hindu married women and one could not get away from principles governing Hindu marriages that marriage among Hindus is not a contract, but is a sacrament and that a Hindu wife has to be with the husband, for marriage is a holy union for the performance of religious duties also and her presence with the husband in the performance of such duties is essential and separation of such a union, though for purposes of separate living cannot be countenanced except for valid reasons. There can be no doubt that on the facts of this case there has been neither cruelty by the husband nor by the senior wife much less there is any proof of systematic unkind and unsympathetic treatment. Even assuming that there was some kind of unsympathetic treatment at the hands of her co-wife, it appears to me that that alone would not be "justifiable cause". But it may be that if there is habitual cruelty from the first wife which the husband is not able to prevent, the second wife would be entitled to allege it as a ground for claiming the rights under the Act, as it is immaterial whether cruelty should proceed

from the husband alone; cruelty may proceed from any person in the house which the husband is unable to prevent and may sometimes passively be allowing such cruelty against the second wife. That would more appropriately come within clause (2) of S. 2 of the Act. "Justifiable cause" therefore must be some cause which should be considered to be real and serious by reason of which the position of the married woman becomes miserable and cannot be invoked for temporary bickerings, which are common in every Hindu family but are of a fleeting nature. In any event, sentimental incompatibility of the woman with the husband cannot be treated as "justifiable cause" for claiming rights under the Act.

(9) In the result, the appeal is allowed and the decree of the District Munsif of Kollegal dismissing the suit will stand. In the circumstances of this case, there will be no order as to costs. No leave.

A/D.R.R. Appeal allowed.

A.I.R. 1953 MADRAS 716 (Vol. 40, C. N. 275)

RAJAMANNAR C. J. AND VENKATARAMA AIYAR J.

In re K. A. Meera Sahib Tharaganar and Brothers, Appellants.

Writ Appeals Nos. 8 to 15 of 1953, D/- 6-2-1953.

(a) Income-tax Act (1922), S. 5(8) — No inconsistency with Art. 14 — (Constitution of India, Art. 14).

There is nothing in S. 5(8), Income-tax Act which is inconsistent with the rights guaranteed under Art. 14 of the Constitution. (Para 3)

Section 5(8) does not contemplate orders, instructions and directions from the Central Board of Revenue to the Assessing Officer in any particular case. What is contemplated, is the issue of general orders, instructions and directions to guide the subordinate officers in the execution of the duties laid on them by the several provisions of the Act. (Para 3)

The issue of directions by the Central Board of Revenue which is the chief income-tax authority under the Act is not in the nature of outside or executive pressure or interference. (Para 3)

Anno: Income-tax Act, S. 5 N. 2.

(b) Income-tax Act (1922), S. 23 — Income-tax Officer is not bound to disclose materials on which he finally makes assessment — Assessee aggrieved by assessment has his remedy by way of appeal to several tribunals — Entire proceeding cannot be attacked on ground that provision that Income-tax Officer is not bound to disclose materials is inconsistent with Art. 14 — (Constitution of India, Art. 14). (Para 4)

Anno: Income-tax Act, S. 23 N. 1.

M. R. M. Abdul Karim, for Appellants.

RAJAMANNAR C. J.: These are appeals under the Letters Patent against the judgment of Chandra Reddi J. dismissing a batch of applications under Art. 226 of the Constitution. The points raised in all these petitions were the same and the petitions were all disposed of by a common judgment. The relief sought by the petitioner was the same in all the petitions and was in respect of proceedings taken for the enforcement of orders of assessment of excess profits tax and income-tax. The petitioners were assessed to income-tax and excess profits tax for several years and against the orders of assessment they have preferred appeals to the Appellate Assistant Commissioner of Income-tax and it is represented to us that the appeals are pending. Meanwhile, the petitioners have filed these applications to get rid of the same orders evidently provoked by the proceedings taken by the Income-tax authorities to collect the tax imposed on them.

(2) The only ground on which our jurisdiction under Art. 226 is sought to be invoked is that the procedure contemplated by the Income-tax and Excess Profits Tax Acts offends against the constitutional guarantees contained in Part III of the Constitution, and in particular, the procedure violates the right guaranteed by Art. 14 of the Constitution. We have heard learned counsel at great length but must confess that we are unable to see how Art. 14 has any application whatever to the contentions raised on behalf of the petitioners.

(3) Broadly, the attack on the procedural provisions of the Income-tax Act falls into three heads. Firstly, it was said that S. 5(8), Income-tax Act violates the principle enunciated in Art. 14 of the Constitution inasmuch as it affects the independence and impartiality of the assessing officer. Section 5(8) runs thus:

> "All officers and persons employed in the execution of this Act shall observe and follow the orders, instructions and directions of the Central Board of Revenue:
> Provided that no such orders, instructions or directions shall be given so as to interfere with the discretion of the appellate Assistant Commissioner in the exercise of his appellate functions."

At the outset, we may observe that it is not alleged by the appellants that in the cases before us there have been any orders, instructions or directions of the Central Board of Revenue which were followed by the assessing officer in making the assessments on the appellants. The contention was that S. 5(8) of the Act contemplates the issue of orders, instructions and directions by the Central Board of Revenue and the very possibility of this happening would render the entire proceedings of the assessing officers void as being a violation of the principle of equality of law embodied in Art. 14 of the Constitution.

In the first place, in our opinion, this provision, namely, S. 5(8) does not contemplate orders, instructions and directions from the Central Board of Revenue to the assessing officer in any particular case. What is contemplated, we think, is the issue of general orders, instructions and directions to guide the subordinate officers in the execution of the duties laid on them by the several provisions of the Act. In the absence of any allegation that in the cases before us, any officer had followed any order, instruction or direction of the Central Board of Revenue in making any order adverse to the appellants, we do not think it necessary to embark on a general discussion of the validity of this provision.

Moreover, we are also convinced that even if such orders, instructions and directions are issued in any particular case by the Central Board to the assessing officer, the principle of equality before law is not infringed in any manner. It was said that the assessing officer was performing judicial functions and there-

fore should not be subject to executive pressure or any extraneous influence. Assuming this is the correct position, we do not think the issue of directions by the Central Board of Revenue which is the chief income-tax authority under the Act is in the nature of outside or executive pressure or interference. Passages were cited to us from Wade and Phillips on Constitutional law and Robson's Justice and Administrative law. We are not concerned with any question of policy as to the desirability of having administrative tribunals to deal with the rights of citizens. Varying views have been held by eminent jurists and public men on this matter, and it is not the province of this Court to embark on a discussion of the merits or demerits of the system of administrative law. It suffices to say that there is nothing in S. 5(8), Income-tax Act which is inconsistent with the right guaranteed under Art. 14 of the Constitution. Learned counsel was unable to cite any decided authority in support of his contention.

(4) The second head of argument was based upon the fact that the Income-tax Officer is not bound to disclose the material on which he finally makes the assessment and this circumstance also is inconsistent with the right guaranteed under Art. 14. Here again we are unable to follow learned counsel. It is true that the Income-tax Officer is given wide powers to ascertain the income of the assessee, and the powers include the gathering of material without the knowledge of the assessee. This is a well known provision in taxing statutes. If the assessee is aggrieved by the order of assessment eventually passed by the officer, he is not without remedy. He can appeal to the several tribunals prescribed under the Act ending with this Court and he can prefer an appeal from this Court to the Supreme Court. The appellants have resorted to the remedy provided by the Act, and have filed appeals. In our opinion, they have no further right to attack the entire proceedings on this ground.

(5) Lastly, it was contended that the appellants have been denied the right to be heard. What counsel meant was that the appellants were not given an opportunity to test the worth of the evidence upon which evidently the Income-tax Officer made the assessment. It is not for us to say whether there should be provision enabling the assessee to lead evidence controverting the evidence which might have been gathered by the Income-tax Officer. All that we are called upon to decide is whether the procedure prescribed by the provisions of the Act as they stand is in any way in violation of any of the rights guaranteed by the Constitution. Learned counsel wanted to rely upon decisions of the Supreme Court of the United States on the due process clause of the Fourteenth. Amendment of the Constitution and (2) the system of assessment and procedure relating to it followed in England and in the United States. We refused to hear him on these points because we consider that these have no bearing on the question to be decided in this case.

(6) As already mentioned, the appellants in this case are content with urging these general grounds attacking the validity of the provisions of the Income-tax Act and the procedure prescribed by them and have nothing whatever to say about the orders actually passed against them. Indeed, these orders are the subject-matter of appeals before the tribunal under the Act.

(7) We find no substance in any of the contentions raised on behalf of the appellants, and the appeals are therefore dismissed.

A/R.G.D. Appeals dismissed.

A.I.R. 1953 MADRAS 717 (Vol. 40, C. N. 276)

RAMASWAMI J.

In re P. Moosa Kutty, Petitioner.

Civil Revn. Petn. No. 2363 of 1952, D/- 16-12-1952.

(a) Civil P. C. (1908), O. 26 R. 9 — Object of local investigation.

The object of the local investigation is not so much to collect evidence which can be taken in Court but to obtain evidence which from its very peculiar nature can only be had on the spot. The Court has a discretion to order local investigation or not; it is not bound to order it in all cases. In any event, an application under the Rule must be made before the case is closed. AIR 1933 Cal 475 and AIR 1933 Pat 542, Foll. (Para 4)

Anno: Civil P. C., O. 26, R. 9 N. 2 Pts. 1, 4 and 6.

(b) Civil P. C. (1908), O. 26, Rr. 9 and 18 — Presence of parties.

There is no provision that a commission could be issued only after notice has been issued to the defendant and, therefore, an order appointing the commissioner without notice to him and hearing him is not illegal and opposed to the provisions of O. 26, R. 18. (Para 5)

Anno: C.P.C., O. 26, R. 9 N. 2, O. 26, R. 18 N. 1.

(c) Civil P. C. (1908), O. 26, R. 10 — Objections to commissioner's report.

It is open to the defendant to show that the report of the commissioner is incorrect and that it is not entitled to credence. He cannot seek to shortcircuit it by alleging that the investigation was made on an emergent order passed ex parte. (Para 6)

Anno: Civil P. C., O. 26, R. 10 N. 6.

K. P. Ramakrishna Iyer, for Petitioner.

CASES CITED:

(A) ('33) AIR 1933 Cal 475: 144 Ind Cas 870
(B) ('33) AIR 1933 Pat 542: 147 Ind Cas 789
(C) ('38) AIR 1938 Nag 530: 181 Ind Cas 177
(D) ('42) AIR 1942 Bom 266: ILR (1942) Bom 680
(E) ('17) AIR 1917 Lah 57: 42 Ind Cas 221
(F) ('17) AIR 1917 Pat 278: 38 Ind Cas 491
(G) ('15) AIR 1915 Cal 280: 18 Cal WN 697
(H) ('26) AIR 1926 Pat 462(2): 96 Ind Cas 327
(I) ('19) AIR 1919 Cal 946: 47 Ind Cas 650
(J) ('34) AIR 1934 Cal 116: 60 Cal 1331
(K) ('47) AIR 1947 Nag 56: 226 Ind Cas 101
(L) ('35) AIR 1935 Mad 918: 1936 Mad WN 935
(M) ('36) AIR 1936 Oudh 192: 1935 Oudh WN 1388
(N) ('33) AIR 1933 Sind 327: 27 SLR 194
(O) ('44) 1944 RD 69: 1944 All WR Rev 18
(P) ('34) AIR 1934 Mad 548: 40 Mad LW 358
(Q) ('50) C. R. P. No. 627 of 1950 (Mad)
(R) ('83) 7 Mad 241
(S) ('43) AIR 1943 Bom 143: ILR (1943) Bom 138
(T) ('51) C. R. P. No. 997 of 1951 (Mad)
(U) ('52) C. R. P. No. 398 of 1952 (Mad)
(V) ('46) AIR 1946 Pat 419: 224 Ind Cas 312
(W) ('49) AIR 1949 Pat 307: 27 Pat 1132

(X) ('52) AIR 1952 Orissa 99:
ILR (1949) 1 Cutt 139
(Y) ('49) AIR 1949 Bom 17: 50 Bom LR 368
(Z) ('50) AIR 1950 Bom 360:
ILR (1950) Bom 510 (FB)
(Z1) ('52) AIR 1952 Mad 1: 1952-2 Mad LJ 209
(Z2) (1879) 48 LJCP 705: 4 AC 504

ORDER: This civil revision petition arises out of an order made by the learned District Munsif, Parappanangadi, in I. A. No. 1363 of 1952 in O. S. No. 245 of 1952 filed under O. 26, R. 9, C. P. C.

(2) The facts are: P. Amarankutti of Kodinhi Amsom filed the suit for a declaration that he is entitled to a right of easement to pass through a specified portion of Moosakutty's 'paramba' to his house close by and that he has been in possession of the alleged pathway and that this Moosakutty has demolished a bund on the pathway and for an injunction and damages. The plaintiff filed along with his plaint an application on 8-10-1952 for the issue of a commission to make a report about the condition of the pathway and the damages alleged by him to the bund. This application for the appointment of a commissioner for local investigation under O. 26, R 9, C. P. C., was ordered 'ex parte' and a Commissioner, an advocate of the Court, was appointed to prepare a plan of the plaintiff's as well the defendant's property and to make a report of what he saw concerning the alleged demolition of the bund.

This order was passed on 9-10-1952 and the Commission was made returnable on 28-10-1952 and the commission warrant was ordered to issue on the plaintiff depositing Rs. 25. On 12-10-1952 at about 9 a.m. the Commissioner went to the spot and he enquired among others this defendant Moosakutty and then drew up a plan and submitted his report regarding the condition of the bund as called for. On receipt of this report final order was passed on 28-10-1952 "Commission issued returned executed. Petition closed." The defendant after appearing in Court obtained copies of the application by the plaintiff and the plan and report of the Commissioner. This plan and report are obviously very inconvenient from the point of view of this defendant.

Therefore he has come forward with this revision petition stating that if the plan and report filed by the Commissioner are used in evidence in the case, he would be greatly prejudiced as they are one-sided and that the order of the learned District Munsif appointing the Commissioner without notice to him and hearing him, is illegal and opposed to the provisions of O. 26, R. 18, C. P. C. Therefore, he has filed this revision petition against that order which has been executed and what is really more important for him is to get a stay of the trial of the suit on that pretext, obviously to protract the proceedings and wear out the opposite side.

(3) The short point for our consideration is the scope of O. 26, R. 18. C. P. C. and whether it bears out the interpretation which is sought to be placed upon it by the learned advocate, Mr. K. P. Ramakrishna Aiyar. In the Civil Procedure Code there are two provisions for issuing commissions for local investigation, viz., when the suit is instituted and after the suit is instituted. Order 26, R. 9 states:

"In any suit in which the Court deems a local investigation to be requisite or proper for the purpose of elucidating any matter in dispute or of ascertaining.....damages.....the Court may issue a commission to such person as it thinks fit directing him to make such investigation and to report thereon to the Court."

(4) The object of this local investigation is not so much to collect evidence which can be taken in Court but to obtain evidence which from its very peculiar nature can only be had on the spot: — 'Amulyakumar v. Anandacharan', AIR 1933 Cal 475 (A). The Court has a discretion to order local investigation or not; it is not bound to order it in all cases; — 'Ram Brichh v. Muhammad Sahib', AIR 1933 Pat 542 (B). In any event, an application under this Rule must be made before the case is closed. The form prescribed for commission for local investigation is set out in form No. 9 in Appendix H, Civil P. C. The form states:

"Whereas it is deemed requisite for the purpose of this suit, that a commission for..... should be issued you are hereby appointed Commissioner for the purpose of .....

Process to compel the attendance before you of any witnesses, or for the production of any documents whom or which you may desire to examine or inspect, will be issued by any Court having jurisdiction on your application.

A sum of Rs.....being your fee in the above is herewith forwarded."

(5) This issue of commission can be made 'ex parte' and in fact it stands to common sense has often got to be made 'ex parte'. It will be borne in mind that this application has been filed along with the plaint and before the issue of suit summons. This application is made on account of urgency. If a commission is not going to be issued until the defendant appears, most often there will be no point in taking out a commission because the object of the commission itself would be lost and incriminating circumstances would be obliterated. The appointment of a commissioner for local investigation in such cases would be an instance of locking the stable door after the horse had been stolen.

Rule 9 does not provide for the presence of the parties when a commission is issued and merely leaves it to the discretion of the Court. But interests of justice require that such acts should not be done without notice to one of the parties: — 'Jamshed Karimuddin v. Kunjilal Harsukh', AIR 1938 Nag 530 (C). Then in the instant case the commissioner has as a matter of fact made the local investigation in the presence of this defendant and has also enquired of him. In fact, this is what is contemplated under O. 26, R. 18, which states:

"Where a commission is issued under this order the Court shall direct that the parties to the suit shall appear before the commissioner in person or by their agents or pleaders;

(2) Where all or any of the parties do not so appear the commissioner may proceed in their absence."

This provision has been made because in so far as commissions for local investigations are concerned, the following are the relevant and cogent further provisions. Rule 9 enables the Court to appoint commissioners for local in-

vestigation; Rule 10(1) regulates the procedure of the commissioner, viz., that after such local inspection as he deems necessary and after reducing to writing the evidence taken by him shall return such evidence, together with his report in writing signed by him to the Court. Rule 10(2) lays down that the report of the commissioner and the evidence taken by him (but not the evidence without the report) shall be evidence in the suit and shall form part of the record in the same way as pleadings, affidavits and other documents of a suit form part of the record of that suit — 'Vithaldas Damodar v. Lakshmidas Harjiwan', AIR 1942 Bom 266 (D) and that the Court or with the permission of the Court any of the parties to the suit may examine the commissioner personally in open Court touching any of the matters referred to him etc.

Rule 10(3) makes provision for the making of further enquiry as the Court thinks fit if it is dissatisfied with the proceedings of the commissioner. Then we come to the general provision in R. 15 which regulates the expenses of commission to be paid into Court. Rule 16 defines the powers of commissioners including examination of parties, documents, inspection, etc. Rule 17 provides for attendance and examination of witnesses before Commissioners and then we come to R 18 which, to enable the commissioner to do all these things, enjoins upon the Court at the time the commission is issued under this order to direct that the parties to the suit shall appear before the commissioner in person or by their agents or pleaders. Finally, it is laid down that where all or any of the parties do not so appear, the commissioner may proceed in their absence.

The examination admittedly of this defendant by the commissioner shows that the order itself contained a direction as required by R. 18 and that is why the petitioner has been scrupulously careful not to file any of the documents for which he has secured copies. The net result of this analysis is that there is no provision under O. 26, R. 9, C. P. C., that a commission could be issued only after notice has been issued to the defendant and secondly, that R. 18 cannot bear the interpretation which is sought to be put upon it by the learned Advocate for the petitioner and that as a matter of fact in this case the defendant had notice and participated in the commissioner's enquiry.

(6) The next grievance of this petitioner is that the plan and report of the Commissioner cannot be admitted in evidence. In regard to it, this objection is obviously made without fully comprehending the scope of the relevant provisions of R. 10 which has been reproduced above. The Commissioner's report does not automatically become evidence and the parties are entitled to object to the commissioner's report and prove their objections by examining the commissioner or other witnesses: — 'Harcharan Das v. Danpat Mal', AIR 1917 Lah 57 (E); — 'Ajodhyaprasad Singh v. Kamal Narasin Singh', AIR 1917 Pat 278 (F) and — 'Sitarama v. Ramprasad Ram', AIR 1915 Cal 280 (G). It is within the discretion of a Judge to accept the report of Commissioner: — 'Sone Kuar v. Baidyanath' AIR 1926 Pat 462 (2) (H) — 'Jadavendra v. Gajendra Naraindas', AIR 1919 Cal 946 (I). The Commissioner's report and the opinion he expressed on the evidence is merely a piece of evidence to be considered by the Judge. It does not become 'ipso facto' evidence. 'Jnanda Sundari Rai v. Pramada Sundara Rai', AIR 1934 Cal 116 (J). The person behind whose back the Commissioner has been appointed is entitled to cross-examine him. 'Ramnath Ramakrishna v. Wasudeo', AIR 1947 Nag 56 (K). Though under O. 26, R. 10 the Commissioner's report forms part of the record and it is incumbent on the Court to consider the contents — 'Venkatarama Aiyar v. Ponnusami Padayachi', AIR 1935 Mad 918 (L).

Commissioner's report does not fall under S. 35, Evidence Act, and as it can be proved only by examining writer or witness. 'Ibrahim Beg v. Aziman', AIR 1936 Oudh 192 (M). It is the duty of the Judge to consider every objection of fact or of law made by the parties to the report, to show the nature of the objection in his judgment and his grounds for allowing or dismissing it. 'Arjandas v. Gangaram', AIR 1933 Sind 327 (N). Therefore, it is open to this defendant to show that the report of the Commissioner is incorrect and that it is not entitled to credence. After all it is the facts contained in a commissioner's report and proved to be correct which count as evidence and not his opinion. 'Sarada Prasad v. Ram Bharas', 1944 All W R Rev 18 (O). The petitioner cannot seek to shortcircuit it by alleging that this investigation was made on an emergent order passed 'ex parte'. Therefore, I see no substance whatsoever in the revision petition.

(7) Before parting with it I shall refer to the decisions relied upon by the learned Advocate for the petitioner. The first decision relied upon is — 'Latchan Naidu v. Rama Krishna Ranga Rao', 40 Law Weekly 358 (P), wherein Cornish J. held on the facts in that case that no emergency excused the order of the District Munsif and did not absolve the District Munsif from complying with R. 18. It is unfortunate that the head-note of the report has made this observation much wider than what was really meant by stating that there is no power in the Court to issue an 'ex parte' commission and even an emergency cannot absolve the Court from complying with R. 18. Then the learned Judge held that R. 18 of O. 26, C. P. C., is mandatory and is intended to ensure that the parties have notice of the appointment of the Commissioner and that they must attend his investigation.

I have pointed out that in the instant case the defendant had notice of the appointment of Commissioner and actually attended his investigation by him. Apart from that, in that case when an application was made along with the plaint for the appointment of a commissioner for local investigation. notice was ordered to the defendants and notice was actually served on the defendants and before they could appear in Court another application was filed for the issue of a commission emergently alleging that if the Court should pass orders after service of notice on the defendants it would cause delay and that owing to the changes made by the rainfall the defendants would get the opportunity of including a certain channel in their lands. It was, therefore, held by Cornish J. that this second application was ordered behind the back of the defendants. This is not the case here.

I must not, however, be understood as agreeing with the interpretation of R. 18 of O. 26,

C. P. C. by Cornish J. But it is unnecessary for the disposal of this civil revision petition to embark furtner on this matter. The second decision relied on is an unreported judgment of Raghava Rao J. in 'C. R. P. No. 627 of 1950 (Mad) (Q)'. That judgment has no relevance because the case therein arose under O. 39, R. 7 corresponding to S. 499, old Civil P. C. Raghava Rao J. held that an interlocutory order under O. 39, R. 7 can be made only after notice to the other side because R. 8 says that an application by the plaintiff for an order under R. 6 or R. 7 may be made after notice to the defendant at any time after institution of the suit. Rule 8(2) says that an application by the defendant for a like order may be made after notice to the plaintiff at any time after appearance. There is also a Bench decision of this Court under S. 499 of the old Code in — 'Sengotha v. Ramaswami', 7 Mad 241 (R), by Turner C. J. and Hutchins J. wherein it was held:

> "An application for an order under S. 499 can only be made by a plaintiff after the summons has been served and after reasonable notice of the intention to apply for the order has been given in writing to the defendant. The term 'may' must be read with the words 'at any time' and does not import that it is competent to a plaintiff to apply before service of summons, or to evade the condition of notice."

The advocate for the respondent in that case brought to the notice of Raghava Rao J. the decision in — 'Totaram Icharam v. Dattu Mangu', AIR 1943 Bom 143 (S), wherein an opposite view was held by Beaumont C. J. and Wassoodew J. viz., that in cases in which it is necessary to take action promptly in order to prevent property from being made away with by the defendant, the Court, before proceeding under O. 39, R. 7, can always appoint a receiver or grant an injunction 'ex parte' and that the appointment of commissioners, which was made in that case 'ex parte' was really less detrimental to the defendants than would have been the appointment of the same persons as receivers. This decision does not apply to the case on hand wherein we have no provision corresponding to R. 8 of O. 39, C. P. C. The notice to be given under O. 26, R. 18 is a notice after the issue of commission that such a commission has been issued.

The third decision is an unreported judgment of Basheer Ahmed Sayeed J. in 'C. R. P. No. 997 of 1951 (T)', Therein on the facts of that case it was held that the report of the Commissioner should not form part of the record and made evidence in the suit but that there was no objection to that commissioner being examined as a private individual by the plaintiff as one who had seen the plot of land at that particular time and that it was open to the trial Court to appoint a fresh commissioner. The fourth case is an unreported decision of Venkatarama Aiyar J. in 'C. R. P. No. 398 of 1952 (U)'. The facts were : O. S. No. 181 of 1951, District Munsif Court, Virdhachalam, was filed for an injunction restraining the defendants from interfering with their taking water from a well situated in the land of defendants. The plaintiffs filed I. A. No. 708 of 1951 for the appointment of a commissioner to inspect the well and the channels through which the water flows from the well and to submit a plan and report. The petition was ordered 'ex parte'.

It was contended before Justice Venkatarama Aiyar on the foot of the decision in 'AIR 1934 Mad 548 (P)' that the Commissioner should have been appointed after notice to defendants. It is not clear from the order whether the appointment of the Commissioner was under O. 26 or O. 39. It is also seen that the defendants had themselves filed an application for a duly qualified commissioner being appointed. In these circumstances the order of the lower Court was set aside. The facts of the instant case are quite different and therefore these decisions do not apply here.

I need not point out that a decision is only an authority for what it actually decides; it cannot be quoted for a proposition that may seem to follow from it. Every judgment must be read applicable to the particular facts proved or assumed to be proved; the generality of expressions that may be found cannot be intended to be expositions of whole law but must be regarded as governed or qualified by the particular facts of the case in which such expressions occur. 'Deonath Sahay v. Lekhasingh', AIR 1946 Pat 419 (V); — 'Attu Hussain v. Jai Narain', AIR 1949 Pat 307 (W); — 'Tirtha Naick v. Lal Sadanand Singh', AIR 1952 Orissa 99 (X) — 'Khanderao Gaekwar v. Commissioner of Income-tax , Bombay', AIR 1949 Bom 17 (Y); — 'Jivaji Annaji v. Hanmant Ramchandra', AIR 1950 Bom 360 (FB) (Z) and — 'Govindarajulu v. Balu Ammal', AIR 1952 Mad 1 (Z1).

In addition, where the language of an order is clear this exploration into the wilderness of single instances (to quote Tenyson) is a wholly supererogatory task and in the interpretation of these procedural provisions regard must be had to the fundamental principles laid down by Lord Penzance in — 'Kendall v. Hamilton', (1879) 4 AC 504 at p. 526 (Z2) cited with approval in the Civil Justice Committee Report 1924-25 page xxviii. The

> "procedure is but the machinery of the law after all, the channel and means whereby law is administered and justice reached. It strangely departs from its proper office when in place of facilitating it is permitted to obstruct, and even extinguish the legal rights and is thus made to govern where it ought to subserve."

Therefore, these decisions do not substantiate the contentions of this petitioner.

(8) In the result, the civil revision petition is dismissed.

B/V.R.B. Revision dismissed.

A.I.R. 1953 MADRAS 720 (Vol. 40. C. N. 277)

SATYANARAYANA RAO AND KRISHNASWAMI NAYUDU JJ.

Narayanaswami Goundar, Appellant v. Perumal Chettiar and others, Respondents.

Second Appeal No. 1578 of 1947 and C. M. P. No. 8183 of 1950, D/- 18-12-1952.

(a) T. P. Act (1882). S. 60 — Mortgagee acquiring share in property.

A and his three brothers constituting a joint Hindu family executed a mortgage of the entire family property in favour of B. B acquired by auction purchase the 1/4th share of one of the three brothers in the hypotheca with the result that the

integrity of the mortgage was broken up. A brought a suit for redemption of the mortgage against B impleading as defendants his other two brothers who had subsequently executed a usufructuary mortgage on their interests in the hypotheca in favour of V.

Held that in the circumstances a suit for redemption of the entire property was not the proper remedy and the plaintiff should be allowed to sue for partition and redemption of his share only especially when the mortgagee had no objection to such a course which would avoid multiplicity of suits. (Para 2)

Anno: T. P. Act, S. 60 N. 44.

(b) T. P. Act (1882), S. 72, Proviso — Retrospective operation.

The proviso to S. 72 which was introduced by the Amendment Act of 1929 is not retrospective in operation. Hence a mortgagee who has paid prior to 1929 the municipal taxes on the property which the mortgagor was bound to pay under the contract, is entitled to add that amount to the principal under S. 72 even if he has not given notice to the mortgagor as required by the proviso. (Para 3)

Anno: T. P. Act, S. 72 N. 2, 3 and 8.

(c) Debt Laws — Madras Agriculturists Relief Act, (4 of 1938), S. 9A (7) (ii) (c) — Applicability.

Clause (c) of S. 9A (7) (ii) applies not only to a case where the mortgagee's interest was in the first instance created in favour of two or more persons but also to a case where the mortgagee's interest was created only in favour of one person to start with and there was later an assignment of that interest in favour of two or more persons the condition, however, being that the assignment must have taken place before the date of the partition. The main object of this sub-clause (c) is to protect partitions effected during the particular period just as clause (b) is intended for the protection of bona fide transfers for value of the interest of the mortgagee. (Para 6)

C. S. Swaminathan, for Appellant; S. V. Venkatasubramaniam, for Respondents.

SATYANARAYANA RAO J.: The first defendant is the appellant in the second appeal. The suit was for redemption of a mortgage executed by the plaintiff and others on 23-4-1908 (Ex. D. 1) in favour of one Veeraraghava Pillai, the mortgage being a usufructuary mortgage. Contemporaneously with the document, there was a lease-back of the properties to the mortgagors by the mortgagee. On 28-9-1910 under Ex. D. 2, the mortgagee assigned his rights under the mortgage to one Venkatarama Gowder who was the head of a joint family. In a partition of 1941, evidenced by Ex. P. 1 dated 30-4-1941, the rights under this mortgage were allotted to the first defendant, the present appellant. In the mortgagors' family, there were four members viz., the plaintiff, Palani Chettiar, the 2nd defendant and the third defendant. These were the members of the joint family at the time of the execution of the deed. The assignee-mortgagee purchased in 1916 in a court auction sale one-fourth interest of Palani Chettiar who is now dead and therefore there was a merger of the two interests to the extent of one-fourth. The substantial defence, apart from some other minor matters, to the action for redemption was that the plaintiff should not be allowed to redeem more than one-fourth share in the hypotheca as, by reason of his purchase of one-fourth interest of Palani Chettiar the integrity of the mortgage was broken.

The learned District Munsif who tried this suit upheld this contention and directed that the plaintiff should get only one fourth share after partition particularly as there were no other properties in the family to be divided and as he was not inclined to dismiss the suit for redemption on the ground that it was not maintainable which was the objection taken on behalf of the defendants. This course was all the more necessary because after the mortgage, Ex. D. 1, the third defendant created two usufructuary mortgages in favour of Venkatarama Gowder one dated 1-9-1917 (Ex. D. 5) for a sum of Rs. 100 and the other dated 29-8-1924 (Ex. D. 5a) for Rs. 200. The second defendant created on 5-9-1925 under Ex. D. 6 a usufructuary mortgage for a sum of Rs. 350. The mortgages will undoubtedly operate on their respective shares and cannot affect the interests of the plaintiff. Notwithstanding the fact that defendants 2 and 3 remained ex parte, he also directed division 'inter se' between defendants 2 and 3 and also redemption of one fourth share to each of them subject however to the condition that before they get possession of the property from the first defendant they should pay the amount due under the usufructuary mortgages to the first defendant. There was some dispute regarding tacking on of some payments made by the first defendant to the mortgage amount, the main item being Municipal taxes paid by the first defendant in respect of the property hypothecated to him. He held that he was entitled to tack it on and granted him relief accordingly. On appeal, the learned Subordinate Judge reversed the decree of the trial Court directing partition and granted instead a decree for redemption of the entire property and directed the first defendant to work out his rights by a separate suit for partition.

(2) In the second appeal, the main ground urged by Mr. Swaminathan, counsel for the first defendant-appellant is that the view taken by the trial Court was correct and that the learned appellate Judge ought not to have interfered with it. It cannot be disputed that the integrity of the mortgage was broken by reason of the merger of one fourth interest of Palani Chettiar in the mortgagee, the first defendant. A suit for redemption in such circumstances of the entire property was not the proper remedy of the plaintiff who owns only an one-fourth share in the property. He should have sued for partition and claimed redemption in respect of his share. But the trial Court took, what appears to us a sensible view of giving such relief to the plaintiff even in this suit, as the first defendant did not seriously object to that course. The effect of the judgment of the learned Subordinate Judge is that it would practically drive the first defendant to another suit and multiplicity of suits could have been avoided by giving the plaintiff the relief which he is entitled to under the law without a separate suit either by the first defendant or the plaintiff. Further, there is the fact that defendants 2 and 3 created usufructuary mortgages on their interests in the properties in favour of Venkatarama Gowder and without payments to the first defendant amounts due under those documents, it would be unfair to deprive him of possession of the shares of even defendants 2 and 3. We are, therefore, of the opinion that the view taken by the trial

Judge on this aspect of the case is correct and that by the appellate Judge is wrong.

(3) There is a memorandum of cross objections which pertains to the finding of the appellate Court which confirmed the finding of the District Munsif that the first defendant was entitled to add to the mortgage amount the municipal taxes paid on the property. Section 76 of the Transfer of Property Act does not apply to the case as there is a contract to the contrary between the parties by which the mortgagors undertook to pay the municipal taxes. No doubt ordinarily the first defendant who paid the amount would be entitled to recover it from the mortgagors but he claims a further right that he is entitled to add this amount to the mortgage amount. This he can only do under S. 72 of the Transfer of Property Act. Under S. 72(b) as stood before the amendment of 1929, payments made for the preservation of the mortgaged property from destruction, forfeiture or sale, by the mortgagee can be tacked on to the mortgage amount without further limitations. A new proviso was added to this section by which it requires that there should be a prior notice before payment is made so as to treat it as a necessary payment which can be added to the mortgage amount. The contention now urged is that this proviso applies and that, as no such notice was ever given by the first defendant, he was not entitled to add that amount to the redemption amount. The new proviso is not retrospective in operation and the right to pay and add it to the mortgage amount accrued to the first defendant under the mortgage of 1908 long before the amendment. That right cannot be taken away. This Court has held that notwithstanding the omission by the Legislature to include in S. 63 of the Transfer of Property Amendment Act, 1929 any of the sections of the Amending Act, by that circumstance alone the section or sections could not be treated as retrospective. If the proviso newly introduced affects the vested rights, it cannot be deemed to have retrospective operation. Whatever may be the view taken by the other Courts, we are governed by the view taken by this Court. Therefore we think that retrospective operation cannot be given to the proviso to S. 72 which was introduced by the Amendment Act 20 of 1929. It follows that the view taken by both the Courts on this question is correct and the amount was rightly added to the mortgage amount.

(4) The result is that the second appeal must be allowed, the decree of the lower appellate Court is set aside and that of the trial Court is restored with costs here and the Court below. The memorandum of cross objections is dismissed. No costs.

(5) There remains C. M. P. No. 8183 of 1950, an application filed by the plaintiff under Act 4 of 1938 to scale down the decree debt. The first defendant in answer to this contention relies on the new provision, S. 9-A, sub-s. 7 (ii) (c). The sub-cl. 7 states that nothing contained in this section (S. 9-A) except sub-s. (1) shall apply to any usufructuary mortgage in respect of property situated in any other area in the cases mentioned below. Sub-section (ii) (c) states:

> "Where the mortgagee's interest in the property subject to the usufructuary mortgage or any part of such interest belonged to, or devolved on, two or more persons and during the period aforesaid, a partition has taken place among such persons, then, to the whole or such part of the interest as the case may be."

Sub-section (ii) deals with the assignments during the period after 30-9-1937 and before 30-1-1948. Sub-section ii (a) relates to the transfer 'inter vivos' by the mortgagor of his interest. Sub-section (ii) (b) deals with bona fide transfer for valuable consideration during the said period of the mortgagee's interest and (c) deals with partitions during that period. This is the scheme of the section which must be borne in mind in construing the section. The argument advanced on behalf of the plaintiff-petitioner was that cl. (c) does not apply because it requires that the mortgagee's interest in the mortgage which is the subject-matter of the usufructuary mortgage should have vested from the date of the creation of the mortgage to the date of the partition on two or more persons and when such interest was assigned the assignee-mortgagee is not entitled to the benefit of this exception as he was not the original mortgagee. On the other hand, it is contended on behalf of the respondent that the clause applies both to the original mortgagee and the assignee from the mortgagee of his interests provided that in either case it belonged to two or more persons by the time it came to be partitioned during the period indicated in this section. When S. 9-A was introduced a definition of "mortgagee" was also included by cl. (vi) of S. 3 thus " 'mortgagee' includes his heirs, legal representatives and assigns".

(6) When cl. (c) speaks of "mortgagee's interest" it includes also the interests acquired by an assignee from the mortgagee. The word "belonged" imports ownership and the ownership must be by two or more persons. The ownership contemplated by the use of the word "belonged" in contrast with the word "devolved" implies that it was acquired by a mode other than devolution. "Devolution" in ordinary legal language means descent by succession. The property might belong to two or more persons either because the original mortgage was in favour of two or more persons or even though the original mortgage was in favour of one person at a time before the period indicated in the section commenced, there was an assignment of the mortgagee's interest in favour of more than two persons. There is really no conflict between the word "belonged" and the word "devolved" and none of those two words would become otiose if the interpretation which we have placed is accepted; nor is there anything in the section or the subject or context to exclude the operation of the definition of "mortgagee". In clause (vi) of S. 3 "mortgagee" includes "assigns". Therefore it follows that the clause applies not only to a case where the mortgagee's interest was in the first instance created in favour of two or more persons but also to a case where the mortgagee's interest was created only in favour of one person to start with and there was later an assignment of that interest in favour of two or more persons the condition however being that the assignment must have taken place before the date of the partition. The main object of this sub-clause (c) is to protect partitions effected during the particular period just as clause (b) is intended for the protection of bona fide transfers for value of the interest of the mortgagee. In the present case though the mortgage was in favour of Veeraraghava Pillai there was an assignment in favour of Venkatarama Gowder who was the head of the joint family and there was a partition in 1941 between the members of the family. The sub-clause therefore applies to this case and the benefit of the provisions of the Act cannot be taken advantage of by the plaintiff.

(7) The application is therefore dismissed with costs.

B/K.S. Application dismissed.

A.I.R. 1953 MADRAS 723 (Vol. 40, C. N. 278)

MACK AND KRISHNASWAMI NAYUDU JJ.

Parsam Venkataramayya, Appellant v. Parsam Venkataramappa and others, Respondents.

Appeal No. 20 of 1949, D/- 25-11-1952.

(a) Hindu Law — Joint family — Trade.

If a member of a joint Hindu family is inclined to start a trade and for that purpose he gets assistance by way of a contribution from the joint family funds without any further assistance from the joint family and goes and starts a business of his own individually or in partnership and acquires properties by his own exertions it will be not justifiable to hold that either the business or his properties would be joint family properties. It is reasonable to extend the principle of Hindu Gains of Learning Act (1930) to such a case. Case law referred. (Para 11)

(b) Civil P. C. (1908), O. 20, Rr. 12 and 18 — Scope and applicability.

The final decree proceedings under O. 20, Rr. 12 and 18 only relate to matters which are provided in the preliminary decree as to partition, as to an account for mesne profits or as to an account for other properties, but do not relate to the decision of any substantial rights of parties as to title to properties which can only be decided in a regular suit. (Para 14)

Anno: C. P. C., O. 20, R. 12 N. 1; R. 18 N. 1.

P. Somasundaram, for Appellant; T. S. Narasinga Rao and M. Balachandrudu, for Respondents.

CASES CITED:

(A) ('29) AIR 1929 PC 1: 113 Ind Cas 897 (PC)

(B) ('42) AIR 1942 PC 13: ILR (1942) Kar PC 33 (PC)

(C) ('37) AIR 1937 Mad 335: (1937) 1 Mad LJ 95

KRISHNASWAMI NAYUDU J.: The main question that arises for determination in this appeal is as to whether a certain interest which the plaintiff-appellant had in a business is joint family property or the separate property of the plaintiff. The plaintiff and defendant 1 were brothers. Defendants 2 to 4 are the sons of defendant 1 and defendants 5 to 7 are the sons of a pre-deceased son of defendant 1 by name Thimmiah. The suit is for partition of the joint family properties. Defendant 1 was the manager and the elder brother of the plaintiff. He died on 28-8-1946, a day after the institution of the suit, the suit, having been instituted on 27-8-1946. The joint family was possessed of about 60 acres of lands and a house at Kothur village and some valuable moveables including gold and silver. Defendant 1 was also conducting a small retail shop at Kothur and doing money lending business. There is no dispute that the plaintiff left his ancestral village of Kothur for Anantapur at which place he was married to the daughter of P. W. 4, Rentala Bala Venkataswami. From 1933 onwards he continued to remain in his father-in-law's place and never came back to Kothur excepting probably on certain occasions. The feelings between the members of the joint family and the plaintiff have always been cordial. In the written statement filed on behalf of defendants 3 and 4, while not disputing the plaintiff's right to a partition of the joint family properties, it was alleged that the plaintiff was carrying on a mandy business on behalf of the family in partnership with the plaintiff's brother-in-law, Rentala Venkatasubbayya (D. W. 5), son of P. W. 4, and that the plaintiff should be directed to bring the family's interest in the said partnership into the hotchpot and the defendants given a share therein. The defendants also claimed a share in two houses at Anantapur, one acquired in the name of P. W. 4 and the other in the joint names of the plaintiff's wife and his brother-in-law D. W. 5. The case of the defendants is that they were fraudulently obtained in their names, though really the properties belonged to the family, that they were benami transactions and that therefore, they must be declared to be the properties of the joint family. The learned District Judge held in favour of the defendants that the plaintiff's share in the business at Anantapur was joint family business and that the defendants are entitled to an account of that business. As regards the houses, the learned Judge reserved it for decision in the final decree proceeding directing the impleading of necessary parties to the transaction.

(2) It is well established that there is no presumption that a business carried on by a member of a joint Hindu family is joint family business and it is for those who set it up to establish it that though the business was carried on by an individual member it was the business of the family.

(3) The plaintiff's case is that in 1932 or 1933 on account of some differences among the womenfolk and misunderstandings with defendant 1, he left for Anantapur, borrowed a sum of Rs. 1000 under Ex. A. 5 from P. W. 2 and out of the sum he contributed about Rs. 600 or Rs. 700 to the partnership business of himself & his father-in-law and that later he discharged that liability. He is supported by P. W. 2 who has also filed the promissory note Ex. A. 5. The learned District Judge declined to accept this evidence and it is unnecessary for us, in the view which we are taking of the other evidence in the case, to differ from the conclusion of the learned Judge as regards the truth of this portion of the plaintiff's case as to his securing a sum of Rs. 1,000 from P. W. 2 required for providing for the capital of the partnership business of himself and his father-in law. On behalf of the defendants, while it is conceded that the plaintiff left the village about 1932 or 1933, the capital required for the business was stated to have been furnished by defendant 1 by realisation of a sum of Rs. 600 due from D. W. 1 to whom a sum Rs. 1,000 was lent on a promissory note by defendant 1 which was family money. Defendant 1 having died, D. W. 1 who is the person who borrowed from the family and paid Rs. 600 to the plaintiff says that he borrowed a sum of Rs. 1,000 on a promissory note, that Rs. 600 was required by the plaintiff with a view to enable him to start the business in Anantapur, that he paid the same to the plaintiff and defendant 1 in the presence of others and that an endorsement was made in the promissory note. D. W. 2 supports D. W. 1 that he was taken to the house of defendant 1 by D. W. 1 and that he was present when the sum of Rs. 600/- was paid and endorsed on the promissory note. This evidence the learned District Judge has preferred to accept.

(4) We are, however, unable to agree with the learned District Judge on this finding. The promissory note which is stated to have been discharged has not been produced and the more important circumstance is that the account books admittedly maintained by the defendants which must necessarily have contained an entry as to this lending of Rs. 1000 if it was true and the repayment of Rs. 600 by D. W. 1 have not been produced. But on the other hand the learned Judge was of the opinion that defendants

2 to 4 have suppressed these accounts. In the absence of the promissory note and these accounts, it is not possible to accept the oral testimony of two witnesses on an important question as to payment of a sum of money on a certain occasion to the plaintiff for a particular purpose. We are therefore, unable to attach much weight to the oral testimony furnished by D. Ws. 1 and 2.

(5) If the evidence on the side of the plaintiff and the defendants as regards the source of the capital for the starting of the partnership business is excluded, we have to fall back upon the documentary evidence in this case which throws some light as to how the plaintiff was able to secure the necessary capital and invest it in the business at Anantapur. (After considering the evidence the judgment proceeded:) What we are able to arrive at from the evidence which is mainly documentary is that undisputedly a sum of Rs. 274-9-7 has been contributed by defendant 1 presumably out of joint family funds to make up the plaintiff's share of capital in the Anantapur business, the share of capital that required of him being Rs. 700-9-8. The balance must be deemed to have been provided by the plaintiff independently, as there is no evidence which we can rely upon to justify the conclusion that the joint family made further contribution towards the share capital. It may be mentioned here that except the contribution of Rs. 274 and odd or even according to the defendants the sum of Rs. 600 there is no other connection between the plaintiff's partnership business at Anantapur and the joint family at Kothur. It is not pretended that the defendants were drawing the profits of Anantapur business or contributed any further capital as by way of replenishing the capital of the partnership business at Anantapur; nor is there any evidence as to any blending of these two businesses; nor is it suggested that the members of the family at Kothur except the plaintiff have participated in the business at Anantapur. On the sole circumstance of this contribution, it is argued, the plaintiff's interest in the partnership business is joint family business and that would be sufficient to constitute a joint family business.

(6) It is further sought to be shown by the evidence of three witnesses D. Ws. 3, 4 and 6 that there was an admission by the plaintiff that his interest in the Anantapur business was family business and that he was prepared to bring it into account in any family partition about which there appears to have been a demand just sometime before the institution of the suit, when defendant 1 was admittedly ill. We are unable to attach any weight to this evidence of these witnesses as to the admission and it is significant that the important person through whom the mediation is sought to have been broached has not been examined. We are, therefore, left with nothing except to decide on the mere fact that there is a small contribution made from the joint family funds to the plaintiff, that it is a joint family business. Decisions of the Privy Council have held that there is no presumption that a business started by a member of the joint family business, unless there is something to show that it was started with the nucleus of the joint family or that the joint family participated in it or that there was a blending of the two businesses.

(7) In — 'Annamalai v. Subramanian', AIR 1929 PC 1 (A), Lord Buckmaster observed that a member of a joint undivided family can make separate acquisition of property for his own benefit, and unless it can be shown that the business grew from joint family property, or that the earnings were blended with joint family estate, they remain free and separate and that the burden of proving in a partition action that any particular item of property is joint, primarily rests upon the person who sets up a case of a joint family nature. In — 'Bhuru Mal v. Jagannath', AIR 1942 PC 13 (B), with reference to presumptions as to properties and business, it was held that whether or not it can be said that if a joint family is possessed of some joint property, there is a presumption that any property in the hands of an individual member is not his separate individual property but joint property, no such presumption can be applied to a business. A member of a joint undivided family can make separate acquisition of property for his own benefit and, unless it can be shown that the business grew from joint family property or that the earnings were blended with joint family estate, they remain free & separate. Sir George Rankin while agreeing with the observations of Lord Buckmaster in 'AIR 1929 PC 1 (A)' observed that this question is a question of fact and the burden of proof lies upon the person who claims a share in the business and that jointness may be proved by evidence that the business was carried on as a family business, by proof that the profits were treated as joint family property being brought to one account or divided among the members.

(8) Excepting that in this case there has been a nucleus of joint family fund in the sense of a very small contribution from the family to one of its members to enable him to become a partner, there is nothing to show that the profits earned by the plaintiff in that business were brought into account in the family books or enjoyed by them. There could not have been any blending of the two businesses, which only points to the absence of an intention on the part of the plaintiff to treat it as a joint family concern and equally no intention on the part of defendant 1 and the other members to treat it as first family business. There must be some proof of intention at the time of contribution that a particular business carried on by a member of the joint family individually or in partnership with others was treated as a joint family concern. That intention may be expressed by direct evidence or by conduct of the members of the family which can be inferred from circumstances and the manner in which they have been dealing with each other. There is admittedly no participation and it cannot be said that such an intention has been established in this case. The subsequent conduct on the part of the defendants, i. e., of the family does not show that they took any interest at all in the partnership business of the plaintiff. There appears to have been no connection whatsoever between the family and the plaintiff's partnership business.

(9) Mr. Narasinga Rao argues that the account books of the defendants will disclose the nature of the business and the way in which the family was treated with reference to the plaintiff's share and the non-production of the books of the defendants has placed the defendants, most of whom are minors, in a difficulty and they are, therefore, unable to establish their case. But it must be noted that the defendants have suppressed their account books. By reason of the suppression it can be reasonably inferred that the production of the account books will show the absence of any entry relating to the Anantapur business in the joint family accounts. It is correct to say that the accounts of the Anantapur business have been completely suppressed. Certain ledgers and day books Exs. B. 8 and B-10 relat-

ing to the period from 1944 to 1946 and from 1947 to 1948 and even accounts relating to October 1936 have been filed. Excepting for the period from 1937 to 1943, the rest of the accounts have been filed and D. W. 5 has given some explanation which seems to be reasonable as to the inability to file the remaining account books. Even in the defendant's accounts so far produced, the defendants have not been able to establish or point out any entry to show any payment of the profits payable to the plaintiff to the joint family or any contribution for the carrying on the partnership business. We are, therefore, of the opinion that mere contribution, assuming in this case and accepting the evidence on behalf of the defendants, that the contribution has provided a major portion of the capital viz., Rs. 600 out of Rs. 700 and odd, coupled with the subsequent non-interference with the business by the defendants' family and the absence of any participation and non-enjoyment of any income from the business, would not justify the conclusion that the member's interest in that partnership business is joint family property.

(10) It is not uncommon among trading families, as in the present case, for a member of the joint family who is fortunately married into a wealthy family to be taken by the father-in-law and set up in a business and that is what appears to have happened in this case. Almost ever since his marriage, the plaintiff has been with the father-in-law. His father-in-law took him as a partner in the business. It is not likely that the success of the business was due solely or mainly to the contribution of Rs. 274-9-7 towards the capital of business at its inception. It can reasonably be held in this case that the business was carried on by the plaintiff & not by the joint family and it is by reason of his efforts and exertions with the help and association with his father-in-law that he happened to be successful in that business.

(11) We are inclined to the view that if a member of a joint family who was given a certain sum from the joint family funds and who goes out of the family in the sense of leaving the family house as in the present case, starts a business of his own individually or in partnership and by virtue of his exertions he prospers in his business and acquires properties it will be not justifiable to hold that either the business or his properties would be joint family properties. In view of the constitution of the Hindu joint family and the incidents of its ownership of properties, to come to any other conclusion would be to deprive a member of such family of his initiative and his desire to eke out a livelihood by his individual efforts and intelligence. The trend of judicial opinion has been as far as possible to recognise properties acquired out of the individual exertions of a member of a joint family to be his self-acquisition. The Hindu Gains of Learning Act (Act 30 of 1930) is one of the enactments which gave legislative recognition to this view, by treating the properties acquired out of the earnings of the members of the family who happened to have had their education from out of the joint family funds as self-acquired and separate properties. The Act provides that notwithstanding any custom, rule or interpretation of the Hindu law, no gains of learning shall be held not to be the exclusive and separate property of the acquirer merely for the reason that his learning, in whole or in part has been acquired with the aid of the funds of the family and "learning" has been understood to mean education which is to enable a person to pursue any trade, industry, profession or avocation in life. If a member of the family is inclined to start a trade and for that purpose he gets assistance by way of a contribution from the joint family funds without any further assistance from the joint family and goes and starts a business and acquires properties, it appears to be reasonable to extend the principle of the Hindu Gains of Learning Act to such a case. We are unable to find any real distinction between the case of a member getting himself educated out of the joint family funds and employing himself somewhere earning and acquiring properties and a member getting a cash contribution from the family and starting a trade on his own account. Unless it is shown that the joint family did not stop with the contribution but continued to take interest and the business was subsequently carried on with the assistance of the joint family, it should not be held that the business is family business.

(12) Mr. Narasinga Rao referred to certain observations of Venkatasubba Rao J. in — 'Manickam Chetti v. Kamalam', AIR 1937 Mad 335 (C). That was a case where there was already a partition and allotments of properties and a further claim was made as regards certain business and other properties and in considering the nature of the business whether it was joint family or separate, the learned Judge observed as follows:

> "There is no doubt that the business had been carried on with the aid of joint family funds, and that circumstance would prima facie make it a joint family concern. When coparcenary funds are employed there may be one of two intentions, either that the concern belongs to an individual member, his share being debited with the sums employed or what is more natural that the concern was carried on for the joint benefit."

With these observations we are in respectful agreement. The business in that case was carried on with the aid of joint family fund and not merely started with a contribution from the joint family. The question is one of intention on the part of the members starting the business & the intention of the other members of the family as to the manner in which they treated the business, and such an intention must be established by sufficient evidence. That evidence is lacking in the present case.

(13) We are of the opinion that the plaintiff's share in the business at Anantapur in respect of which an account was ordered by the learned District Judge is not joint family business and the defendants are not entitled to an account thereof. This disposes of the appeal and the appellant has to succeed.

(14) But, there is one matter about which we consider it is necessary to express our views. Issue 5 relates to the ownership of the two houses at Anantapur standing in the name of the plaintiff's father-in-law, wife and brother-in-law as to whether they were benami for the joint family of the plaintiff and the defendants. In view of our finding that the plaintiff's interest in the Anantapur business is not joint family business, it may be unnecessary to go into the question as to whether the properties purchased with the income from the business are joint family properties or not. However, we desire to express our opinion, that the manner in which the learned Judge had dealt with it is not satisfactory. The consideration of the question as to the ownership of these houses can only be disposed of completely and effectively in the presence of the persons in whose names the properties are purchased, i.e., P. W. 4 and P. W. 5 and the plaintiff's wife all of whom are not parties to the suit. The learned District Judge thought that this is a matter that could

be reserved for decision in the final decree proceedings after impleading the necessary parties. But, we would say that this is wrong procedure which should not be adopted. The final decree proceedings under O. 20, Rr. 12 and 18 only relate to matters which are provided in the preliminary decree as to partition, as to an account for mesne profits or as to an account for other properties, but do not relate to the decision of any substantial rights of parties as to title to properties which can only be decided in a regular suit. If P. W. 4, D. W. 5 and the plaintiff's wife had been parties to the suit and this issue had been raised, it would have been open to the learned Judge while deciding the case to give his decision on that matter. But it was not open to him to reserve the question for the final decree proceedings. We, therefore, set aside that direction regarding the properties covered by issue 5 and reserve it for any suit which the defendants may file if so advised.

(15) The appeal is allowed. The appellant will get his costs. Advocate's fee being fixed at Rs. 250 from the respondents.

B/G.M.J. Appeal allowed.

A. I. R. 1953 MADRAS 726 (Vol. 40, C. N. 279)

SATYANARAYANA RAO J.

M/s. Kothari and Sons, Appellants v. V. Krishna Rao, Respondent.

Second Appeal No. 784 of 1949, D/- 3-2-1953.

(a) Civil P. C. (1908), Ss. 100 and 101 — Negligence — Question of fact.

Negligence is question of fact — Brokers entrusted to sell shares — Shares sold to company itself — Subsequent liquidation and owner of shares required to pay call-money — Brokers held guilty of negligence concurrently by both lower Courts — No interference in second appeal. (Para 3)

Anno: C.P.C., Ss. 100-101 N. 39, 54.

(b) Limitation Act (1908), S. 24, Art. 90 — Suit for damages against brokers due to negligence — Starting point — (9 Ind Cas 54 (Mad), Dissented).

A entrusted B, a firm of brokers with the sale of certain shares of bank. B sold the shares to the Bank itself which went into liquidation and A was called upon to pay unpaid call money. Though A was aware of the sale in 1939, he made the payments first, on 13-3-1944 and last, on 20/4/1945. A then filed a suit on 1-10-1945 for damages against B on the ground that B was negligent in selling the shares to the Bank.

Held that the suit was one in which the cause of action could not be unless and until the specific injury had actually resulted to A. In such a case, under S. 24, the period of limitation has to be computed from the date when the injury had resulted.

(2) So, reading Art. 90 and S. 24, Limitation Act, together, the suit, which was instituted within three years from the date when A actually made the payments was clearly within limitation. 9 Ind Cas 54 (Mad), Dissented from; AIR 1938 Rang 258 (F.B.), AIR 1914 Cal 888 & AIR 1932 Rang 1, Distinguished; AIR 1930 Bom 572, AIR 1926 All 605 and AIR 1929 Pat 245, Rel. on. (Para 6)

Anno: Limitation Act, S. 24, N. 1, 5; Art. 90 N. 7.

R. Narasimhachariar, for Appellants; P. C. Parthasarathy Iyengar, for Respondent.

CASES CITED:

(A) ('30) AIR 1930 Bom 572: 54 Bom 226
(B) ('26) AIR 1926 All 605: 24 All LJ 550
(C) ('29) AIR 1929 Pat 245: 8 Pat 776
(D) ('11) 9 Ind Cas 54: 21 Mad LJ 453
(E) ('38) AIR 1938 Rang 258: 1938 RLR 457 (F. B.)
(F) ('14) AIR 1914 Cal 888: 25 Ind Cas 706
(G) ('32) AIR 1932 Rang 1: 9 Rang 575

JUDGMENT: The defendants, a firm of stock brokers and commission agents, Madras, are the appellants in this second appeal. They were sued by the respondent to recover a sum of Rs. 1064-14-0 for damages caused by their negligence in effecting a sale of 40 shares of the Travancore National and Quilon Bank Ltd., hereinafter called the Bank. The shares were of the paid-up value of Rs. 25 each, the face value of which was Rs. 50. The pltff. with a view to have the shares sold, requisitioned the services of the defendants and on 9-5-1938 by Ex. P. 1 the shares were handed over to the defendants. The bank went into liquidation in 1938 and on 10-3-1939 a demand was made on the plaintiff by the liquidators of the bank for payment of the unpaid call money. He thereupon came to know from the defendants by their letter of 20-4-1939 that the shares were in fact sold to the bank. The plaintiff made an unsuccessful attempt in the High Court by an application to have the share register rectified by excluding his name from the list of contributories. The application was dismissed on 19-12-1941. The plaintiff was thereafter obliged to pay from time to time the balance calls amounting in all to Rs. 1000 and odd. The first payment was made on 13-3-1944 and the last was on 20-4-1945. On 1-10-1945 the present suit was instituted by the plaintiff to recover the sum as damages on the ground that the defendants, by their negligence brought about an invalid sale as they should have known that the bank could not buy its own shares by reason of the prohibition contained in S. 55, Companies Act. The suit was instituted in the District Munsif's Court Vellore.

(2) The suit was resisted by the defendants on three principal grounds : firstly that it was barred by limitation under Art. 90 Limitation Act; secondly that the Court had no territorial jurisdiction to try the suit as the cause of action did not arise within its jurisdiction; and lastly that there was no negligence on their part. Both the Courts below disallowed the objections of the defendants and granted a decree in favour of the plaintiff. Hence this second appeal.

(3) The same grounds have been repeated before me. Grounds Nos 2 and 3 may be disposed of easily. Regarding want of jurisdiction in the Court which tried the suit, the defendants were not able to establish any prejudice which affected the merits of the case to entitle a reversal of the decree on the ground of want of jurisdiction assuming that the Court had no jurisdiction. The question of negligence is one of fact and the Courts below arrived at a concurrent finding that the plaintiff was able to establish negligence on the part of defendants as they did not take the simple precaution of not selling the shares

to the bank itself. There is no ground to interfere with the finding of fact.

(4) There remains the question of limitation. Under Art. 90, Limitation Act, for "other suits by principals against agents for neglect or misconduct" a period of three years is provided for and time begins to run from "when the neglect or misconduct becomes known to the plaintiff". It was argued on behalf of the appellant that on the facts as stated, above, the plaintiff had definite knowledge that the shares were sold to the bank at least on 20-4-1939 and as the suit was filed more than three years from the date it was barred by limitation. But it must be mentioned that by that date no damage in fact had accrued to the plaintiff. The plaintiff was later called upon to pay the calls and it was not until 20-4-1945 that the last of the payments was made, the first of such payments having been made on 13-3-1944. If the period of limitation is to be counted from those dates, undoubtedly the suit is in time. But unfortunately, that is not the language of the third column of Art. 90 Limitation Act.

(5) In answer to the contention of the learned counsel for the appellant, the respondent's learned counsel relied upon S. 24 Limitation Act, which provided that

"in the case of a suit for compensation for an act which does not give rise to a cause of action unless some specific injury actually results therefrom, the period of limitation shall be computed from the time when the injury results."

I at first thought that this section would have application only to suits based on a cause of action in which the claim for damage is an essential part as in the case of actions for slander. But such a doubt is dispelled by the illustration to the section and also by the decisions which have applied that section to different articles of the Limitation Act. —'Govind Narayan v. Ranganath Gopal', AIR 1930 Bom 572 (A), is a case of misfeasance summons against directors for loss occasioned by their negligence. It was held that the application was governed by Art. 120, Limitation Act, and the cause of action to make the application arose, within the meaning of S. 24 Limitation Act, when the actual damages had resulted. It is an instance, therefore, where the time from which period begins to run under the third column of the Limitation Act was extended by invoking the provisions of S. 24, Limitation Act. Similarly in —'Kedarnath v. Hargovind', AIR 1926 All 605 (B), S. 24, Limitation Act was invoked to a case to which Art. 116 applied. In —'Jagannath v. Kalidas', AIR 1929 Pat 245 (C), the suit was for damages for malfeasance based on an implied covenant that the surface owner had an inherent right of support from the owner of underground mines. It was held that such a suit was governed by Art. 115, Limitation Act, & under S. 24, Limitation Act, the cause of action arose from the date when the injury had resulted to the plaintiff and not from the date of malfeasance or mis-feasance provided for in the Article.

(6) In the light of these decisions, in my opinion, the third column in Art. 90 must be read with the modification contained in S. 24, Limitation Act, as the present is an action in which no cause of action could have been complete to the plaintiff unless and until the specific injury had actually resulted. Under the section, the period of limitation should be computed from the date when the injury resulted. So, reading the Article and the section together, the present suit which was instituted within three years from the date when the injury actually resulted to the plaintiff, i.e., the date when he made the payments is clearly within time.

(7) The appellant's advocate drew my attention to a decision of a single Judge of this Court in —'Rangaswami Iyenger v. Srinivasa Iyengar 21 Mad L. J. 453 (D), in which Art. 90 was applied and the suit was held to be barred by limitation but S. 24 was not considered by the learned Judge. With great respect, I am unable to follow the decision in that case. The other decisions relied on by the learned advocate for the appellant, —'Annamalai Chettiar v. Cowasji', AIR 1938 Rang. 258 (E); — 'Janki Koer v. Mahabir Prasad', AIR 1914 Cal 888 (F) and —'Saw Hla Pru v. S. S. Halkar', AIR 1932 Rang. 1 (G), do not at all throw any light upon the question which arises for consideration in the present case where the date of knowledge is different from the date when the damage actually accrued or resulted. In cases where the two dates coincide, there is no difficulty in applying Art. 90, as in that event the period of limitation begins to run from the date of knowledge, which is also the date when the damage has resulted. These decisions did not consider — and perhaps there was no necessity for considering — the applicability of S. 24, Limitation Act.

(8) I am, therefore, of opinion that the view taken by the Courts below that the suit was not barred by limitation is correct and the second appeal is dismissed with costs. No leave.

A/D.R.R. Appeal dismissed.

A.I.R. 1953 MADRAS 727 (Vol. 40, C. N. 280)

RAJAMANNAR C. J. AND VENKATARAMA AIYAR J.

H. Chandanmull and Co., by Proprietor, C. Laxmichand Mehta, Petitioner v. Mohanlal M. Mehta, and others, Respondents.

Civil Misc. Petn. No. 10470 of 1952, D/- 25-2-1953.

(a) Constitution of India, Art. 133 (1) — "Final order."

On a notice of filing an award in Court was served on the petitioner instead of filing an application to set aside the award within the time prescribed by Art. 158, Limitation Act, the petitioner filed merely an application purporting to be under S. 5, Limitation Act, for excusing the delay in filing the application to set aside the award. That application was dismissed by the High Court. The petitioner sought leave to appeal to the Supreme Court.

Held that an order refusing to excuse the delay in filing an application, could not be treated except as a procedural order; though it may have far-reaching consequences and adversely affect the rights of parties, by itself it could not be held to have decided the rights of parties. Case law Ref. (Para 10)

Dictum :— The case being otherwise fit under Art. 133(1)(c), "if in the present

case an application to set aside the award has been likewise dismissed on the dismissal of an application to excuse the delay in filing it, we would have held that the petitioner is entitled to appeal to the Supreme Court." (Para 8)

(b) Constitution of India, Art. 133(1) — "Judgment."

It is only a final judgment that falls within the category of judgment referred to in Art. 133(1) of the Constitution. (Para 4)

K. C. Doraiswami, for Petitioner; A. N. Rangaswami, for Respondents.

CASES CITED:

(A) ('53) AIR 1953 Mad 561: (O S A No 122 of 1951 Mad)
(B) ('50) AIR 1950 FC 77: 1949 FCR 842 (FC)
(C) ('49) AIR 1949 FC 1: 1947 FCR 180: 49 Cri LJ 625 (FC)
(D) ('20) AIR 1920 PC 86: 47 Ind App 124 (PC)
(E) ('33) AIR 1933 PC 58: 60 Ind App 76 (PC)
(F) ('21) AIR 1921 Cal 415: 33 Cal LJ 128
(G) ('48) ILR (1948) 2 Cal 202
(H) ('08) 9 Bom LR 566: 32 Bom 108

RAJAMANNAR C. J.: This is an application for leave to appeal to the Supreme Court of India against the judgment and order passed by us in — 'Chandan Mull & Co. v. Mohanlal M. Mehta', AIR 1953 Mad 561 (A): O. S. A. No. 122 of 1951 dismissing it. This appeal arose out of proceedings under the Arbitration Act. On 2-11-1950 an 'ex parte' award was passed for a sum of Rs. 21052-12-8 with interest and costs in favour of the third respondent herein and against the petitioner. The award was filed into this court in O. P. No. 66 of 1951 which prayed for making the award a rule of court. Notice of filing the award was served on the petitioner on 27-3-1951. Under Art. 158, Limitation Act, the petitioner had a period of thirty days from the date of service of notice of filing the award to file an application to set aside the award. The petitioner did not file any such application within time but filed an application, No. 2355 of 1951, purporting to be under S. 5, Limitation Act, for excusing the delay in filing the application to set aside the award. That application was dismissed by Krishnaswami Nayudu J. on the ground that S. 5, Limitation Act did not apply. There was an appeal under Cl. 15 of the Letters Patent and we dismissed the appeal agreeing with the learned Judge that S. 5, Limitation Act, has no application to proceedings in Court under the Arbitration Act. It is against this decision of ours that the petitioner seeks leave to appeal to the Supreme Court.

(2) At the very outset we may mention that the question of law involved in this appeal, in our opinion, is of such general importance that we have no hesitation in certifying that the case is a fit one for appeal to the Supreme Court under Art. 133 (1) (c) of the Constitution.

(3) The only question on which we have felt considerable difficulty is whether our order can be said to be a judgment, decree or final order in a civil proceeding within the meaning of Art. 133 (1)(c) of the Constitution. There is no direct decision on the point to help us to decide this question. Our attention has been drawn to several decisions of the Privy Council, the Federal Court and of several High Courts in India but we have felt not a little difficulty in applying the test laid down by the Privy Council and by the Federal Court to the facts of the present case.

(4) In view of the observations in the decision of the Federal Court in —'Mohammed Amin Bros v. Dominion of India', AIR 1950 FC 77 (B), it is difficult to maintain the position that the order now under appeal is a judgment or decree. Mukherjea J. pointed out in that decision that in English Courts the word "judgment" is used in the same sense as a "decree" in the Civil Procedure Code and it means the declaration or final determination of the rights of the parties in the matter brought before the court. It is clear that calling our order "a judgment" would not really be of much assistance in deciding the question which falls for decision because it would nevertheless remain to be considered whether the judgment is an "interlocutory judgment" or "a final judgment". It is only a final judgment that will fall within the category of judgment referred to in Art. 133(1) of the Constitution.

(5) The scope of the expression "final order" was fully discussed by the Federal Court in the ruling reported in —'Kuppuswami Rao v. The King', AIR 1949 FC 1 (C). Though that case arose out of criminal proceedings, their Lordships were called upon to construe the expression "final order" in S. 205(1), Government of India Act, 1935. The test laid down in that decision that it is only an order which finally disposes of the rights of the parties and determines the points in dispute and brings the case to an end that can be called a "final order". A preliminary or interlocutory order would not therefore be a "final order". Kania C. J. referred to several English authorities and two rulings of the Judicial Committee in — 'Ramchand Manjimal v. Govardhandas Vishindas Ratanchand', AIR 1920 PC 86 (D) and — 'Abdul Rahman v. D. K. Cassim and Sons', AIR 1933 PC 58 (E), and arrived at the test mentioned above. The same test was applied in 'AIR 1950 FC 77(B)'. Mukherjea J. in delivering the judgment of the Court said:

"The expression 'final order' has been used in contradistinction to what is known as 'interlocutory order' and the essential test to distinguish the one from the other has been discussed and formulated in several cases decided by the Judicial Committee. All the relevant authorities bearing on the question have been reviewed by this court in their recent pronouncement in 'AIR 1949 FC 1 (C)', and the law on point, so far as this court is concerned, seems to be well settled. In full agreement with the decisions of the Judicial Committee and the authorities of the English courts upon which these pronouncements were based, it has been held by this court that the test for determining the finality of an order is, whether the judgment or order finally disposed of the rights of the parties. To quote the language of Sir George Lowndes in 'AIR 1933 PC 58 (E): 'the finality must be a finality in relation to the suit. If after the order the suit is still a live suit in which the rights of the parties have still to be determined, no appeal lies against it.' The fact that the order decides an important and even a vital issue is by itself not material. If the decision on an issue puts an end to the suit, the order will undoubtedly be a final one, but if the suit is still left alive and has got to be tried in the ordinary way, no finality could attach to the order."

It was not difficult to apply the test so laid down to the two cases which arose before the Federal Court. In both the cases the order sought to be appealed against left the proceeding alive which could continue to a final termination in spite of the order.

(6) In the present case the position is this: O. P. No. 66 of 1951 is the petition in which an award is sought to be made a decree of court. It is in this petition that the application was filed by the petitioner under S. 5, Limitation Act. Now that the application has been dismissed, there is nothing to prevent the petition from being proceeded with and resulting in the passing of the decree in terms of the award. In this sense it might be said that the dismissal of the petitioner's application has left the original petition alive.

(7) But it must not be overlooked that after the dismissal of the petitioner's application, he cannot take any proceeding to have the award set aside. That right he has undoubtedly lost as a result of the order of Krishnaswami Nayudu J. and our order confirming it. Though the original petition is alive, the petitioner cannot raise any objection to the award itself as such. In this sense the petitioner's right in this behalf has been finally negatived. This appears to be a plausible way of looking at the case of the petitioner. In this view the order dismissing his application would be tantamount to the dismissal of a substantive application by him to set aside the award. Unfortunately, however, it turns out that the petitioner never filed into court an application to set aside the award. He thought that he could file such an application after this court had excused the delay. Strictly speaking an application under S 5, Limitation Act, should have been filed along with the substantive application; but that was not done. We cannot, therefore, say that the result of the dismissal of the application under S. 5, Limitation Act, is virtually a dismissal of the application to set aside the award. It might then have been more easy for us to hold that the particular proceeding has come to an end by reason of our order, viz, the proceeding to set aside the award, and in that sense our order must be deemed to be a final order.

(8) In —'Promotho v. W. A. Lee', AIR 1921 Cal 415 (F), what happened was this: An appeal was filed out of time. There was an application under S. 5, Limitation Act, to excuse the delay in filing the appeal. That application was dismissed and as a result the appeal itself was dismissed. It was held that the order of the High Court dismissing the appeal after refusing the application under S. 5, Limitation Act, was appealable, under cl. (a) of S. 109 C. P. C. If in the present case an application to set aside the award had been likewise dismissed on the dismissal of an application to excuse the delay in filing it, we would have held following this authority, that the petitioner is entitled to appeal to the Supreme Court. But as we have already pointed out there was no substantive application to set aside the award.

(9) In a later case in the Calcutta High Court in — 'Purnendu Nath Tagore v. Kanailal Ghoshal', ILR (1948) 2-Cal 202 (G), the facts were slightly different. A memorandum of appeal presented to an officer of the High Court was returned as barred by limitation. Thereupon an application was filed under S. 5, Limitation Act. That application was dismissed. It was held that the order dismissing the application under S. 5, Limitation Act, was neither a decree nor a final order passed on appeal by the High Court within the meaning of S. 109 cl. (a) C. P. C. The earlier decision in — 'AIR 1921 Cal 415 (F)', was distinguished on the ground that in that case there was an order made in the appeal itself dismissing it. The learned Judges relied upon a ruling in — 'Karsondas Dharmsey v. Gangabai', 32 Bom 108 (H), in which it was held that an order of the High Court refusing to admit an appeal after the period of limitation had expired was not a decree against which leave to appeal to Privy Council can be granted. But it must be mentioned that these decisions are not of much assistance, because the reasoning in these decisions was based on a consideration of the language of S. 109, cl. (a), C. P. C., which is absent in Art. 133(1) of the Constitution. In S. 109, cl. (a), C. P. C., which they were construing, the language was "a decree or final order passed on appeal by a High Court." Part of the reasoning was based on the meaning to be attached to the words "passed on appeal"; words which are not found in Art. 133.

(10) The question is not free from doubt but on the whole we think that an order like the one in question, viz., an order refusing to excuse the delay in filing an application, cannot be treated except as a procedural order. Though it may have far reaching consequences and adversely affect the rights of parties, by itself it cannot be held to have decided the rights of parties. If as a result of the dismissal of such an application, a substantive application is dismissed, or otherwise put an end to, it may then be held that there had been a final adjudication of rights and therefore there has been a final order.

(11) We are, therefore, compelled to dismiss this application though we are otherwise convinced that the case is a fit one for appeal to the Supreme Court of India. In the circumstances we do not make any order as to costs.

A/V.S.B. Application dismissed.

A. I. R. 1953 MADRAS 729 (Vol. 40, C. N. 281)

RAJAGOPALAN AND
CHANDRA REDDY JJ.

In re C. G. Menon and another, Accused.

Criminal Revn. Case No. 1034 of 1952 (Case Refd. No. 51 of 1952), D/- 20-2-1953.

(a) Interpretation of Statutes — Invalidity of Statute as being repugnant to the Constitution — Extent of invalidity — (Constitution of India, Art. 13) — (Civil P. C. (1908), Preamble).

With the initial presumption being in favour of the validity of a statute, investigations of the validity of a given statute or any part thereof should be limited to the extent absolutely necessary for the disposal of the issue before the Court.

By reason of Art. 13, a section offending the said article is not struck out from the statute book but no effect will be given to any of its provisions in regard to a person claiming that his fundamental rights are affected thereby.

When such is the comparatively limited scope of determination by a judicial Court even in cases where Art. 13 (1) of the Constitution is invoked, a Court will not undertake the investigation of the alleged invalidity of a statute except to the extent absolutely necessary. AIR 1951 SC 128; W. P. No. 568 of 1952 (Mad). Relied on. (Paras 7, 9)

Anno: Civil P. C., Preamble N. 9.

(b) Constitution of India, Arts. 372, 13 and 14 — Earlier adaptation of Act under Art. 372 (2) cannot confer validity to Act nor ensure its continuance after commencement of Constitution, if the Act offends Art. 14 — Continuance

in force of an Act, provided for by Art. 372 is subject to Arts. 13 and 14. (Paras 11, 12)

(e) Constitution of India, Art. 14 — Article is not limited to citizens of India — (Obiter). (Para 14)

† (d) Fugitive Offenders Act (1881), S. 14 — Validity — (Constitution of India, Arts. 14 and 13(1)).

Section 14. Fugitive Offenders Act offends Art. 14 of the Constitution, in that it denies "the equal protection of the laws within the territory of India", that is, the laws relating to extradition and surrender of fugitive offenders and, to that extent, S. 14 is void under Art. 13 (1) of the Constitution. (Paras 39, 43, 62, 63)

Basis and unreasonableness of classification indicated. (Paras 37, 57, 61)

Rajagopalan J. (Obiter). Section 14 is severable from the rest of Part II of the Act. (Para 41)

Advocate General assisted by State Prosecutor, for the State; M. K. Nambiar, B. T. Sundararajan and C. F. Louis, for Accused.

CASES CITED:

(A) ('34) AIR 1934 Mad 55: 57 Mad 259: 35 Cri LJ 511
(B) ('52) W. P. No. 568 of 1952 (Mad)
(C) ('51) AIR 1951 SC 128: 1951 SCR 228: 52 Cri LJ 860 (SC)
(D) ('51) AIR 1951 SC 318: 1951 SCR 682: 52 Cri LJ 1361 (SC)
(E) ('51) AIR 1951 SC 41: 1950 SCR 869
(F) ('52) AIR 1952 SC 75: 1952 SCJ 55: 1952 Cri LJ 510 (SC)
(G) ('52) AIR 1952 SC 123: 1952 SCJ 168: 1952 Cri LJ 805 (SC)
(H) (1886) 30 Law Ed 220: 118 US 356
(I) (1921) 66 Law Ed 254: 257 US 312

RAJAGOPALAN J. : Under Section 432 Criminal P. C. as amended by the Codes of Civil and Criminal Procedure Amendment Act (Act 24 of 1951), the Chief Presidency Magistrate, Madras, referred two questions of law to this Court :

(i) Whether the Fugitive Offenders Act, 1881, applies to India after 26-1-1950, when India became a Sovereign Democratic Republic; and

(ii) Whether, even if it applied, it or any of its provisions, particularly Part II thereof, is repugnant to the Constitution of India and is therefore void and/or inoperative.

The events that led up to this reference were set out in full in the order of the learned Chief Presidency Magistrate, which was appended to his reference. Mr. C. G. Menon and his wife, Mrs. Villasini Menon, are Indian nationals. Mr. Menon is a Barrister-at-law. He was practising as an 'advocate and solicitor in the colony of Singapore. Mrs. Menon, who was enrolled as an advocate of the Madras High Court, lived with her husband at Singapore, and until recently she was a member of the Legislative Council of Singapore. The Colonial Secretary of Singapore requested the assistance of the Government of India for the arrest and return to Singapore of Mr. and Mrs. Menon under warrants issued by the Third Police Magistrate of Singapore. On 27-8-1952, the Chief Presidency Magistrate, Madras, issued provisional warrants under S. 16, Fugitive Offenders Act, 1881, for the arrest of Mr. and Mrs. Menon. Subsequently, on 12-9-1952, two warrants issued by the Third Police Magistrate of Singapore were produced before the Chief Presidency Magistrate by Mr. E. J. Linsell, Assistant Superintendent of Police, Singapore. On 16-10-1952 Mr. Linsell produced before the Chief Presidency Magistrate three more warrants for the arrest of Mr. Menon and thirteen more for the arrest of Mrs. Menon, all of them issued by the Third Police Magistrate, Singapore. The offences alleged to have been committed by Mr. and Mrs. Menon were criminal breach of trust in respect of various sums of money, abetment thereof and cheating.

(2) Meanwhile, on 4-9-1952, Mr. and Mrs. Menon presented a petition to the Chief Presidency Magistrate, contending that the charges against them had not been preferred in good faith, and that they were victims of political animosity. They pleaded that under the conditions that prevailed then in Singapore and the political background of the charges, their return to Singapore was likely to result in a denial of justice. Mr. Linsell gave evidence before the Chief Presidency Magistrate on 15-9-1952 and again on 13-10-1952 to prove the identity of Mr. and Mrs. Menon with the persons for whom warrants of arrest had been issued by the Third Police Magistrate of Singapore, and to prove the authenticity of the warrants. Mr. Linsell was cross-examined by the counsel for Mr. and Mrs. Menon. This was followed up by another petition presented by Mr. and Mrs. Menon to the Chief Presidency Magistrate on 15-10-1952. It is not necessary to set out the several allegations of fact in that petition. Mr. and Mrs. Menon contended that the Fugitive Offenders Act, 1881, was not applicable to India after 26-1-1950, and that, even if it applied, it was repugnant to the Constitution of India. It was after that, that the Chief Presidency Magistrate referred to this Court the two questions mentioned above. It should be more convenient to refer to Mr. and Mrs. Menon as the petitioners in the rest of this judgment.

(3) In para 31 of his order appended to the reference, the Chief Presidency Magistrate observed :

"No attempt has been made to place any material by way of deposition of witnesses etc. to establish a 'prima facie' case with respect to the offences with which the Menons have been charged, so that if the rendition of the Menons depended on the establishment of a 'prima facie' case, I will not have the slightest hesitation in discharging them."

(4) The question of the liability of the petitioners to be returned to Singapore under the warrants issued by the Magistrate of Singapore has to be determined with reference to the provisions of Part II of the Fugitive Offenders Act, 1881. The petitioners were arrested in the first instance under the Provisional warrants issued by the Chief Presidency Magistrate, Madras, under S. 16, Fugitive Offenders Act, 1881. Eighteen warrants issued by the Magistrate of Singapore had to be "backed" by the Chief Presidency Magistrate under S. 13 of the Act. It was S. 14 of the Act that empowered the Chief Presidency Magistrate to order the return of the petitioners to Singapore. S. 14, Fugitive Offenders Act has to be read with S. 19 thereof see — 'Mahomed

Naina Marikayar v. Ahmed Marakair', AIR 1934 Mad 55 (A). It is not, however, necessary to refer any further to S. 19 to dispose of the questions that have been referred to this Court for answers.

(5) The validity of the Fugitive Offenders Act, 1881 (hereinafter referred to as the impugned Act) forms the subject-matter of the first question referred to this Court. The second question raises the issue of the validity of Part II of the Act. It should be sufficient for the purpose of this case to restrict the scope of the second question to the validity of S. 14, which is in Part II of the impugned Act. The real question in these proceedings is not whether the petitioners as fugitive offenders are liable to be returned to Singapore under any provision of law, but whether they are liable to be returned under S. 14 of the impugned Act. If, for any reason, S. 14 is held to be invalid and inoperative as part of the law of India, the proceedings initiated before the Chief Presidency Magistrate for the return of the petitioners to Singapore must terminate. And, we are not called upon in the proceedings before us to provide for any other contingency.

(6) The main objection to the validity of S. 14 of the impugned Act is that it offends Art. 14 of the Constitution of India and is therefore void under Art. 13 of the Constitution. If that objection prevails, it should be wholly needless to answer the first question, or even the second question as it has been framed. I shall deal later with the question, whether the declared invalidity of S. 14 of the impugned Act would involve the determination of the question, whether Part II of the impugned Act must be declared void, and inoperative.

(7) It is well settled that, with the initial presumption being in favour of the validity of a statute, investigations of the validity of a given statute or any part thereof should be limited to the extent absolutely necessary for the disposal of the issue before the Court. The issue can be narrowed down in the case before us to the question : "Are the petitioners liable to be returned to Singapore under S. 14, Fugitive Offenders Act?" That, in my opinion, can be answered effectively with reference to Arts. 13 and 14 of the Constitution of India.

(8) On the scope of Art. 13 of the Constitution, the learned Advocate General repeated before us the arguments that were accepted by Subba Rao J. in his decision on —'W. P. No. 568 of 1952 (Mad) (B) (unreported) :

". . . . the learned Advocate General drew a distinction between legislative power and infringement of a fundamental right. His argument may be put thus : So far as the question of the infringement of the fundamental right was concerned, having regard to the nature of the writ law, it was not the position that any law to the extent it was inconsistent with fundamental rights would become void as if it had been struck off from the statute book. It was only the person, whose right had been infringed, that could raise the question of the unconstitutionality of the enactment and not others, and the unconstitutionality of the enactment had to be decided only so far as it related to the person raising the question. To put it differently, the impugned section is not struck off from the statute book, but its validity will have to be considered only in relation to the petitioner, who complains that his fundamental rights have been infringed."

The learned Judge set out the three classes of cases formulated by Prof. Willis in his Constitutional Law of the United States, at page 91 :

"(i) There are situations where the Courts are in substantial agreement that an unconstitutional statute is void 'ab initio;

(ii) There is a second class of situations in which the courts are in conflict as to whether the rule should be the rule of void 'ab initio' or the rule of void from the date of the declaration of unconstitutionality; and

(iii) There is a third class of situations where the Courts generally refuse to apply the void 'ab initio' rule but instead apply the rule of void from the time of declaration."

After quoting further passages from Prof. Willis's Constitutional Law, Cooley's Constitutional Limitations and James Parker Hall's Constitutional Law, Subba Rao J. referred to the observations of Das and Mahajan JJ. in —'Kesavan Madhavan Menon v. State of Bombay', AIR 1951 S.C. 128 (C). Dealing with the scope of Art. 13 (1), Das J. observed at page 130 :

"It will be noticed that all that this clause declares is that all existing laws, in so far as they are inconsistent with the provisions of Part III shall to the extent of such inconsistency be void ... It must follow, therefore, that Art.13(1) can have no retrospective effect but is wholly prospective in its operation. After this first point is noted, it should further be seen that Art. 13(1) does not in terms make the existing laws which are inconsistent with fundamental rights, void 'ab initio' for all purposes. On the contrary, it provides that all existing laws, in so far as they are inconsistent with the fundamental rights, shall be void to the extent of their inconsistency. They are not void for all purposes, but they are void only to the extent they come into conflict with the fundamental rights. In other words, on and after the commencement of the Constitution no existing law will be permitted to stand in the way of the exercise of any of the fundamental rights. Therefore the voidness of the existing law is limited to the future exercise of the fundamental rights. Art. 13(1) cannot be read as obliterating the entire operation of the inconsistent laws or to wipe them out altogether from the statute book, for to do so will be to give them retrospective effect, which they do not possess.

Mahajan J. observed at page 136:

"It seems clear that an existing statute in spite of declaration by Court, that it is void, remains in force till 25-1-1950 and continues to remain on the statute book even after 26-1-1950, except that no effect can be given to any of its provisions, which are repugnant to the fundamental rights guaranteed by the Constitution. The effect of Art. 13(1) is only prospective and it operates in respect to the freedoms, which are infringed by the State subsequent to the coming into force of the Constitution."

The effect of these observations was summed up by Subba Rao J. as follows:

"They accepted the principle noticed in the various text books on American Constitutional law and held that by reason of Art. 13, a section offending the said article is not struck out from the statute book but no effect will be given to any of its provisions in regard to a person claiming that his fundamental rights are affected thereby."

I respectfully agree with the exposition of Subba Rao J. of the principles laid down by the Supreme Court of India.

(9) When such is the comparatively limited scope of determination by a judicial Court even in cases where Art. 13(1) of the Constitution of India is invoked, it should be needless to point out that a Court will not undertake the investigation of the alleged invalidity of a statute except to the extent absolutely necessary.

(10) It was common ground during the arguments before us that, though the impugned Act was enacted by the Parliament of Great Britain, upto 26-1-1950 the impugned Act was part of the Municipal law of what was at one time known as British India. The legislative competence of the Parliament to legislate for India in 1881 would never be in issue. S. 18(3) of the Indian Independence Act (X and XI George VI Ch. 13) ran:

"Save as otherwise expressly provided in this Act the law of British India and the several parts thereof existing immediately before the appointed day (that is, 15-8-1947), shall, so far as applicable and with the necessary adaptations, continue as the law of each of the new dominions and the several parts thereof until other provision is made by laws of the legislature of the dominion in question or by any other legislature or other authority having power in that behalf."

That continued the operation of the Fugitive Offenders Act, 1881, though it was not adapted up to 26-1-1950, when the Constitution of India took effect.

(11) Article 372(1) of the Constitution of India runs:

"Notwithstanding the repeal, by this Constitution of the enactments referred to in Art. 395, but subject to the other provisions of this Constitution, all the law in force in the territory of India immediately before the commencement of this Constitution shall continue in force therein until altered or repealed or amended by a competent Legislature or other competent authority."

Art. 372(2) empowered the President to adapt any of the laws in force to accord with the provisions of the Constitution. The Fugitive Offenders Act, 1881, was not adapted by any specific order of the President; nor does any other Act of the Parliament appear to have been adapted. As the learned Advocate General pointed out, the omission to adapt the impugned Act in no way affects the question, whether it continued in force as the law in the territory of India even after the commencement of the Constitution. Adaptation could not ensure the validity of an Act if it was invalid, that is, if it offended any of the Articles of the Constitution. It is not necessary to consider at this stage each of the several circumstances provided for by the Constitution in which an Act can be void and cease to be operative, as I have limited myself in this case only to Arts. 13 and 14 of the Constitution. If the impugned Act or any portion thereof, namely, S. 14, offends Art. 14, an earlier adaptation of the impugned Act under Art. 372(2) of the Constitution could not confer validity on the Act, nor ensure its continuance after the commencement of the Constitution..

(12) No more than Art. 13(1) does Art. 372(1) of the constitution operates as an automatic repeal of a statute at the commencement of the Constitution on 26-1-1950, even if the statute fails to satisfy the test imposed by Art. 372 in the phrase "subject to the other provisions of the Constitution." It may not be necessary to decide in these proceedings whether the phrase "subject to the other provisions of the Constitution" in Art. 372 is of wider significance than the phrase "in so far as they are inconsistent with the provisions of this Part" in Art. 13(1). Articles 13 & 14 of the Constitution are certainly "provisions of the Constitution" within the meaning of Art. 372(1). The continuance in force of S. 14 of the impugned Act after the commencement of the Constitution, provided for by Art. 372 (1) of the Constitution, is therefore subject to the provisions of Arts. 13 & 14. If S. 14 of the impugned Act contravenes Art. 14, that is, is inconsistent with Art. 14, Art. 13 should make S. 14 of the impugned Act void, to the extent of such inconsistency in the sense that S. 14 of the impugned Act is unenforceable by a Court of law against the petitioners in these proceedings.

(13) I shall first deal with the question, does S. 14 of the impugned Act offend Art. 14 of the Constitution?

(14) Article 14 is not limited to the citizens of India. Though that will have no real bearing on any of the questions at issue before me in these proceedings, the petitioners are citizens of India.

(15) Before I consider the question, whether Sec. 14 of the impugned Act constitutes a denial of the equal protection of the laws within the territory of India, within the meaning of Art. 14, it may be desirable to refer to the scheme of the Statutory law of extradition in India, which was in force prior to the commencement of the Constitution and which could, under Art. 372(1) of the Constitution continue in force after the commencement of the Constitution, subject, of course to the limitation prescribed by Art. 372. The Extradition Act, 1870 (33 and 34 Vict. Ch. LII) as amended from time to time and the Fugitive Offenders Act, 1881 (44 & 45 Vict. Ch. 59) were enacted by the Parliament of the United Kingdom. The Acts also applied to that part of India which was included in Her Majesty's Dominions. The Indian Extradition Act (15 of 1905) was enacted by the Indian Legislature. The preamble ran:

"Whereas it is expedient to provide for the more convenient administration in British India of the Extradition Acts, 1870 and 1873, and of the Fugitive Offenders Act, 1881;

And whereas it is also expedient to amend the law relating to the extradition of criminals in cases to which the Extradition Acts, 1870 and 1873 do not apply;"

(16) These statutes provided for the extradition of fugitive offenders found on the soil of what was then British India to four well-defined classes of countries or territories.

(17) Section 2, Extradition Act 1870 provided for the surrender of fugitives to a foreign State with which "an arrangement had been made by Her Majesty", that is, with which Her Majesty of the United Kingdom had entered into trea-

ties. S. 3, Indian Extradition Act also applied to these States. I shall call this group of foreign States as "treaty States", for my present purposes. It should, however, be noted that S. 23, Extradition Act of 1870 specifically saved the treaties for the extradition of criminals, which the Governor-General of India entered into with the Indian Native States or with other Asiatic States coterminous with British India. These, for the purposes of this classification, I exclude from the group of Treaty States.

(18) The second class consisted of the British Dominions (which included the United Kingdom) and the British possessions, which by statutory definition excluded the United Kingdom. The surrender of a fugitive offender between any of two of the territories of this class was regulated by the Fugitive Offenders Act, 1881. This class itself consisted of two subclauses. S. 2 in Part I of the Fugitive Offenders Act was general in its scope, in that it applied to all parts of Her Majesty's Dominions. S. 12 in Part II applied only to those groups of British possessions, to which "by reason of their contiguity or otherwise it was found expedient by Her Majesty to apply the same by an Order in Council." An Order in Council dated 2-1-1918 grouped together for the application of Part II of the Act, British India, Hong Kong, Straits Settlements, the Federated Malaya States as also some other territories.

(19) As already noticed, S. 3, Indian Extradition Act of 1903 dealt with the Treaty States. S. 7 of that Act dealt with the third and fourth classes of States, comprehensively grouped as "territories of any State not being a foreign State." That included what were known as the Indian Native States, and States to which Chapter 2, Indian Extradition Act including S. 3 thereof did not apply.

(20) For our present purposes it is sufficient to note two of the principal changes on and after 26-1-1950, when India proclaimed herself a Sovereign Democratic Republic. India ceased to be a British possession within the statutory meaning given to that expression in the Extradition laws; but India continued to be a member of the Commonwealth. The need for extradition arrangements with what were at one time known as the Indian Native States disappeared. They became an integral part of the Sovereign Democratic Republic of India and were described as Part B States in the Constitution. The Criminal Procedure Code Amending Act (1 of 1951) now regulates the apprehension of an offender who escapes from a Part B State to any other part of India.

(21) Therefore of the four classes of countries listed above, we need consider only three for defining the scope of the extradition laws of India. We need not concern ourselves with the fourth class at this stage, nor with the first, the "Treaty States." Neither the Extradition Act of 1870 nor the Indian Extradition Act of 1903 provided for the surrender of a fugitive offender by one part of the British Empire (I am using this expression for convenience and without any significance) to another. The Fugitive Offenders Act alone provided for that. Even after 26-1-1950, it is the Fugitive Offenders Act, 1881, alone that provides for the demand and surrender of fugitive offenders between India and the rest of the Commonwealth, of which India continues to be a member.

(22) The position of India as the extraditing country, that is, the country called upon to surrender a fugitive offender under the provisions of the Fugitive Offenders Act of 1881 may now be examined.

(23) Part I of the Act applies to a demand from every one of the territories other than those which have been grouped together by an Order in Council for the application of Part II of the Act. The main difference between the two groups in the procedure prescribed antecedent to the surrender or the return of the fugitive offender to the demanding country is that, while the demand is from a territory to which Part I applies, an Indian Court has to be satisfied by evidence tendered that the fugitive offender is 'prima facie' guilty of the offences with which he has been charged, the need for such evidence is dispensed with, if the demand is from a territory with which India was grouped by the Order in Council dated 2-1-1918, for example Singapore. Proof of authenticity of the warrant and the identity of the offender are then sufficient to justify an order to return the fugitive offender under S. 14, Fugitive Offenders Act. It is this difference that has been assailed as a discrimination amounting to denial of equality within the meaning of Art. 14 of the Constitution.

(24) In the oft quoted words of Prof. Willis (Constitutional Law) page 579:

> "The guaranty of the equal protection of the laws means the protection of equal laws. It forbids class legislation, but does not forbid classification which rests upon reasonable grounds of distinction. It does not prohibit legislation, which is limited either in the objects to which it is directed or by the territory within which it is to operate."

These principles were accepted by the Supreme Court of India. In — 'the State of Bombay v. F. N. Balsara', AIR 1951 S C 318 (D) Fazl Ali J. laid down:

> "The meaning and scope of this Article (Art. 14) has been fully discussed in the case of — 'Charanjitlal v. Union of India', AIR 1951 SC 41 (E), and the principles laid down in that case may be summarised as follows:
>
> 1. The presumption is always in favour of the constitutionality of an enactment, since it must be assumed that the legislature understands and correctly appreciates the needs of its own people, that its laws are directed to problems made manifest by experience and its discriminations are based on adequate grounds.
>
> 2. The presumption may be rebutted in certain cases by showing that on the face of the statute, there is no classification at all and no preference peculiar to any individual or class and not applicable to any other individual or class, and, yet the law hits only a particular individual or class.
>
> 3. The principle of equality does not mean that every law must have universal application for all persons who are not by nature, attainment or circumstances in the same position, and the varying needs of different classes of persons often require separate treatment.
>
> 4. The principle does not take away from the State the power of classifying persons for legitimate purposes.

5. Every classification is in some degree likely to produce some inequality, and mere production of inequality is not enough.

6. If a law deals equally with members of a well-defined class, it is not obnoxious and it is not open to the charge of denial of equal protection on the ground that it has no application to other persons.

7. While reasonable classification is permissible such classification must be based upon some real and substantial distinction bearing a reasonable and just relation to the object sought to be attained, and the classification cannot be made arbitrarily and without any substantial basis."

(25) Does the classification underlying Parts I and II and particularly S. 14 of the impugned Act satisfy the seventh of the tests formulated Fazl Ali J. is the real question. Is that classification based on some real and substantial distinction bearing a reasonable and just relation to the object sought to be attained by the Fugitive Offenders Act, 1881?

(26) The basis for the classification, that is, the differentiation between the territories to which Parts I and II of the impugned Act respectively apply, has been furnished by the Act itself, as also by the Order in Council issued under S. 12 of the Act on 2-1-1918. Section 12 of the Act ran:

"This part of this Act shall apply only to those groups of British possessions to which, by reason of their contiguity or otherwise, it may seem expedient to Her Majesty to apply the same."

In the preamble to the Order in Council dated 2-1-1918, it was stated:

"And whereas by reason of their contiguity or the frequent intercommunication between them, it seems expedient to His Majesty and conducive to the better administration of justice therein to apply Part II of the Fugitive Offenders Act to the abovenamed British possessions and protected States.... ...."

Geographical contiguity and frequences of intercommunication, between for instance India and Singapore, furnish a real and substantial basis for distinction between the territories to which Part I and to which Part II applied, that is, in relation to India.

(27) That basis for classification is still there, though India has ceased to be a British possession. Sri Nambiar who appeared for the petitioners, urged that the real basis for the classification disappeared when India ceased to be a British possession. I am unable to accept that argument. I have already pointed out that even after India became a Sovereign Democratic Republic the impugned Act continued to be part of the statutory law of those territories of India which were at one time designated British India, but that its continued validity after the commencement of the Constitution was a totally different question. Geographical contiguity and the frequence of intercommunication furnish now the only basis for the classification. Do they bear a just and reasonable relation to the object sought to be attained by the impugned Act is therefore the next question.

(27a) The declared object of the impugned Act was to provide for the demand and return of fugitive offenders between the defined groups of territories. It was the Parliament of the United Kingdom that provided the machinery for this, as it was competent to legislate for the entire group of these territories. The Extradition Act of 1870 and the Indian Extradition Act of 1903 provided for extradition between the other groups of countries.

(28) In Oppenheim's "International Law" Edn. 7, Vol. I, at page 635, the learned author said:

"Extradition is the delivery of an accused or convicted individual to the State on whose territory he is alleged to have committed, or to have been convicted of, crime, by the State on whose territory the alleged criminal happens for the time to be."

In Clarke upon Extradition, Edn. 4 the learned author, after observing at page 11, "that the granting of extradition is, if not scientifically speaking a matter of perfect obligation, at least a duty of public morality" summed up his conclusions at page 14:

"The surrender of fugitive criminals is an international duty. It may not be so plainly a matter of right that the refusal to grant it should subject a nation to the penalty of war, but such refusal is so clearly injurious to the country which refuses, and to the whole world, that it is a serious violation of the moral obligations which exist between civilised communities.

.....the recent course of European legislation has been.....to cast upon the legislature of a country the task of providing for the performance of this duty.

This provision should be guarded by the exclusion of political offenders, and the requirement of some evidence of guilt before the accused person is delivered up. It would be wise also to restrict the crimes for which surrender should be granted, according to the facility with which criminals could escape from one country to another; but to refuse to make provision at all, would be to inflict an injury upon the whole world, and especially upon the country so refusing.

The surrender, when so restricted, involves no interference with national independence, as the duty of punishing the crime could not be effectively and justly performed by any nation but that whose laws have been broken."

(29) This last aspect was also stressed by Corbett in his "Law and Society in the Relations of States" at page 173:

"One important expression of sense of world society would be the universal recognition of a duty on the part of States to surrender fugitive criminals for trial in the place where the crime was committed."

(30) Sri Nambiar contended that it should be the object of the extraditing country to ensure safeguards for the surrendered fugitive for a fair trial in the receiving country. One of these safeguards, the learned counsel urged, was prima facie evidence of the guilt of the fugitive offered to a Court in the extraditing country. To quote again the passage from Clarke:

"This provision (for extradition) should be guarded by.....the requirement of some evidence of guilt before the accused person is delivered up."

The terms on which extradition is granted are normally regulated by the local laws of the extraditing country. That is the position in India. As between two Sovereign States, the terms are normally settled by treaties between them. Section 2 of the Extradition Act of 1870 provided for the terms of the treaty being given statutory force by an Order in Council. Reci-

procity is the normal rule. Exclusion of political offenders from the scope of the extradition laws appears almost universal. Refusal to surrender a national of the extraditing country appears to rest on no other intelligible basis than the unwillingness of that country to expose its nationals to a trial in a foreign Court. As the text-book writers have pointed out, England and America did not ever display such reluctance except, of course, where reciprocity demanded it. Demand of prima facie evidence of guilt is only another such restriction, based in the first instance on reciprocity, and eventually on the Municipal law of the extraditing country. The validity of an Extradition law that dispenses with such prima facie evidence of guilt cannot be assailed on that basis alone. The validity of S. 14 of the impugned Act can be attacked in these proceedings not on the ground that it does not provide for such prima facie evidence of the guilt of the fugitive offender, but only on the ground that, while the extradition law applicable to a fugitive from other countries demands such evidence, S. 14 of the impugned Act does not. If, for instance, the extradition laws of India were uniform in dispensing with such evidence before the surrender of the fugitive offender, whichever be the country that asked for the surrender, it would be the competence of the legislature that would settle the question of the validity of those laws, and not the policy that underlay the legislation.

(31) Whether reciprocity can satisfy the test of the reasonableness of the Classification that underlay Parts I and II of the impugned Act, does not arise for consideration in this case. As I see it, reciprocity was the result of the classification, not the basis for it. Reciprocity in the surrender of fugitive offenders between India and the other countries including Singapore grouped together by the Order in Council issued under S. 12 of the impugned Act was imposed by legislation by a legislature competent then to legislate for the whole group of the territory included in the Order in Council.

(32) I agree with the learned Advocate General that, in testing the reasonableness of the classification that underlay Parts I and II of the impugned Act, the fact, that both were parts of the same statute, makes no difference. The position would have been just the same if Parts I & II had each constituted a separate enactment, and if the validity of the provisions of Part II had to be tested by the fundamental right guaranteed by Art. 14 of the Constitution.

(33) The learned Advocate General pointed out that the basic assumption of the impugned Act was that in each of the countries of the Commonwealth there was a trustworthy administration of justice, which would ensure as fair a trial for the fugitive offender in the receiving territory as in the extraditing country. He urged that S. 14 of the impugned Act prescribed a quicker procedure for contiguous territories by dispensing with prima facie evidence of the guilt of the fugitive offender, and that the resulting convenience of administration could be accepted as a reasonable basis for the classification. However attractive the argument may appear at first sight, it has to be rejected. In — 'State of West Bengal v. Anwar Ali Sarkar', AIR 1952 SC 75 (F) Mahajan J. observed at page 86:

> "Speedier trial of offences may be the reason and motive for the legislation but it does not amount either to a classification of offences or of cases. As pointed out by Chakravarthi J. the necessity of a speedy trial is too vague and uncertain a criterion to form the basis of a valid and reasonable classification."

These principles were not really departed from in — 'Kathi Raning Rawat v. State of Saurashtra', AIR 1952 SC 123 (G)

> "The mere mention of 'speedier trial' standing by itself provided no rational basis of classification. It was merely a description of the result sought to be achieved by the application of the special procedure laid down in the Act and afforded no help in determining what cases required speedier trial."

At page 128, after pointing out the rationale of the impugned Ordinance, Fazl Ali J. observed:

> "I am satisfied that this case is distinguishable from the case relating to the West Bengal Act, but I also feel that the legislatures should have recourse to legislation such as the present only in very special circumstances."

(34) As I have already stated, there is no difficulty in finding the basis for the classification of the two groups of territories in the impugned Act, because S. 12 of the Act itself and the Order in Council dated 2-1-1918 set it out in specific terms, namely, contiguity and frequent intercommunication.

(35) "Frequency of intercommunication" appears to me to be as vague and uncertain a criterion to furnish a basis for a valid and reasonable classification as "speedier trial". If it refers to the normal means of communication between India and Singapore, it means so little in these days of quick travel. There can be no absolute standard against which the reasonableness of the time factor can be tested. If it means that more people travel from India to Singapore and vice versa, that can have little to do with the object of the Fugitive Offenders Act, namely, the surrender of a fugitive. It has not been established that more fugitives escape from Singapore to India than, say, from England to India to justify the adoption of one procedure for the surrender of a fugitive from England and another for the surrender of a fugitive from Singapore. Frequent intercommunication is a nebulous basis for reasonable classification.

(36) We are left with geographical contiguity as virtually the sole factor in defence of the reasonableness of the classification. After observing "another classification for the police power may be geographical", Prof. Willis (Constitutional Law, pages 584 and 585) listed the cases where such classification was held to be reasonable. But the question still remains: Does the classification on the basis of geographical contiguity bear a reasonable and just relation to the object sought to be attained by the extradition laws of India.

(37) Earlier in this judgment I referred to the four classes of territories provided for by the extradition laws of India: (1) The Treaty States; (2) British Dominions and British possessions (now the Commonwealth which includes India); (3) What were known as the Indian Native States; and (4) other States. To the last two of these S. 7, Indian Extradition Act of 1903 applied. Of these four classes, the second class itself consisted of two sub-classes: (a) the territories grouped by an Order in Council issued under S. 12, Fugitive Offenders Act; and (b) Other British Dominions and

British possessions. The extradition or surrender of a fugitive offender from India to every one of these territories except those grouped by an Order in Council issued under S. 12, Fugitive Offenders Act necessitated prima facie evidence of the guilt of the offender to the satisfaction of an Indian Court, or in the case of territories in classes 3 and 4, to the satisfaction of the Political Agent. The geographical contiguity of Madras and Mysore, for instance, did not dispense with the need for such evidence, while the geographical contiguity of Madras and Singapore was enough to apply Ss. 12 and 14 of the impugned Act and dispense with such evidence. Of course, that consideration cannot prevail in that form now, as Mysore is part of India, and after 1-4-1951, there can be no question of Mysore invoking S. 7, Indian Extradition Act of 1903. All the same, it furnishes a fair indication of how frail geographical contiguity can be for the purpose of classification of the States to which the Indian laws extended the right of extradition. The duty that India owed to the Comity of Nations to provide for extradition was discharged by the Municipal legislation on the subject. Whether from the point of view of the duty in International Law so discharged, or the right in International law of the countries that ask for extradition, there seems to be no necessity to provide for a classification based on geographical contiguity alone, especially, if such classification is to be the basis for so vital a difference, vital both from the point of view of India, the extraditing country, and the Fugitive offender himself. The need for offering evidence to show that prima facie the offender is guilty of the crimes with which he has been charged by the country asking for his extradition has been well recognised. Though it may not be an integral part of the law of extradition of every State in relation to every other State, it is certainly a normal feature, and one can even say, almost a universal feature of extradition laws. To dispense with such a need, there must, in my opinion, be some basis better than geographical contiguity alone, if the test of "equal protection of the laws within the territory of India" specifically provided for by Art. 14 of the Constitution is to apply. I am unable to hold that the discharge of the duty India owes to herself and the other States in the Comity of Nations to provide for the extradition or the surrender of a fugitive offender can be any the less effective if prima facie proof of the guilt of the offender is asked for in all cases of demands for the surrender of a fugitive offender, whichever be the country that prefers that demand.

(38) Judged by that test, of reasonable and just relation between the basis of the classification in the impugned Act and the object of that Act, the classification fails. I hold that the discrimination based on the differentiation between the territories to which Parts I and II of the impugned Act respectively apply has no just and reasonable basis, no just and reasonable relation to the object of the impugned Act.

(39) In my opinion S. 14 of the impugned Act offends Art. 14 of the Constitution in that it denies "the equal protection of the laws within the territory of India", that is, the laws relating to extradition and surrender of fugitive offenders and that, to that extent, S. 14 is void under Art. 13(1) of the Constitution.

(40) It should be sufficient to record that answer for the disposal of the proceedings now pending in the Court of the Chief Presidency Magistrate against the petitioners. As I have already pointed out, if the Chief Presidency Magistrate cannot order the return of the petitioners to Singapore under S. 14 Fugitive Offenders Act, the proceedings as instituted against the petitioners must terminate in their discharge. It is not, therefore, necessary to answer even the second of the questions as framed by the learned Chief Presidency Magistrate.

(41) It is really unnecessary for the disposal of the proceedings against the petitioners now pending in the Court of the Chief Presidency Magistrate to investigate the validity of Part II of the impugned Act as a whole, or to go into the question, whether Sec. 14 cannot be severed from the rest of Part II. Should it be necessary, I have to hold that S. 14 is severable from the rest of Part II. The grouping of territories by itself under S. 12 of the Act may not affect the fugitive offender, if it does not lead to an order under S. 14. Nor can S. 13, which provides for the backing of the warrant issued by a Magistrate of the demanding country by the Magistrate of the extraditing country, really affect the real question, is the fugitive offender liable to be returned? That can be answered only with reference to S. 14. Ss. 15, 16, 17 and 18 do not call for any special notice in determining the ultimate liability of the fugitive offender to be returned. S. 19 of the Act is really analogous to S. 10 in Part I and affords no basis for any charge of discrimination.

(42) Though such of the arguments advanced before us centred round the first of the questions formulated by the learned Chief Presidency Magistrate, it is not necessary to answer that question for the disposal of the claim preferred to the Chief Presidency Magistrate, that the petitioners are liable to be returned to Singapore under S. 14, Fugitive Offenders Act. I, therefore, refrain from answering that question.

(43) My answer to the second question is that S. 14, Fugitive Offenders Act is inconsistent with the fundamental right of equal protection of the laws guaranteed by Art. 14 of the Constitution and is to that extent void and unenforceable against the petitioners.

(44) CHANDRA REDDY J. : I agree. The two questions that have been referred to us by the Chief Presidency Magistrate are :

1. Whether the Fugitive Offenders Act, 1881 applies to India after 26-1-1950, when India became a Sovereign Democratic Republic; and
2. Whether, even if it applied, it or any part of its provision is repugnant to the Constitution of India and is therefore void and inoperative?

In the order of my learned brother the circumstances necessitating the reference under S. 432, Criminal P. C. have been set out fully, and I do not propose to traverse same ground.

(45) The first question which was elaborately argued by the counsel on both sides covers a wide ground. But we do not propose to go into that larger question in the view we take

of the second point. The question whether extradition is an international duty or an international necessity was debated at great length. An elaborate discussion on this topic is not called for. As pointed out by Openheim in his International Law "there is no universal rule of customary international law in existence which commands extradition". No doubt it is the duty of every civilised State to which an individual has escaped after committing an extraditable crime abroad either to punish him or to surrender him to the prosecuting State. It is also a well recognised principle that an offender is best punished by the laws of the country which have been broken by him. Apart from this the surrender of a fugitive offender or a fugitive criminal to the State that demands extradition will facilitate the trial of the offender and also save unnecessary expenditure to the State from which extradition is sought. Almost all the countries have come to recognise the need for extradition and treaties have arisen between the countries in this direction. The need has become all the greater under modern conditions of developed intercommunications with the appearance of Trans-Atlantic Steamships and aeroplanes when individuals can easily escape into a foreign country having committed an offence. Consequent on this, States have realised that it is in the common interests to surrender such criminals to each other. It is needless to pursue this matter further here.

(46) So far as India was concerned prior to 26-1-1950, there were two enactments governing the extradition, the Fugitive Offenders Act regulating the procedure for the surrender of the criminals as between British India and other countries forming the British possessions, and the Indian Extradition Act passed by the Indian Legislature under the authority conferred by the Fugitive Offenders Act (hereinafter referred to as the Act) regulating extradition between British India and foreign States including native States. By order in Council dated 7-3-1904, Chap 4 of the Indian Extradition Act, 1903 passed by the Governor General of India in Council was declared to have effect as if it was part of the Fugitive Offenders Act, 1881.

(47) The Fugitive Offenders Act was passed by the British Parliament in the year 1881 the object of which was to amend the Act with regard to fugitive offenders in Her Majesty's dominions, and other purposes connected with the trial of the offenders. This Act contains two parts and we are more particularly concerned with Part II in this enquiry, as extradition sought in the case before us is under Part II of the Act.

(48) Part II relates to the Inter-Colonial backing of warrants and it can be only applied to British possessions to which by reason of their contiguity or otherwise it may seem expedient to Her Majesty to apply the same. The second paragraph of S. 12, Part II runs thus :

> "It shall be lawful for Her Majesty from time to time by order in Council to direct that this part of this Act shall apply to the group of British possessions mentioned in the Order, and by the same or any subsequent order to except certain offences from the application of this part of this Act and to limit the application of this part of this Act by such conditions, exceptions and qualifications as may be deemed expedient."

By virtue of this power by an order in Council dated 2-1-1918, for purposes of Part II of the Fugitive Offenders Act, certain territories forming British possessions and protected States with British India were grouped together : Ceylon, Hong-Kong, the Straits Settlement, the Federated Malay States, Johore, Kedah etc. The result was that so far as British India was concerned, extradition between her and other countries mentioned in the Order in Council was regulated by the provisions of Part II of the Act, while the other part of the country which consisted of native States was governed by the Indian Extradition Act.

(49) It is now necessary to notice the difference between Part I and Part II of the Act. The main distinction in so far as it has a bearing on the questions before us is that under Part I, Sec. 5 a fugitive could be surrendered only when the evidence produced was such as would raise a strong or probable presumption that the fugitive committed the offence mentioned in the warrant, whereas under S. 14 of Part II the necessity for the production of evidence to make out a prima facie case is dispensed with. In this connection it is also useful to refer to S. 13 also :

> "Where in a British possession of a group to which this part of this Act applies, a warrant has been issued for the apprehension of a person accused of an offence punishable by law in that possession, and such person is or is suspected of being in or on the way to another British possession of the same group, a Magistrate in the last mentioned possession, if satisfied that the warrant was issued by a person having lawful authority to issue the same, may endorse such warrant in manner provided by this Act, and the warrant so endorsed shall be a sufficient authority to apprehend within the jurisdiction of the endorsing Magistrate the person named in the warrant, and bring him before the endorsing Magistrate or some other Magistrate in the same British possession."

Under S. 14 all that has to be proved is that the warrant was duly authenticated and was issued by a person having lawful authority to issue the same and that the prisoner is the person named or described in the warrant.

(50) In passing, I may mention that even under the Indian Extradition Act, before the surrender of a fugitive criminal could be demanded, it was essential that a 'prima facie' case should be made out in support of the requisition.

(51) It is this distinction between S. 5 of the Part I and S. 14 of Part II that is impugned as repugnant to the Constitution of India. The relevant provision of the Constitution which it is said to violate is Art. 14 which is included in Chap. 3 of the Constitution which guarantees certain fundamental rights to the people of India. The scope of this enquiry is restricted to an examination of the relevant provisions of the Act in the light of Art. 14 of the Constitution. Article 14 runs thus :

> "The State shall not deny to any person equality before the law or the equal protec-

tion of the laws within the territory of India."

Here we are only concerned with the second clause namely "equal protection of the laws". It may be mentioned that this is based on the fourteenth Amendment to the American Constitution. As observed in 'Yick Wo v. Hopkins', (1886) 118 U.S. 356 (H), equal protection of laws is a pledge of the protection of equal laws." It gives the required minimum of protection for every one's right of liberty and property. It was pointed out by Taft C. J. in —'Truax v. Corrigan', (1921) 257 U.S. 312 (I), when dealing with the fourteenth Amendment which contains a provision for due process of law and equal protection. "The guarantee was aimed at undue favour and individual or class privilege on the one hand and at hostile discrimination or oppression of inequality on the other. It sought equality of treatment of all persons" etc. . . . "This guarantee was intended to secure equality of protection not only for all but against all similarly situated."

(52) It is this principle that underlies the second clause of Art. 14. It is thus seen that Art. 14 contains an inhibition against discrimination either in favour of a person or a class or against any individual or particular group of individuals. Art. 14 does not prohibit the Legislature from enacting special laws as applicable to a particular group in a State, nor does it forbid classification resting upon reasonable grounds of distinction. The principle is stated by Willis on Constitutional Law at page 579 thus :

"The guaranty of the equal protection of the laws means the protection of equal laws. It forbids class legislation but does not forbid classification which rests upon reasonable grounds of distinction. It does not prohibit legislation, which is limited either in the objects to which it is directed or by the territory within which it is to operate. It merely requires that all persons subjected to such legislation shall be treated alike under like circumstances and conditions both in the privileges conferred and in the liabilities imposed. The inhibition of the amendment was designed to prevent any person or class of persons from being singled out as a special subject for discriminating and hostile legislation."

The author further points out that while the equality principle does not preclude the States from classifying in the adoption of certain laws and on the other hand gives them wide discretion in the matter, it will nullify classification when it is done without any reasonable basis.

(53) This passage has been cited with approval in —'AIR 1951 S.C. 41 (E). Fazl Ali J. in the same case accepted this statement of Willis as correct exposition of the principle. At page 45 the learned Judge observes thus :

"I wish to lay particular emphasis on the principle enunciated by him that any classification which is arbitrary and which is made without any basis is no classification and a proper classification must always rest upon some difference and must bear a reasonable and just relation to the things in respect of which it is proposed."

(54) While dealing with Art. 14 of the Constitution Mukherjea J. remarked at page 57 that there should be no discrimination between one person and another if as regards the subject matter of the legislation their position is the same.

(55) This doctrine is reiterated by the Supreme Court in —'AIR 1952 S. C. 75 (F). It is pointed out by Patanjali Sastri C. J. in that case that Art. 14 of the Constitution is a safeguard given to the citizens of India throughout the territory against arbitrary laws and arbitrary applications of laws, and that it is intended to prevent discrimination both in the legislative and administrative spheres in India. Fazl Ali J. in the same case sums up the position thus :

"Art. 14 is designed to protect all persons placed in similar circumstances against legislative discrimination, and if the Legislature takes care to reasonably classify persons for legislative purposes and if it deals equally with all persons belonging to a well-defined class, it is not open to the charge of denial of equal protection on the ground that the law does not apply to other persons."

This principle is re-affirmed in some other decisions of the Supreme Court also. See — 'AIR 1952 S. C. 123 (G).

(56) Bearing the principle in mind I have to see whether S. 14 of Part II of the Act, in any way, offends against the fundamental right guaranteed under Art. 14 of the Constitution. While examining this question, the well settled rule of construction that constitutionality of a statute should be presumed cannot be overlooked. But at the same time, it should also be remembered that if any enactment is inconsistent with any of the provisions of the Constitution, it is the duty of this Court to strike off such a legislation. If any law in force, or to be passed after the Constitution comes into force, abridges any of the rights granted under the Constitution, such a law should be declared to be void to the extent which transgresses that fundamental right. The fundamental right guaranteed in Chapter III of the Constitution can be taken away only in the manner indicated in that chapter. Unlike the Parliament of England whose powers are absolute and transcendent, the Legislatures in India cannot enact any laws which are repugnant to the Constitution which is supreme and which fixes limits to the exercise of legislative authority & prescribes an orbit within which the latter body should move. Any law to be passed by the Legislatures should be conformable to the Constitution or else it would be void. That being so, I have to consider whether Sec. 14, Part II of the Fugitive Offenders Act which was a law in force on the date the Constitution came into effect, offends against the provisions of Art. 14 of the Constitution.

(57) Geographical contiguity and frequency of intercommunications formed the basis for grouping India and other countries mentioned in the Order in Council dated 2-1-1918 for the purpose of the applicability of Part II of the Act. It should be recalled in this connection that this test has only limited application, because it applied only as amongst the countries forming British possessions and did not govern the relation between a part of the British India and the adjoining native State in the matter of extradition. Native States as they were described before 26-1-1950 did not form part of the British possessions and as such

were not governed by the Fugitive Offenders Act. Extradition between British India and Native States was governed by the provisions of the Indian Extradition Act.

(58) The learned Advocate General sought to justify the above mentioned grouping on the additional grounds namely that there was a trustworthy administration of criminal justice in those countries and that it was designed to have speedy trial. I do not think that I can accede to this argument based on speedy disposal. That cannot form the basis of reasonable classification and as pointed out by Mahajan J. in —'AIR 1952 S. C. 75 (F), speedier trial of offences may be the reason and motive for the legislation but it does not amount either to classification of offences or of cases. The necessity for a speedy trial cannot furnish basis for valid and reasonable classification.

(59) Coming now to the argument based on the existence of trustworthy administration of criminal justice in the British possessions which were grouped together, apart from the question as to how far that can be a reasonable and substantial ground of distinction, that consideration no longer applies to the present day so far as at least India is concerned. Now the same system of criminal jurisprudence prevails in all the parts of India. Parliament of India has amended the Criminal Procedure Code by the Criminal Procedure Code Amending Act I of 1951 by which all the provisions of the Criminal Procedure Code are made applicable to all the States of India.

(60) The learned Advocate General in support of his contention that a geographical contiguity could furnish a reasonable basis for classification relied on a passage in the Constitutional Law by Willis that a geographical classification for police power is a proper one. No doubt in some cases classification based on geographical contiguity may be a sound one and may not be hit at by the doctrine of equal protection of laws. The result of the American decisions and of Supreme Court is that any classification for purposes of legislation must have a real and substantial distinction bearing a just and reasonable relation to the objects to be attained. It should not be arbitrary one without reference to the purpose for which the legislation is made. Further, this geographical contiguity and the frequency of communication which are mentioned as the reasons for grouping these countries together had only limited application even at the inception since it was only applicable to certain of the British possessions. This principle could not be extended to the whole of India. This basis of distinction for applying Part II to any of the countries specified in the order including British India which forms now Part A States does not bear a reasonable and just relation to the object of those laws. The purpose of the extradition is to secure the surrender of an individual guilty of extraditable crime and it could be achieved without depriving him of his right to require the prosecuting State to lead evidence as would raise a strong presumption of his guilt as required both in Part I of the Act and the Indian Extradition Act. If that were so, the grounds of distinction are unsubstantial and unrelated to the object of extradition laws. To surrender a fugitive offender without a 'prima facie' case being made out is opposed to principles of natural justice.

(61) At the risk of repetition, it may be recalled that Part II of the Act is applicable only to the part of India which was known prior to the attainment of Independence as British India & which now constitutes Part A states & that the native States which now constitute Part B States under the Constitution, did not come within the purview of the Act. The consequence is that two producers, one prescribed under Part I, S. 5 para 2 requiring production of evidence raising a strong and probable presumption that the fugitive committed the offence mentioned in the warrant as the 'sine quo non' of surrender and another laid down in S. 14 of Part II dispensing with such a necessity, exist side by side in the area to which the Act applied. If the extradition of a fugitive offender is sought from any of the part of an A State what was designed comprehensively as British India prior to the establishment of India as a Sovereign Republic, the procedure applicable is that prescribed in Part II of the Act, while if a demand for surrender of an offender is made to any Native State now included in the list of Part B States a different procedure namely the requirement of a 'prima facie' case has to be followed. Can this classification be justified on any rational basis? In another way also it is discriminatory. If an Indian national escapes into any of the Part A States from any country which formed part of British possessions, one procedure has to be followed while another fleeing to the same place from a State which was not a part of British possessions a different procedure has to be followed. Here again there does not seem to be a reasonable basis for the distinction. At any rate after India has become Sovereign Republic and when citizens of India similarly situated are entitled to similar treatment, there does not seem to be any justifiable basis for this distinction. No doubt it is not the identity of treatment that is required under Art. 14 but it is similarity of treatment that is guaranteed under the relevant Articles of the Constitution. After the declaration of Independence of India the principle of geographical contiguity cannot have any basis at all. I may point out that viewed in the light of the doctrine of equal protection of laws the test of geographical classification is bound to fail even with reference to the time of the grouping together of some of the British possession for the application of Part II of the Act for the reason that it had only a limited application in that a part of India was excluded from the ambit of the Act. Any Indian citizen whose extradition is sought under Part II of the Act may legitimately put the question as to why a less advantageous procedure should be adopted against him, while another individual similarly situated should have a more favourable procedure.

(62) For these reasons, I have reached the decision that S. 14 of Part II of the Act offends against the provisions of the Constitution being discriminatory in its effect. Consequently, it has to be declared inoperative against the petitioners who have invoked the fundamental rights guaranteed under Art. 14 of the Constitution. In this enquiry it is not necessary for us to decide whether the petitioners can be

extradited under the other provisions of the Act or other extradition laws.

(63) ('Order' delivered by Rajagopalan J.) :— We do not consider it necessary to answer the first of the two questions formulated by the Chief Presidency Magistrate. Our answer to the second question in the form to which we have restricted it is, Sec. 14 of the Fugitive Offenders Act is inconsistent with the fundamental rights of equal protection of laws guaranteed by Art. 14 of the Constitution and is to that extent void and unenforceable against the petitioners. Reference answered.

A/R.G.D. Answer accordingly.

A. I. R. 1953 MADRAS 740 (Vol. 40, C. N. 282)

SUBBA RAO AND RAMASWAMI JJ.

Dana Lakshmi Ammal and others, Appellants v. Pichayya Naidu and another, Respondents.

Appeal No. 203 of 1949, D/- 26-11-1952.

Registration Act (1908), S. 17 (3) — Authority to adopt given by will — (General Clauses Act (1897), S. 3 (64))—(Succession Act (1925), S. 2 (h)) — (Hindu Law — Adoption).

A document is a Will if it contains specific words of bequest to come into effect after the death of the testator. Where the terms of a will are ambiguous and where the alleged words of devise are consistent with a testamentary disposition and also with a narrative, it is open to a Court on a reading of the entire document to hold that in the context the words are not words of disposition but only form part of a narrative. (Para 6)

But where there are clear words of devise, it is not permissible for a Court to ignore them and hold that the document is not a will on the ground that the will was invalid or for the reason that even if the will had not been executed the same legal consequences would flow. For the purpose of construction of a document, the validity of the will or its clauses must be ignored. 10 Moo Ind App 279 (PC); 19 Cal 452 (PC); 27 Mad 30; AIR 1922 PC 162 (2); AIR 1946 PC 103; AIR 1920 Mad 237, Discussed. (Para 7)

A document was styled a will. It deliberately broke the line of succession and contained, 'inter alia', the following posthumous directions of the executant: "If in case it is not possible for me to take the said boy in adoption during my lifetime, I have in order that my third wife D shall take R in adoption for me given authority under this will to my (third) wife the aforesaid D. The adopted son, namely, R who is so taken in adoption to me by my third wife shall like unto my 'aurasa' son take my properties and the hereditary office of the village munsif and enjoy them."

Held that the words "take and enjoy" were clear words of devise, that the testamentary character of the document was established, that though not registered it was admissible in evidence and that power to adopt incorporated therein could be relied upon to sustain the adoption. (Para 9)

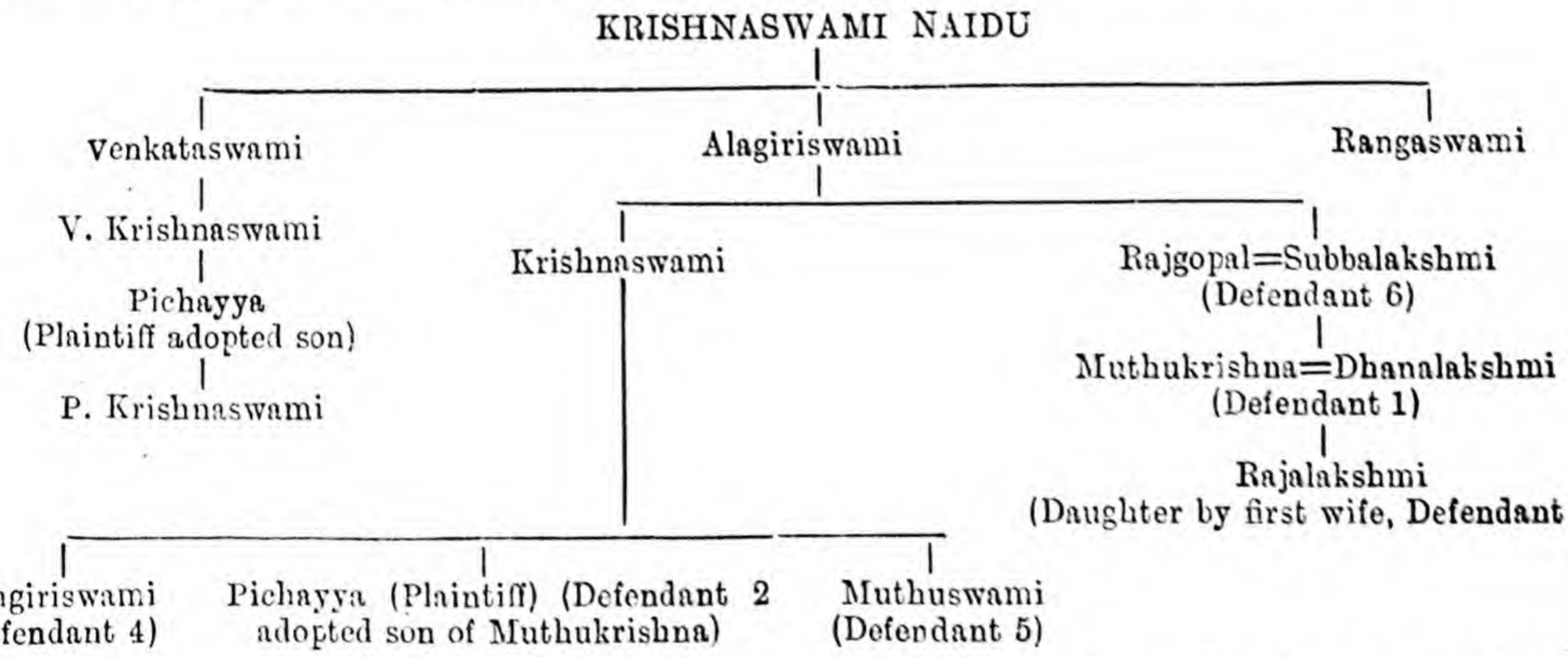
Anno: Reg. Act, S. 17 N. 73 Pt. 3; Suc. Act, S. 2 N. 7.

V. Sundaresan, for Appellants; S. V. Rama Iyengar, for Respondents.

CASES CITED:

(A) (1863-66) 10 Moo Ind App 279 (PC)
(B) (1900) 19 Cal 452: 19 Ind App 101 (PC)
(C) ('04) 27 Mad 30
(D) ('22) AIR 1922 PC 162(2): 44 Mad 733 (PC)
(E) ('46) AIR 1946 PC 103: 1946-2 Mad LJ 235 (PC)
(F) ('20) AIR 1920 Mad 237: 12 Mad LW 596

SUBBA RAO J.: This is an appeal against the decree and judgment of the Court of the Subordinate Judge, Tinnevelly, in a suit filed by the first respondent for a declaration that the second defendant is not the adopted son of the first defendant and the alleged adoption is neither true in fact nor valid in law. For convenience of reference the following genealogy may usefully be read:



(2) Muthukrishna Naidu died on 22-6-1941. The first defendant is his widow, Danalakshmi Ammal. He died possessed of the plaint schedule properties. He is alleged to have executed a document styled will dated 21-6-1941. Pursuant to the power to adopt conferred on her under the said document the first defendant took the second defendant in adoption. The second defendant is the sister's son of the first defendant. The plaintiff's case is that the document dated 21-6-1941 was not executed by Muthukrishna Naidu in a sound disposing state of mind and that even if he did, the said document conferred only a bare power to adopt on the first defendant, and not having been registered, invalid and inadmissible in evidence. He also denied that the adoption, in fact, had taken place. The third defendant is the daughter of Muthukrishna Naidu by his first wife. Defendants 4 and 5 are Muthukrishna Naidu's paternal uncle's sons. Plaintiff is a brother of defendants 4 and 5 but taken in adoption by Muthukrishna's father's father's brother's son. The sixth defen-

dant is Muthukrishna's mother. Defendants 1, 2, 3 and 6 denied the allegations in the plaint and contended that the document dated 21-6-1941 was a Will and that the adoption was true in fact and valid in law. The 5th defendant was 'ex parte;' the 4th defendant appeared in person and stated that he had no contest. On the pleadings the following issues were framed:

1. Whether the plaint has not been properly valued and proper court-fee paid?
2. Whether the suit is barred by res judicata?
3. Whether defendants 3 and 4 have colluded with the other defendants?
4. Whether the suit as brought is maintainable?
5. Whether the Will set up by the defendants is true and valid?

5-a. Whether the will merely amounts to a power to adopt and so invalid for want of registration?

6. Whether the adoption is not valid.
7. Whether the family members consented to the adoption?
8. Whether the preferential claim of the plaintiff to the village Munsif's office is correct?
9. To what relief, if any, is the plaintiff entitled?

The learned Subordinate Judge held that the document, dated 21-6-1941 was executed by Muthukrishna in a sound disposing state of mind and that the adoption was true. But he held that the document was not a Will but one conferring a power to adopt and, therefore, was invalid for want of registration. He further held that the consent of the next reversioners on the basis of the alleged power would not validate the adoption as the conferment of the power itself was held to be invalid. In the result he decreed the suit. Defendants 1, 2, 3 and 6 prefer the above appeal.

(3) The factum of adoption was not disputed before us. The learned counsel for the appellants argued that the learned Subordinate Judge was wrong in holding that the aforesaid document was not a will. The learned counsel for the respondent, while supporting the construction of the Subordinate Judge put upon the said document, contended that the finding of the learned Subordinate Judge that the document was executed by Muthukrishna in a sound disposing state of mind was wrong. The other findings of the learned Subordinate Judge were accepted by the parties.

We shall first take the question whether the document dated 21-6-1941 was executed by Muthukrishna in a sound disposing state of mind.

(After discussing the evidence in the case His Lordship proceeded). We therefere accept the finding of the court below that Muthukrishna executed Ex. B. 2 in a sound disposing state of mind.

(4) Learned counsel for the appellant then contended that the construction put upon Ex. B. 2 by the learned Judge was not correct. He argued that on a fair reading of the document, it would be clear that it is a document of a testamentary character. Before we consider the contents of this document, it may be convenient at this stage to refer to the cases cited on either side to discover if possible rules of construction which may afford guidance for us to construe this document. In — 'Mst. Bhoobun Moyee v. Ramkishore', 10 Moo Ind App 279 (A), the question was whether a deed of permission to adopt given by one Kishore Acharj Chowdry to his wife Chandrabullee Debia was valid and whether the adoption made pursuant to that permission was true. That question depended upon a construction of a document dated 9-11-1819. The relevant portion of the document reads:

"Subsequently, by the Will of God, you have given birth to a male child. Still, having regard to the future, I have again given you permission. If, which God forbid, the male child of your body be non-existent, then you will adopt a son from my race (Gotra) or from a different race (gotra) for the purpose of performing mine and your 'Shradh and other rites, and for the sheba (service) of the Gods and for the succession to the Zamindary and other property; on which, if the adopted son be non-existent, which God forbid, then you shall, according to your pleasure, on the failure of one, adopt other sons in succession, to avoid the extinction of the 'pinda' (funeral cake or offering); that 'dattaka' (adopted) son shall be entitled to perform your and my 'shradh' etc., and that of our ancestors, and also to succeed to the property."

In construing the document the Judicial Committee observed at page 309:

"The instrument before us is merely what it purports to be, a deed of permission to adopt; it is not of a testamentary character, it was registered as a deed in the lifetime of the maker; it contains no words of devise, nor was it the intention of the maker that it should contain any disposition of his estate, except so far as such disposition might result from the adoption of a son under it. He mentions the objects which induced him to make the deed — religious motives, the perpetuation of his family, and the succession to his property; but it was by the adoption, and only by the adoption, that those objects were to be secured, and only to the extent in which the adoption could secure them."

The document construed by their Lordships obviously contained no testamentary disposition. There were no words of devise. A bare power of adoption was conferred on the widow and the object of the adoption was mentioned, namely, to succeed to the property.

(5) In — 'Bireshwar Mookerji v. Ardhachander Roy', 19 Ind App 101 (PC) (B), the question was whether a bequest was to the boy to be adopted as a 'persona grata' or whether it depended upon whether the adoption was a condition precedent for the bequest taking effect. The testator mentioned in the will that the legatee was attached to him and his wife, and that he had a mind to give a portion of the property to his daughters and the balance to him, that he had taken the boy in adoption and that therefore he was bequeathing the properties to him, the Judicial Committee thought that he did not select the boy as an adopted son but for reasons independent of adoption, though they were likely to lead to it. On the construction of that will the Judicial Committee held that the boy took the bequest even though the adoption was held to be invalid. This decision, in our view, is not really relevant to the question raised before us. In — 'Somasundara Mudali v. Duraiswami Mudali', 27 Mad 30 (C), Benson and Bashyam Aiyangar JJ. had to construe a document conferring an authority to adopt. The document in question was described as a will executed by Somasundara Mudali. Under the document he gave Vanji Anni, his wife, a power to adopt. The material part of the document reads:

"I have given you authority to adopt Somasundaram, second son of Vaiyapuri Mudaliar Avergal .....I have further hereby given you authority to put into his possession all the properties which I got under the decree in suit No. 50 of 1899 on the file of the Subordinate Judge's Court of Kumbakonam. If you are not willing to adopt the said Somasundaram, you shall adopt any-

body you please and put the properties into his possession."

The learned Judges held that the later clause directing her to put the adopted son in possession of the properties was a statement of the consequences that should follow on the adoption. In that view they held that the authority to adopt being in writing and not contained in a Will and not being registered, it was inoperative to confer such authority under Ss. 17 and 49, Registration Act. It may be noticed that in this case there are no specific words of devise. In — 'Jagannatha Bheema Deo v. Kunja Behari Deo', AIR 1922 P. C. 162(2)(D), the Judicial Committee had another occasion to construe a document to ascertain whether it contained a testamentary disposition or whether it only conferred a power to adopt. There the document was described as a Will. The operative contents of the document were found in the following passage:

"I have consented to your adopting a son at your pleasure and conducting the management of the estate in the best manner. None of my heirs shall have cause to raise disputes touching this matter. This will has been executed with my consent."

Viscount Haldane made the following observations in construing the document at page 163:

"That standing by itself appears to their Lordships to be no more than a present authority to the wife to make an adoption, and there is nothing else of substance in the document. It may be that the writer was in a position under the law applicable to give her such power, but whether he was or was not, he purports to give her nothing else; for the references to property that occur in it are no more than consequences of the guardianship of the wife, and the character of being a Will is not established independently of these."

(6) The document in this case also does not contain any words of devise. Strong reliance was placed by the learned counsel for the respondent on the judgment of the Privy Council in — 'Shyam Pratap Singh v. Collector of Ettawah', AIR 1946 A. C. 103 (E). The document in that case was in the following terms:

"To-day (Kumar Madho Singh) has given him (Maha Vindeshri Pratap Singh) to me in adoption and I have taken him in adoption. After my death, my adopted son, Lal Maha Vindeshri Pratap Singh, shall be the 'gaddinashin' and the owner of my entire moveable and immoveable property. After my death, he shall like myself, have all the powers. Lal Maha Vindeshri Pratap Singh is yet a minor, therefore during his minority, my mother Rani Beshni Madho Kumar, who was my guardian during my minority, and who managed the entire estate very well, shall remain the guardian of my adopted son Lal Maha Vindeshri Pratap Singh and shall manage the entire estate. I have therefore executed this will while in a sound state of body and mind and after full deliberation."

The question was whether the said document was a Will within the meaning of the Indian Succession Act. It was contended that the words "after my death my adopted son Lal Maha Vindeshri Pratap Singh, shall be the gaddinashin .....and the owner of my entire moveable and immoveable property" was a testamentary disposition. In dealing with that contention, Sir John Beaumont made the following remarks at page 106:

"Their Lordships do not doubt that these words, taken out of their context, would operate as an effective gift of the whole of the testator's property, but taking the document as a whole their Lordships prefer the view of the Subordinate Judge. It will be observed that there are no direct words of gift in the Will, and that there was no object in giving to the adopted son property which he would inherit under the law whilst the words imputing that he would take the whole estate are as consistent with mere narrative as with gift."

It is said by making these observations the Judicial Committee held that even though there are definite words of devise in a document, if they are unnecessary and if the adopted son would take the estate even if these words were not found in the document, the Court should hold that such a document is not a will. We do not think that the Judicial Committee intended to lay down any such sweeping proposition. In the case before them, though the words used in the document in a different context could be interpreted as words of devise, they were consistent with mere narrative as with gift. Therefore they held that in the context the words were not words of devise but were only an expression of the consequences that would follow on adoption. The adopted son would be owner of his entire properties. But we do not understand those observations to mean that even if there are specific words of devise, a Court should ignore them and construe them as only a narrative. To illustrate, suppose a testator says in clear terms that he bequeathed his entire properties to the adopted son, we think it is not permissible as a rule of construction to hold that the document is not a will but only a statement of fact. Where the terms of a will are ambiguous and where the alleged words of devise are consistent with a testamentary disposition and also with a narrative, it is open to a Court on a reading of the entire document to hold that in the context the words are not words of disposition but only form part of a narrative. It is not necessary to multiply cases. Nor is it necessary to consider the cases cited by learned counsel for the appellants laying down general rules of construction of Wills.

(7) The document is a Will if it contains specific words of bequest to come into effect after the death of the testator. If there are specific words of devise it is not permissible to ignore them. The validity of a Will in all its clauses is not a relevant consideration in ascertaining whether a document contains a testamentary disposition or is only a conferment of an authority to adopt. To illustrate a minor may execute a will though the will is invalid. See —'K. Viziyarathnam v. Sudarsana Rao', AIR 1920 Mad 237 (F). A testament may dispose of inalienable property or a property in regard to which the testator had no title. The document would be a will but the disposal clause would not operate on the properties conveyed. So too when a member of a joint family makes a bequest of joint family property, the document would be a will but it could not confer any title on the legatee as the testator had no power to dispose of joint family properties. If under a document a power to adopt is conferred on the widow but it does not contain any words of devise, it is obvious it is not a will. It may be in some cases that the alleged words of devise are ambiguous and are consistent with a narrative and a declaration of the consequences of adoption. In such cases, having regard to the context, a Court may hold that the document only conferred a power or authority to the widow and the ambiguous words of devise are only a statement of the legal consequences of an adoption. But where there are clear words of devise, it is not permissible for a Court to ignore them and

hold that the document is not a will on the ground that the will was invalid or for the reason that even if the will had not been executed the same legal consequences would flow. For the purpose of construction of a document, the validity of the will or its clauses must be ignored.

(8) Bearing the aforesaid principles in view we shall now proceed to construe Ex. B. 2. As much of the arguments turned upon the recitals in the document, it would be convenient to read the material part of the document:

"I am aged about 45 years. I am the hereditary village munsif of this village. While I had married three wives, the first two wives died. The third wife alone namely Dhanalakshmi Ammal is alive. I did not beget any son by any of my three wives. I have got only one daughter by my first wife. On account of the sickness wherein I am now suffering from and doubt as to whether I would survive, it is necessary for me to take a suitable boy in adoption in order that my soul may attain spiritual salvation and in order that (he shall) succeed to my properties and also to the office of the hereditary village munsif in my place. I am bringing up Ramdas the son of my brother-in-law the late T. S. Tirumal Rao Naidu & Lakshmi Ammal residing at Vasudevanallur, who are my relatives, as an 'abimanaputra' (foster son) from his childhood. I have a desire to take him in adoption. If in case it is not possible for me to take the said boy in adoption during my lifetime, I have in order that my third wife Dhanalakshmi Ammal shall take Ramdas in adoption for me given authority under this Will to my (third) wife the aforesaid Dhanalakshmi Ammal. The adopted son, namely, Ramdas who is so taken in adoption to me by my third wife the aforesaid Dhanalakshmi Ammal shall like unto as my 'aurasa' son take my properties and the hereditary office of the village munsif and enjoy them. But as the said boy who is proposed to be adopted is a minor, my third wife Dhanalakshmi Ammal shall be his guardian and be in management till the minor attains majority."

It will be seen from the aforesaid document that Muthukrishna was very anxious to take a suitable boy in adoption for spiritual reasons and also for succeeding to his properties. He was also bringing up Ramdas from his childhood as his foster son. He intended to take that boy in adoption before his death. If he did not, he gave power to his wife to take him in adoption. Then comes the following crucial recital.

"The adopted son namely Ramdas who is so taken in adoption to me by my third wife the aforesaid Dhanalakshmi Ammal shall like unto as my 'aurasa' son take my properties and the hereditary office of the village munsif and enjoy them."

He appointed his wife to be the guardian and to be in management till he attained majority. He directed that the document should come into force after his lifetime.

(9) The document is styled a Will. It contains the posthumous directions of the executant. It is intended as well as expressed to come into effect after his death. The words "take and enjoy" are clear words of devise. It deliberately breaks the line of succession. If the Will was not executed, the widow would take a limited interest in the whole property. If he had taken a boy in adoption during his lifetime, or even if the widow had done it after his death, she would inherit her husband's interest in joint family property under the Hindu Women's Rights to Property Act. But under the document the executant directs Ramdas the second defendant to take the entire property to the exclusion of the widow. This is not a narrative of events that would happen in law but a conscious diversion from the natural course of succession. What is more, the bequest is to Ramdas to be taken in adoption by his wife, not to his adopted son. Suppose for one reason or other the adoption has been postponed after the death of the executant, nonetheless the boy to be adopted takes the property under the document for no alternative bequest during the interragnum is provided for. We need not express our opinion on the question whether the interest so taken would be divested if his adoption had not taken place. The validity of the will for the reason that the properties bequeathed are joint family properties is not of much relevance in this context as we are concerned to ascertain the testamentary character of the document not its validity. If the testamentary character is established we hold it has been established in this case — the document though not registered is admissible in evidence and the power to adopt incorporated therein can be relied upon to sustain the adoption in this case. We cannot, therefore, agree with the Court below that Ex. B. 2 is invalid for want of registration. We hold that the adoption made pursuant to the power contained in the document is valid.

(10) It follows that the decree of the lower Court is liable to be set aside and we accordingly do so. The appeal is allowed with costs here and in the Court below.

B/V.S.B. Appeal allowed.

A. I. R. 1953 MADRAS 743 (Vol. 40, C. N. 283)

SUBBA RAO AND PANCHAPAKESA AIYAR JJ.

State of Madras and another, Petitioners v. V. Srinivasa Aiyangar, Respondent.

S. C. Civil Misc. Petn. No. 10596 of 1952, D/- 28/1/1953.

Constitution of India, Art. 133(1) — Leave subject to condition.

Where the point in issue appears to be one of general importance but not of sufficient importance to the proposed respondent to warrant the High Court in putting him to the expense of an appeal to the Supreme Court, permission will be granted for leave to appeal to the Supreme Court subject to the condition that the respondent will get his taxed costs incurred in the Supreme Court in any event from the petitioners: AIR 1923 Mad 232, Rel. on. (Para 1)

The Government Pleader, for Petitioners; R. Kesava Iyengar, for Respondent.

CASES CITED:

(A) ('23) AIR 1923 Mad 232: 44 Mad LJ 217
(B) ('09) 3 Ind Cas 786: 13 Cal WN 1127

SUBBA RAO J.: This is an application for leave to appeal to the Supreme Court against our judgment in C. M. P. No. 8302 of 1950. One of the questions raised in the petition was whether S. 20 of Act 26 of 1948 applied to a post-settlement minor inam. We held the section applied. The Government Pleader argued that our decision would affect innumerable post-settlement minor inams which have been recently notified under the Act. On that ground it is pressed that this is a fit case for appeal to the Supreme Court. We have no doubt that the question

raised is of public importance and therefore we should grant leave. But learned counsel for the respondent, while conceding that the point raised is of sufficient importance, contended that if unconditional leave is granted his client's interest would suffer. He says that the value of the subject-matter of the appeal is only about Rs. 3,000, and that if his client is compelled to go to the Supreme Court he may not be in a position to conduct the litigation and take the risk of the costs of the appeal. In similar circumstances a Full Bench of this Court made some pertinent remarks which we may usefully follow. In — 'Sethupathi v. Thiruneelakantan', AIR 1923 Mad 232 (A), an application was made for leave to prefer an appeal to His Majesty in Council under S. 109 (c), Civil P. C. corresponding to Art. 133(1) of the Constitution. There, as in this case, the value of the subject-matter was far below Rs. 10,000. At pages 233-234 the Chief Justice made the following remarks:

"What is the duty of the Court if it thinks that the case is a fit one for consideration by His Majesty in Council but that it would not be right to call upon one party whose financial interest in the matter is small to incur the risk of the costs of the appeal? Assuming the decision in — 'Clarke v. Brajendra Kishore', 13 Cal W N 1127 (B), is right and in my judgment in view of the fact that that case went before the Privy Council and special leave to appeal was granted and it was not then suggested that the Calcutta High Court could have itself imposed any condition, it is not possible for this court to hold otherwise, the only course open to us is to refuse leave and to leave the appellant, if so advised, to apply to the Privy Council for special leave.

"During the hearing of these applications we asked the appellant whether he would be prepared to agree to a condition that he should be liable for the costs of the defendants as between solicitor and client in any event. This by his counsel he definitely refused.....I think in such cases, the only safe course is to refuse leave stating, if it be the case, that the point in issue appears to be one of general importance but not of sufficient importance to the proposed respondent to warrant this court in putting him to the expense of an appeal to the highest tribunal."

We asked the Government Pleader whether his clients would be willing to a condition that they should be liable for the costs of the respondent in any event. It is represented to us today that they are willing to do so. This application is therefore granted, subject to the condition that the respondent will get his taxed costs incurred in the Supreme Court in any event from the petitioners.

A/V.S.B. Application allowed.

A. I. R. 1953 MADRAS 744 (Vol. 40, C. N. 284)

SUBBA RAO J.

Thirugnanasambandham Pillai, Managing Trustee, of Nangur Sri Narayanaswami Sannidhi Dwadasi Kattalai, Appellant v. Ramachandram Pillai and others, Respondents.

Second Appeal No. 510 of 1949, D/- 10-12-52.

Civil P. C. (1908), S. 92 — Advocate-General's sanction.

A suit by one managing trustee for rendition of accounts against the other trustee during the period of his turn, is maintainable without the sanction of the Advocate General under S. 92, Civil P. C. But possession cannot be delivered to him after expiry of his turn. AIR 1943 Mad 466 (FB), Rel. on. (Para 5)

Anno: Civil P. C., S. 92 N. 2, 23.

S. Sitarama Iyer and S. Rajaraman, for Appellant; K. Venkataramani, for Respondents.

CASE CITED:

(A) ('43) AIR 1943 Mad 466: ILR (1943) Mad 619 (FB)

JUDGMENT: This second appeal arises out of O. S. No. 297 of 1946, a suit instituted by the appellant for rendition of accounts for the period from 13-4-1945 to 13-4-1946 by the first defendant of the plaint Kattalai and to direct the first defendant to hand over to the plaintiff the amount due to the Kattalai and also the moveables, documents, vessels and accounts belonging to the Kattalai and possession of the Kattalai building and for costs of suit.

(2) The Vellalars of Nangur have been conducting a Dwadasi Kattalai for a number of years. On 19-5-1922, an arrangement was arrived at for the due management of the Kattalai and it was embodied in an agreement, Ex. P. 1. Under that agreement five persons, Ayyaru Pillai, Swaminatha Pillai, Kanakasabai Pillai, Selvanayagam Pillai and Thyagaraja Pillai, were constituted as Vicharanakartas of the said Kattalai. One of the material terms of the agreement was that "all transactions relating to the said charity, receipts and expenditure shall be conducted and done by Ayyaru Pillai and Ramachandra Pillai on behalf of Kanakasabai with our consent and, as between the two, as per the lot cast today, Ayyaru Pillai shall first manage and then Ramachandra Pillai, each managing for one year by turns. "It was also provided that the Managing trustee of the charity should, on the New Year day of every year, in the Sannadhi of Narayanaswami and at the assembly of all the members of their community, render account of the receipts and expenditure to all the members of the community and hand over all the articles, accounts and records to the Managing trustee of the next year. If any one of the aforesaid five members died, the agreement provided that the eldest member of the family of the deceased should accept it at the end of the year and manage and he should conduct himself according to the terms of the aforesaid agreement.

(3) Subsequent to the agreement, Ayyaru died. After the death of Ayyaru, the management of the Kattalai was carried on in turns of one year each by the eldest member in the family of the said Ayyaru and Ramachandra Pillai. It is not disputed that after Ayyaru's death, the eldest member of the family, Rajagopala Pillai, managed during his lifetime, and after his death, the then eldest member of the family, Ganapathia Pillai, managed during his lifetime, and thereafter Gnanasambandam Pillai, the plaintiff, became the trustee. All the aforesaid three persons managed the Kattalai during the turn allotted to their ancestor, Ayyaru Pillai. The last turn of the plaintiff expired on 13-4-1945. The next year, the Kattalai was in the management of the first defendant. The next turn, according to the arrangement, was the turn of Ayyaru. If the previous practice was followed, the plaintiff should be in the management during that year. But the other trustees issued a notice to him on 5-6-1946 in-

forming him that he had no right to manage. The suit was, therefore, filed for directing the first defendant to render a true account for one year of his turn and for delivery of possession of the building. Both the courts held that the plaintiffs failed to establish that he was the managing trustee for the year in question. They also held that, even on the assumption that he was the managing trustee, the suit was not maintainable, as the sanction of the Advocate General was not obtained under S. 92, C. P. C. They also expressed the view that, even if the plaintiff's case was true, as the year had run out, he would not be entitled to take possession of the building. In the result, the suit was dismissed. The plaintiff preferred the above appeal.

(4) The first question therefore is, whether, under Ex. P. 1, the plaintiff would be entitled to manage the Kattalai during 1946-47. Under the agreement, the five persons mentioned therein were constituted Vicharanakartas. Iyyaru & Ramachandra were constituted managing trustees by turns. If any one of the five trustees died, the eldest member of the family would succeed to his office. He should conduct himself according to the terms of the aforesaid agreement. There is no express recital in the document indicating who should take over the turn of Ayyaru Pillai or Ramachandran Pillai, if any of them happened to die. But, in my view, a reasonable interpretation should be put on the document consistent with the express words used so as to avoid any lacuna. If the interpretation of the learned Judge be accepted, there would be an obvious lacuna. If Ayyaru or Ramachandra Pillai died, there would not be any provision for taking over the turn of the deceased manager. On the other hand, a fair reading of the entire document shows that the intention of the parties was to provide for the eldest member of the family of the deceased getting into the shoes of the deceased. He was directed to conduct himself according to the terms of the aforesaid agreement. One of the terms was that Ayyaru and Ramachandra Pillai should manage by turns. The member succeeding Ayyaru or Ramachandra would therefore be entitled to manage the Kattalai in accordance with the turns provided under the agreement. That this must have been the intention of the parties to Ex. P. 1 is obvious from the conduct of the parties after the death of Ayyaru. For about 25 years, the parties interpreted the document to mean that the persons succeeding Ayyaru should also succeed to his rights to manage the charity during his turn. I would therefore differing from the courts below, hold that the plaintiff was entitled to his turn of management under Ex. P. 1. It is not disputed that, if the terms of Ex. P. 1 were followed, as interpreted by me the plaintiff would be entitled to manage from 13-4-1946 to 13-4-1947. But the courts below were right in not decreeing to him possession of the house, as the year of his turn had run out.

(5) I cannot agree with the view of the learned Subordinate Judge that the suit was bad because the sanction of the Advocate-General was not obtained. This was a suit by one managing trustee for rendition of accounts against the other trustee during the period of his turn. The learned Judge relied upon a judgment which had been overruled. In — 'Tirumalai Tirupati Devastanams Committee v. Krishnayya', AIR 1943 Mad 466 (F.B.) (A), it has been held that a suit of that character would be maintainable without the sanction of the Advocate General.

(6) The decree of the lower court is therefore modified and the first defendant is directed to render account to the plaintiff for his management of the Kattalai from 13-4-1945 to 13-4-1946. The appeal is allowed with half costs here. The parties will bear their own costs in the courts below.

(7) No leave.

B/D.R.R. Appeal allowed.

A. I. R. 1953 MADRAS 745 (Vol. 40, C. N. 285)

SOMASUNDARAM J.

In re V. Bayamma and others, Petitioners.

Criminal Revn. Case No. 11 of 1953 and Cri. Revn. Petn. No. 11 of 1953, D/- 18-2-1953.

Criminal P. C. (1898), S. 476 — Complaint when not proper for offence under Penal Code (1860), S. 193.

Where there is a doubt in the mind of the District Magistrate whether the statements made in his court are false or whether the earlier statements made in the preliminary investigation are false then unless he specifically and clearly finds that the statements made in court are false, he should not order prosecution for the offence under S. 193, Penal Code. AIR 1941 Bom 408, Foll. (Para 3)

Anno: Cr. P. C., S. 476 N. 11 Pts. 19 to 21.

P. Basi Reddi and K. V. Raghunatha Reddi, for Petitioners; Asst. Public Prosecutor, for the State.

CASES CITED:

(A) ('41) AIR 1941 Bom 408:
ILR (1942) Bom 26: 43 Cri LJ 167
(B) ('10) 6 Ind Cas 476: 37 Cal 618 (SB)

ORDER: This revision is filed against an order directing a complaint to be filed against the petitioners for an offence under S. 193, I. P. C. The facts which led up to this complaint are these: On 3-11-1950 at about midnight one Bayamma who is now sought to be prosecuted as the first accused was stabbed on her buttocks. Her son-in-law who is now sought to be prosecuted as the second accused was sleeping nearby and he rushed to the place on hearing her cries. The other two accused, the servants of Bayamma were said to have been sleeping near her. It is stated that she saw five persons at the time of the occurrence and mentioned the names of four persons and the fifth one could not be identified by her. P. W. 2, the son-in-law, gave information to the Police at about 2 a.m. implicating the four names which she mentioned and also mentioning that there was another person concerned in the offence. The woman was taken to the Pulivendla hospital and on account of her serious condition Sub Magistrate came and took a dying declaration from her. In this dying declaration she reiterated the names of the four persons whom she mentioned to P. W. 2 and whose names were given to the Police at 2 a.m. by P. W. 2 and that another person whom she could not identify was also present. Statements under S. 164, Cr. P. C., were also recorded from the two servants Gangadu and David who, as already stated, were said to have been sleeping near her. They supported her story that the four persons mentioned by her in her dying declaration and mentioned by P. W. 2 in the information to the Police along with another were concerned in the attack. After investigation a charge sheet was filed against the four persons mentioned in the first information and in the dying declaration. At the time when the enquiry started, Bayamma was examined as P. W. 1, her

son-in-law as P. W. 2 and the two servants as P. Ws. 3 and 4. All of them went back on their earlier statements and stated that they could not identify the assailants. The accused in the case were, therefore, discharged. The committing Magistrate thereupon filed a complaint against the petitioners therein, for an offence under S. 195 read with S. 199, I. P. C., against Bayamma, under S. 211, para. 2 of the I. P. C., against P. W. 2, her son-in-law, and under S. 195, I. P. C., against the servants P. Ws. 3 and 4.

(2) Against the order of the committing court, an appeal was preferred to the District Magistrate. The District Magistrate after going into the whole matter fully observes as follows in para. 33 of his order:

> "I am satisfied therefore that these witnesses stated the truth in the early stages of this case and that they intentionally gave false evidence in the preliminary enquiry."

If the District Magistrate has stopped there, I would not have interfered with his order. But he proceeds further and states as follows:

> "At any rate there is reasonable doubt as to which of these two contradictory statements is false. In any event, an offence punishable under S. 193, I. P. C., appears to have been committed by each of these appellants."

He then directed a complaint to be filed against all of them under S. 193, I. P. C. In revision it is contended by Mr. Basi Reddi appearing for the petitioners relying on — 'Emperor v. Ningapa Ramappa', AIR 1941 Bom 408 (A), that in such circumstances as here where the Magistrate is not quite sure as to which of the statements is false, no prosecution should be launched. At any rate without finding specifically that the statement made before the court is false, prosecution should not be launched against these petitioners. In the judgment above referred to Beaumont C. J. follows a decision of a Special Bench of the Calcutta High Court in — 'Emperor v. Tripura Shankar Sarkar', 37 Cal 618 (S.B.) (B), wherein the Chief Justice Sir Lawrence Jenkins observed as follows:

> "This, then, is how matters stand. The court is convinced that of the contradictory statements now under consideration those made in this court were true, but those before the Magistrate were false; and on a careful consideration of the events leading up to the examination before the committing Magistrate, & of the conditions under which that examination was conducted, we are clearly of opinion that the sanction sought should not be given. Had Tripura repeated here the false story he told before the Magistrate, no such application as the present would have been made; is it to be granted because he told the truth here? Certainly not."

After quoting the above observations, Beaumont C. J. observed that in his opinion

> "that reasoning applies, not only when the court is satisfied that it is earlier statement, which is false, but also when the court is not satisfied to the contrary."

(3) In this case the District Magistrate, though he finds in the earlier portion in para. 33 of his judgment that the statement made in court is false, states later on that there is reasonable doubt as to which of the two contradictory statements is false. There is a doubt in the mind of the District Magistrate whether the statements made in court are false or whether the earlier statements are false. Unless he specifically and clearly finds that the statements made in court are false, he should not order prosecution for the offence. In view of the doubt expressed as to which of the statements is true and which is false, I am compelled to set aside his order directing a complaint to be filed against these petitioners for an offence under S. 193, I. P. C.

(4) The next question is whether these petitioners should be prosecuted for any offence at all. So far as Gangadu and David are concerned, they are only servants of Bayamma and in my opinion, interests of justice do not require that they should be prosecuted for any offence at all and no complaint shall be laid against those two persons for any offence. But so far as Bayamma is concerned, she undoubtedly gave a statement to the Magistrate in what is called a dying declaration implicating four persons by name. According to her evidence in court this must be false and she knew it to be false and still she made that statement to him. I think that will fall under S. 211, I. P. C., and the interests of justice requires that persons who gave such false information should not be allowed to go scot-free. A complaint by the proper authority as required by the provisions of S. 195, Cr. P. C., will be laid against her for an offence under S. 211, I. P. C. Similarly, the son-in-law after telling the police that his mother-in-law Bayamma told her about the four names, now tells in court that the mother-in-law did not say so. He has undoubtedly then falsely moved the police for the purpose of taking proceedings against those persons. His act will fall under S. 182, I. P. C. Under S. 195(1), Cr. P. C., the Police officer will have to file a complaint against him for an offence under S. 182, I. P. C. In this order I am only indicating broadly for what offences they might be prosecuted. It is open to the police to examine more carefully the various provisions under which Bayamma and her son-in-law who was examined as P. W. 2 should be properly prosecuted. They need not be bound merely by what is stated in this judgment that Bayamma should be prosecuted under S. 211, I. P. C., and P. W. 2 under S. 182, I. P. C. For such offences as appear to them (except 193 or 195 or 199, I. P. C.) to have been committed by these two persons, the authorities will examine carefully and file a complaint against both of them, as, in my opinion, it is necessary to check such false complaints which are frequently filed.

(5) With these observations, the petition is allowed and the orders of the lower courts are set aside.

B/V.S.B. Order accordingly.

A. I. R. 1953 MADRAS 746 (Vol. 40, C. N. 286)

FULL BENCH

RAJAMANNAR C. J., RAJAGOPALAN AND VENKATARAMA AIYAR JJ.

In re D. Rajamannar and others, Appellants.

S. R. No. 9132 of 1952 (Appeal No. Nil of 1952 sought to be preferred to the High Court), D/- 12-3-1953.

(a) Suits Valuation Act (1887), S. 9 — Rules under — R. 2 (framed by the Madras High Court in 1943) — Suit to obtain declaratory decree where no consequential relief is prayed — Court-fee payable.

In a suit filed to obtain a declaratory decree where no consequential relief is prayed and which does not fall within the category of suits provided for by S. 7(iv-A), Court-fees Act, court-fee is not leviable on an 'ad valorem' basis on the value of the subject-matter of the suit computed in accordance with R. 2. AIR 1951 Mad 793, Expl. **(Para 21)**

(b) Court-fees Act (1870), Sch. I, Art. 1 — "Not otherwise provided for in this Act."

The words "not otherwise provided for in this Act" should not be understood to refer to anything except a provision for the actual fee leviable. It does not refer to the provision for computation of values. If there is any other article in either Sch. I or Sch. II which provides for a fee on any particular class of plaints, then that provision will govern and Art. 1 of Sch. I will have no application. (Para 16)

Anno: Court-fees Act, Sch. I, Art. 1 N. 4.

(c) Suits Valuation Act (1887), S. 9—Scope.

It is not correct to so construe S. 9 as to confer a power on the High Court to provide for a separate class of suits not falling within any of the classes mentioned in the body of the Court-fees Act or in the schedules. Nor can a rule framed under S. 9 of that Act decide whether court-fee should be calculated on an 'ad valorem' basis or on a fixed fee basis. (Para 17)

Anno: Suits Valuation Act, S. 9 N. 1.

(d) Suits Valuation Act (1887), Preamble — Object of Act.

The object of the Suits Valuation Act is to prescribe the method of valuing certain suits for the purposes of determining the jurisdiction of Courts with respect thereto. The Act contemplates suits in which the court-fee value may be different from the value for purposes of jurisdiction. (Para 17)

Anno: Suits Valuation Act, Preamble N. 1.

W. Kothandaramayya, for Appellants; The Government Pleader, for the State.

CASE CITED:

(A) ('51) AIR 1951 Mad 793: ILR (1951) Mad 751

(Order of Reference to the Full Bench by SUBBA RAO AND RAMASWAMI JJ., dated 15-10-1952):

This was referred by one of us to a Bench of two Judges in view of the importance of the question raised. The facts are fully stated in the order of reference and it is not necessary to restate them in detail.

(2) O. S. No. 45 of 1949 on the file of the Subordinate Judge's Court of Chittoor was instituted by two of the daughter's sons of one Chenchiah as presumptive reversioners to his estate for a declaration that the compromise decree in O. S. No. 10 of 1944 is not binding on the reversioners and for the appointment of a receiver to the estate of late Chenchiah to manage his properties and to prevent waste. The suit was dismissed and the plaintiffs preferred an appeal. The Master held that R. 2 of the Rules framed under the Suits Valuation Act and Art. 1 of Sch. I, Court-fees Act applied to the first relief and that court-fee should be paid 'ad valorem' on the value of the property i.e., the subject-matter of the decree. A Bench of this Court consisting of Rajamannar C. J. and Viswanatha Sastri J. held in — 'Narasamma v. Satyanarayana', AIR 1951 Mad 793 (A), that R. 2 of the Rules framed under the Suits Valuation Act would apply to such a case. The learned Judges observed at page 795:

> "Even if the plaintiff in the subsequent suit be considered not to have been a party to the prior suit, still if he sues to set aside the decree in that suit, R. 2 of the Court-fees Rules would govern the case and 'ad valorem' court-fee would be payable."

(3) The learned counsel for the appellants contended that the said R. 2 is invalid on the ground that the High Court has no legal competence in making the rule so as to substitute the fixed court-fee payable under Art. 17-A of Sch. II for one payable on 'ad valorem' basis. The relevant provisions of the Court-fees Act, the Suits Valuation Act and the Rules framed under the Suits Valuation Act by the High Court may now be read:

(4) Art. 17-A of Sch. II, Court-fees Act:

Plaint or Memorandum of Appeal in a suit		
(i) to obtain a declaratory decree where no consequential relief is prayed	When the plaint is presented to or the memorandum of appeal is against the decree of a District Munsif's Court or the City Civil Court	Fifteen rupees
	A District Court or a Sub-Court	Hundred rupees if the value for purposes of jurisdiction is less than ten thousand rupees; five hundred rupees if such value is ten thousand rupees or upwards.

(5) Section 9, Suits Valuation Act:

"When the subject-matter of suits of any class, other than suits mentioned in the Court-fees Act, 1870, S. 7, paras. v and vi, and para. x, cl. (d) is such that in the opinion of the High Court it does not admit of being satisfactorily valued, the High Court may, with the previous sanction of the State Government, direct that suits of that class shall, for the purposes of the Court-fees Act, 1870, and of this Act and any other enactment for the time being in force, be treated as if their subject-matter were of such value as the High Court thinks fit to specify in this behalf."

(6) Rules for valuation of certain classes of suits. The preamble reads:

"Whereas the subject-matter of suits of the class hereinafter mentioned is such, that in the opinion of the High Court, it does not admit of being satisfactorily valued, the High Court under and by virtue of the authority conferred on it by S. 9, Suits Valuation Act (7 of 1887), and with the previous sanction of the Provincial Government, issues the following directions with regard to the valuation of such suits for purposes of the Court-fees Act (7 of 1870) and of the Suits Valuation Act."

(ii) In suits for a declaration or for an injunction consequent on a declaration that a decree for money or any other property having a money value is not binding on the plaintiff who was not a party to the decree, the subject-matter of the suit shall for purposes of jurisdiction and court-fee be valued at the amount or value of the property for which the decree was passed."

(7) Under S. 9, Suits Valuation Act, the High Court has power to specify the value of the subject-matter of suits of any class under the Act, except those specifically exempted, if in its opinion the subject-matter does not admit of being satisfactorily valued. Such valuation is

for the purposes of the Suits Valuation Act, the Court-fees Act and any other enactment for the time being in force. The Court-fees Act and the schedules provide for two classes of suits: (i) suits in regard to which court-fee is payable on the 'ad valorem' basis, and (ii) suits in respect whereof fixed court-fee is payable.

(8) In regard to the former suits under the Court-fees Act, the subject-matter is valued on different principles — market, notional and arbitrary values (see S. 7). In the case of suits covered by Art. 17-A, Sch. II, the court-fee depends upon the forum as well as the value for purposes of jurisdiction. But, in either case, the court-fee is not on 'ad valorem' but on a fixed basis, though varying with the value of the subject-matter for purposes of jurisdiction. Though under S. 9, the High Court is given power to fix the valuation of the subject-matter of a suit for the purposes of the Suits Valuation Act and the Court-fees Act, it does not either expressly or by necessary implication confer on it a power to change the principle adopted by the Court-fees Act for fixing the court-fee. It cannot convert the 'ad valorem' basis into fixed basis or 'vice versa'; nor does R. 2 framed by the High Court attempt to alter the basis. The rule only says that in cases of suits for declaration that a decree for any property, having a money value, is not binding on the plaintiff, who is not a party to the decree, the subject-matter of the suit shall for purposes of jurisdiction and court-fee be valued at the value of the property for which the decree was passed. But it does not say that the court-fee should be calculated 'ad valorem' on the value of the subject-matter of the suit. The rule framed by the High Court is consistent with the scheme of the Court-fees Act. To illustrate, the fixed court-fee payable under Art. 17-A of Sch. II will depend upon the value fixed by the High Court for purposes of jurisdiction under R. 2, i.e., if such a suit is filed in the District Court or a Subordinate Court, court-fee of Rs. 100 has to be paid if the value fixed by the High Court for purposes of jurisdiction is less than Rs. 10,000 and Rs. 500 if such value is Rs. 10,000 or upwards. The rule therefore is valid but it does not compel a party to pay under Art. 1 of Sch. I, Court-fees Act 'ad valorem' court-fee on the value so fixed. We cannot therefore with great respect agree with the observations made by the learned Judges in — 'AIR 1951 Mad 793 (A)', but as the question relates to one of court-fee, it is not advisable to have two conflicting Bench decisions on the same question. It is necessary to have an authoritative decision of a Full Bench. We, therefore, refer the following question to the Full Bench:

"Whether, in a suit filed to obtain a declaratory decree, where no consequential relief is prayed or in an appeal filed against a decree in that suit, the plaintiff or the appellant, as the case may be, is liable to pay court-fee on the 'ad valorem' basis on the value of the subject-matter of the suit fixed under R. 2 of the Rules for the valuation of certain classes of suits framed by the High Court."

(9) The papers will be placed before the learned Chief Justice for constituting a Full Bench.

OPINION

(10) RAJAMANNAR C. J.: The question referred to the Full Bench is as follows:

"Whether, in a suit filed to obtain a declaratory decree, where no consequential relief is prayed or in an appeal filed against a decree in that suit, the plaintiff or the appellant, as the case may be, is liable to pay court-fee on the 'ad valorem' basis on the value of the subject-matter of the suit fixed under R. 2 of the Rules for the valuation of certain classes of suits framed by the High Court."

The question has been amply discussed first by the Master, then by Subba Rao J. on a reference to him under S. 5, Court-fees Act and again by a Division Bench consisting of Subba Rao and Ramaswami JJ. It is not therefore necessary to state at great length the various arguments which could be put forward for either point of view.

(11) The proposed appeal arises out of a suit filed in the Court of the Subordinate Judge of Chittoor by two of the daughter's sons of one Chenchiah Chetti for a declaration that the compromise decree passed in O. S. No. 10 of 1944 on the file of the same Court was not binding on them and for the appointment of a receiver to manage the properties of the late Chenchiah Chetti. The plaintiffs were not parties to the prior suit. That suit was brought by one of the daughters of Chenchiah Chetti against the other daughters and Vediah Chetty the husband of the first daughter for partition of the properties. In that suit the plaintiff therein claimed that certain properties belonged to the estate of Chenchiah Chetti and did not belong to Vediah Chetti who was claiming them as his own. It ended in a compromise decree under which Vediah Chetti and his children were given a large number of items. It is in respect of this compromise decree that the plaintiffs now seek for a declaration that it is not binding on them as reversioners to the estate of Chenchiah Chetti.

(12) Before us it is common ground that the relief of appointment of a receiver was not consequential on the declaration that the compromise decree was not binding on the plaintiffs. It was also practically admitted by the learned Government Pleader that the suit did not fall within S. 7 cl. (iv-A), Court-fees Act as amended by the Madras Legislature. We must therefore take it that the suit was rightly framed as a suit for a mere declaration that the compromise was not binding on the plaintiffs. Prima facie such a suit would fall under Art. 17-A (1) of Sch. II to the Court-fees Act which runs thus:

"Plaint or Memorandum of Appeal in a suit to obtain a declaratory decree where no consequential relief is prayed."

The proper fee leviable for such a suit under that Article depends upon firstly, the Court to which the plaint is presented and secondly, when the plaint is presented to a District Court or a sub-Court according to the value for purposes of jurisdiction. If such value is less than Rs. 10,000 the fee is Rs. 100. If such value is Rs. 10,000 or upwards the fee is Rs. 500.

(13) The question for consideration is, what is the effect of R. 2 of the Rules framed by the High Court of Madras in exercise of the power conferred on it by S. 9, Suits Valuation Act. The rule runs as follows:

"In suits for a declaration or for an injunction consequent on a declaration that a decree for money or any other property having a money value is not binding on the plaintiff who was not a party to the decree, the subject-matter of the suit shall for purposes of jurisdiction and court-fee be valued at the amount or value of the property for which the decree was passed;

Provided that if the value of the property or the interest which the plaintiff seeks to be declared not liable for the decree is less than the value of the decree the plaint shall be valued as if it were one for the possession of such property or interest."

(14) This rule came into operation on and from 1-11-1943. There can be no doubt that the

present suit does fall within the scope of this rule. This is a suit for a declaration that a decree in respect of property having a money value is not binding on the plaintiffs who were not parties to the decree.

(15) The value of the subject-matter must therefore be computed at the value of the property for which the decree was passed. Undoubtedly, this value will determine the Court which will be competent to entertain the suit. The rule provides that the value so computed will also be the value for purposes of court-fee payable. The answer to this question depends entirely on the provisions of the Court-fees Act.

(16) The actual amount or rate of court-fee leviable on a plaint is found in the Court-fees Act only in two schedules. Under Sch. I the fee is calculated on an 'ad valorem' basis. Schedule II provides for cases in which a fixed fee is leviable. In the body of the Act S. 7 embodies the rules as to the computation of the amount of fee in certain classes of suits according to the value of the claim or relief sought. When the value of the claim or relief is ascertained according to these rules, for a calculation of the proper fee one has to turn to Art. 1 of Sch. I. That Article provides 'inter alia' for a plaint presented to any civil Court not otherwise provided for in the Act. The words "not otherwise provided for in this Act" should not be understood to refer to anything except a provision for the actual fee leviable. It does not refer to the provision for computation of values. If there is any other Article in either Sch. I or Sch. II which provides for a fee on any particular class of plaints, then that provision will govern and Art. 1 of Sch. I will have no application. Otherwise, it will apply.

To give an example, there is no provision otherwise in Sch. I or Sch. II for a plaint in a suit for possession of land. Therefore, for such suits Art. 1 of Sch. I will apply so far as the rate of court-fee is concerned. The fee will have to be calculated at the proper rate on the amount as computed under S. 7 (v) of the Act. Likewise, a suit for relief under S. 92, Civil P. C. is specifically provided for in Art. 17 (iii) of Sch. II. The proper fee is a fixed fee of Rs. 50. To such a plaint Art. 1 of Sch. I will not apply. Now as I have already mentioned above there is a specific provision for a suit to obtain a declaratory decree where no consequential relief is prayed in Art. 17-A (1) of Sch. II. To a suit for that class Art. 1 of Sch. II will have no application. It must follow on a plain reading of the material provisions of the Court-fees Act including the schedules that the fee cannot be calculated on an 'ad valorem' basis.

(17) In my opinion, it is not correct to so construe S. 9, Suits Valuation Act as to confer a power on the High Court to provide for a separate class of suits not falling within any of the classes mentioned in the body of the Court-fees Act or in the schedules. Nor can a rule framed under S. 9 of that Act decide whether court-fee should be calculated on an 'ad valorem' basis or on a fixed fee basis. The object of the Suits Valuation Act is to prescribe the method of valuing certain suits for the purposes of determining the jurisdiction of Courts with respect thereto. The Act contemplates suits in which the court-fee value may be different from the value for purposes of jurisdiction.

A suit for possession of land must be valued for purposes of court-fee according to the rule laid down in S. 7 para. (v), Court-fees Act. But the value of such a suit for purposes of jurisdiction may be different if the Provincial Government makes rules for determining the value of the land for purposes of jurisdiction on a different basis (S. 3 (1)). Under S. 8, as regards certain classes of suits the value as determinable for the computation of court-fees and the value for purposes of jurisdiction are the same. Section 9 deals with that class of suits which does not admit of being satisfactorily valued and provides that the High Court may provide for the valuation of such suits. The section then declares that the valuation so computed shall be the valuation both for the purposes of the Court-fees Act and for the purposes of the Suits Valuation Act.

(18) I do not therefore read R. 2 framed under S. 9, Suits Valuation Act as interfering in any manner with the scheme relating to the classification of suits provided in the body of the Court-fees Act and its schedules. Take, for instance, a suit to obtain a declaration that an alleged adoption is invalid. Such a suit in terms falls within para. (iii) of Art. 17-A of Sch. II and a fixed fee is leviable thereon. It will not be open, by a rule made under S. 9, Suits Valuation Act, to take such a suit out of Art. 17-A (iii) or Sch. II and make it a suit for which court-fee is leviable 'ad valorem'. If the rule were to be construed to have this effect, it would be in excess of the powers conferred by S. 9, Suits Valuation Act.

(19) This reference to a Full Bench really became necessary because of the observations contained in the decision of a Division Bench of this Court to which I was a party in — 'AIR 1951 Mad 793 (A). That was a suit in which the plaintiff prayed for the cancellation of the decree in a suit to which she was 'eo nomine' a party. What she alleged was that she was impleaded in that suit as a major while she was still a minor. Actually she had engaged a pleader for her, and she gave evidence in the suit. It was contended that the suit fell within Art. 17-A (1) of Sch. II because the decree must be deemed to be void; but it was held that the suit fell within S. 7 (iv-A) of the Act. Viswanatha Sastri J. who delivered the judgment of the Bench observed thus:

> "The distinction between a decree to which the plaintiff was a party and a decree to which he was not a party and the distinction between void and voidable decrees, may be relevant in connection with other branches of the law, as for instance, in determining the period of limitation applicable to a suit to set aside the decree and the rights of innocent third parties who have acquired for value an interest in the subject-matter of the suit. But so far as the Court-fees Act is concerned, a suit by a party to the decree, which is 'ex facie' regular and within the jurisdiction of the Court, to have it declared void as against him is taken out of Art. 17-A of Sch. II and S. 7 (iv) (c) and brought within S. 7 (iv-A) of the Act."

(20) I may point out that on behalf of the Government the only provision relied upon was S. 7 (iv-A), Court-fees Act and the arguments were confined to a discussion of that provision and Art. 17 A (1) of Sch. II of the Act. But the learned Judge apparently thought that 'ad valorem' court-fee would be payable on the value of the subject-matter of the suit under R. 2 of the Rules framed under S. 9, Suits Valuation Act above-mentioned. The learned Judge expressly mentioned the fact that the rule was not brought to the notice of the Bench by the learned counsel in the case. Strictly speaking, in view of the decision of the Bench that the suit would be governed by S. 7 (iv-A) of the Act, it

was not necessary to deal with R. 2 framed under the Suits Valuation Act. As the learned Judge said:

"Whether the suit is governed by S. 7 (iv-A) of the Act or R. 2 of the Court-fees Rules, 'ad valorem' court-fees must be paid on the market value of the lands in Schs. A and B of the plaint which formed the subject-matter of the previous decree."

In my opinion the decision in — 'AIR 1951 Mad 793 (A)' cannot be considered as an authority on the applicability of the rule now under consideration to a suit for a declaration that a decree in a suit to which the plaintiff was not a party is not binding on him. Having been a party to that decision I am free to say that the contentions now put forward before us as regards the scope of that rule were never before us in that case.

(21) I would answer the question referred to us as follows:

"In a suit filed to obtain a declaratory decree where no consequential relief is prayed, which does not fall within the category of suits provided for by S. 7 (iv-A), Court-fees Act, court-fee is not leviable on an 'ad valorem' basis on the value of the subject-matter of the suit computed in accordance with R. 2 of the Rules framed by this Court under S. 9, Suits Valuation Act in 1943."

(22) RAJAGOPALAN J.: I agree.

(23) VENKATARAMA AIYAR J.: I agree.

A/V.R.B. Reference answered.

A. I. R. 1953 MADRAS 750 (Vol. 40, C. N. 287)

GOVINDA MENON AND
RAMASWAMI GOUNDER JJ.

M. G. Narayanaswami Naidu and another, Appellants v. M. Balasundaram Naidu and others, Respondents.

Appeals Nos. 319 of 1947 and 799 of 1948, D/- 28-9-1951.

(a) Hindu Law — Religious endowment — Performance of religious ceremonies made a charge on income of property — Surplus income not earmarked for any purpose — No appreciable surplus — Entire property is dedicated as trust: AIR 1952 Mad 650, Rel. on. (Para 6)

(b) Evidence Act (1872), S. 42 — Judgment not inter partes — Evidentiary value — Civil P. C., (1908), S. 11.

Though the defendant alone, among the present parties, was involved in a previous litigation and the plaintiff was not a party thereto, the judgment in the previous litigation declaring that certain trust was a private trust has abundant evidentiary value & the Court in the subsequent litigation contesting the character of the trust must pay attention to it. AIR 1921 Mad 248 (FB), Rel. on. (Para 5)

Anno: Evid. Act, S. 42, N. 1, C. P. C. S. 11, N. 68.

(c) Limitation Act (1908), Arts. 142 and 144 — Trustee cannot be in adverse possession of trust property. (Para 8)

Anno: Lim Act, Arts. 142 & 144, N. 46.

†(d) Civil P. C., (1908), Ss. 9 and 92 — Private trust.

Even in the case of private charities courts can interfere to see that no breaches of trust are created. So far as the members of the family are concerned, who are interested in the trust if the trustee for the time being mismanages or acts in breach of trust, it is a civil right which is infringed and under S. 9 of the C. P. C., they are entitled to seek redress in Court for the purpose of remedying the mischief. (Para 10)

There is no justification for refusing to frame a scheme in the matter of a private trust. Case law discussed. (Para 10)

Anno: C. P. C., S. 9, N. 19; S. 92, N. 15, 21.

P. S. Raghavarama Sastri and M. R. Narayanaswami, for Appellants; E. Vinayaka Rao, for Respondents.

CASES CITED:

(A) ('43) AS No. 406 of 1943 (Mad)
(B) ('96) SA No 281 of 1896 (Mad)
(C) ('21) AIR 1921 Mad 248: 44 Mad 778 (FB)
(D) ('52) AIR 1952 Mad 650: 1951-1 Mad LJ 588: 64 Mad LW 574
(E) (1823) 37 ER 1098: (1823) Turn & R 260
(F) ('22) AIR 1922 PC 253: 49 Cal 459 (PC)
(G) ('25) AIR 1925 PC 139: 52 Cal 809
(H) ('37) AIR 1937 Cal 338: ILR (1937) 2 Cal 105
(I) ('20) AIR 1920 Cal 210: 30 Cal LJ 177.
(J) ('32) AIR 1932 Cal 117: 134 Ind Cas 576
(K) ('33) AIR 1933 Cal 519: 60 Cal 538
(L) ('91) 14 Mad 1

JUDGMENT: Both these appeals arise out of the decrees of the Sub-Court, Madura in O. S. No. 1 of 1946, wherein a preliminary decree for the framing of a scheme, after removing the appellant from the office of trustee was passed on 22-2-1947 and A. S. No. 319 of 1947 is preferred against that decree. Against the scheme actually framed, A. S. No. 799 of 1948 has been filed and the two appeals were heard together.

(2) One Narayanaswami Naidu who died long ago created a disposition of property for the object of conducting a mandagapadi in the town of Madurai and the person who conducts it now is the first defendant, who is Narayanaswami Naidu's grandson, i.e. the son of Govindaswami Naidu, one of the sons of Narayanaswami Naidu by his second wife. The plaintiff in the lower Court is another grandson of Narayanaswami Naidu being the son of Venkatasami Naidu, the uncle of the first defendant. The other defendants are the descendants of Venkataswami Naidu. It is not necessary to set out in detail the relationship between the parties as the same is admitted and is found in the genealogical tree appended as schedule B to the scheme. The history of this trust is set out in the judgment of this Court in — 'A. S. No. 406 of 1943 (A)'.

(3) During the procession in the month of Chitrai of the Kalla Alagar Deity from the Alagar hills to the Vaigai river, there are mandagapadis conducted by various pious citizens on the route. Similarly, during the month of Vaikasi the Koodal Alagar deity is also taken in procession, and that procession also stops at various mandapams on the route where poojas are offered. These are generally known as mandagapadis. The plaintiff's case is that Narayanaswami Naidu created a trust of certain properties for the purpose of offering pooja when the aforesaid processions take place and the first defendant, as the present trustee of those properties, is guilty of various acts of misappropriation, malfeasance and breach of trust. It was on that footing that the suit was filed with the object of removing the first defendant from the trusteeship and for the framing of a scheme. The recitals in the plaint

as to how the trust came into existence are as follows.

(4) Narayanaswami Naidu, the original ancestor, being a gentleman of considerable status and of pious disposition, desired to provide a mandagapadi to receive God Sri Kalla Alagar during the Chitrai festival and Koodal Alagar during the Vaikasi festival every year. With that object he put up a stone mandapam now in existence in item 1 of the plaint schedule and constructed two shops shown as item 2 in the plaint schedule. He endowed these items for the purpose of the mandagapadi aforesaid and was conducting the mandagapadi charity in the mandapam in item 1 from out of the income of items 1 and 2. The suit properties are therefore trust properties and are inalienable. They are a private family trust in which the members of the family of the founder alone are interested and have the right of management, control, supervision, etc. That this is a private trust has been confirmed by various decisions, the last of which was in — 'A. S. No. 406 of 1943 (A)' by this Court. The plaint proceeded to state that the first defendant has been deliberately mismanaging the trust and is guilty of misconduct and gross breach of trust.

(4a) The written statement of the first defendant while admitting that mandagapadi has been carried on, denied that the properties were acquired or constructed with a view to dedicate them to any trust and that they have not been dedicated to any private trust by Narayanaswami Naidu at all and that there has been no such dedication of the entire income of the properties for the conduct of the plaint mentioned mandagapadi. The first defendant admitted that there was private worship in the mandapam in item 1 of Gods Kalla Alagar and Koodal Alagar on the two days in the year during the Chitrai festival and Vaikasi festival but stated that this private worship did not last for more than three minutes and that the amount necessary did not exceed Rs. 20 a year whereas the income from the properties would be Rs. 500 per annum. Such being the case the defence was that there was no dedication whatever. The learned trial Judge found that the defence cannot be accepted and that there is a trust created for the purpose of performing the mandagapadis. The learned Judge also found that the first defendant was guilty of breach of trust and removed him from office.

(5) The question as to whether a private trust was created does not admit of any serious doubt. The previous litigations regarding these properties have ended in decisions that the trust is a private trust. In Ex. P. 5, a judgment in — 'S. A. No. 281 of 1896 (B)', Subramania Ayyar and Benson JJ. found that the property was trust property. But the more recent decision is contained, as we have stated in — 'A. S. No. 406 of 1943 (A)'. That arose out of O. S. No. 6 of 1942 on the file of the District Court of Madurai. The Hindu Religious Endowments Board on the footing that the trust in question was a public trust, framed a scheme for the management of the trust, whereupon the first defendant filed O. S. No. 6 of 1942 on the file of the District Court of Madura for setting aside the scheme on the ground that the properties dedicated do not constitute an endowment of a public trust. The District Judge dismissed the suit considering that the offerings made to a deity when installed in the mandapam in item 1 was a service connected with the temple and considered that the mandagapadi was an integral part of the temple itself as it was performed in the course of the festival.

The High Court (Leach C. J. and Clark J.) after considering the evidence in the case as well as the decisions arrived at in previous litigations, came to the conclusion that the endowment in question is an endowment for a private trust and the public has no connection with it whatever. Though the first defendant alone, among the present parties, was involved in that litigation and the plaintiff was not a party thereto, it should be deemed as if the first defendant represented the descendants of the founder when he contested the Endowments Board and wanted a decision that the trust was a private trust. In any event according to the decision in — 'Secretary of State v. Badsha Sahib', AIR 1921 Mad 248 (C), this judgment has abundant evidentiary value and we have to pay attention to it. It is surprising that after this decision the first defendant should have thought of contesting the character of the trust at all. Though there is no deed of trust executed by Narayanaswami Naidu it is clear from Ex. P. 1, a power of attorney executed on 3-5-1857 in favour of his son Alagiriswami by his senior wife, that his intention was to create a trust. That document clearly states that he has constructed the mandapam and chatram on the northern side of the Vaigai river and has built and set apart two substantial terraced shops existing in Madurai east markets for the purpose of charity. It further states that Alagiriswami, from and out of the rent amount received from the two shops and from the rent amount received from the substantial terraced house and site lying on the west of the tiled house to the east of his house, and also from out of the income got from the garden on the west of the mandapam, should manage the mandagapadi Vagaira charity throughout the year receiving honours etc. It is also stated that he should keep the necessary utensils and other materials for the purpose of the pooja. The last sentence in Ex. P. 1 is clearly to the effect that a trust has been created and it is as follows:

> "After I have arranged that the said charity should be conducted in common, since I think that the charity might shortly be endangered and since I believe that you being my eldest son, and honest would, in accordance with my directions, conduct and progressively improve the said charity, this power of attorney has been executed by me with consent."

There can be no doubt whatever that the intention of Narayanaswami Naidu was to create a trust for the purpose of conducting the mandagapadi. But the argument of Mr. Rajagopala Aiyangar for the appellant is that the mandagapadi pooja which lasts only for about three minutes would cost only about Rs. 20 though the income from the property set apart according to the document is about Rs. 500 or Rs. 600. Therefore, the learned counsel contends that there has been no dedication of the entire income for this purpose. At the utmost all that could be said is that the income from the properties is charged with the duty of the performance of this mandagapadi and since there is no dedication of these properties for the trust, the suit cannot be maintained. Ex. P. 1 does not show that any part of the income should be utilised for any other purpose. It is clear that the author of the trust intended that the entire income should be utilised for the purpose of the two mandagapadis.

According to the learned counsel for the appellant, the mandagapadi costs only about Rs. 20; but the evidence in the case is the other way. P. W. 1, the plaintiff deposes that during the time his father was performing the mandagapadis he used to invite relations and to spend about Rs. 600 to Rs. 700 a year. It is common knowledge that a mandagapadi does not mean only the performance

of the pooja to the deity, but also includes the attendant and consequent feeding of the guests invited for the occasion and other expenses connected with the pooja. A poor man may perform a mandagapadi on a small scale but persons in affluent circumstances like the parties to these appeals would not think of conducting a mandagapadi on a scanty and meagre scale of Rs. 20. We can take judicial notice of the fact that mandagapadis in Madura town conducted during the course of the procession of the Kalla Alagar and Koodal Alagar deities to the Vaigai river are performed by devotees in accordance with their status and position in life and the expenses would depend upon the wealth of the individual. We have no doubt whatever that the author of the trust intended the entire income to be utilised for the mandagapadi and despite Mr. Rajagopala Aiyangar's strenuous arguments that the mandagapadi would cost only Rs. 20 we prefer to accept the evidence of P. W. 1 and hold that the entire income from these properties has to be utilised for the performance of the mandagapadi.

(6) In a recent decision reported in — 'Vasudeva Rao v. Rangai Gounder', AIR 1952 Mad 650 (D), to which one of us was a party the question regarding the dedication of property where the performance of certain ceremonies was made a charge on the income has been considered and the conclusion arrived at is that if there is no appreciable surplus income and if that surplus income has not been earmarked for any purpose, then it should be taken that the entire property has been dedicated as trust. On a reading of Ex. P. 1 coupled with the subsequent conduct of the parties and the judicial decisions evidenced by Exs. P. 5 and D. 13 we have no doubt whatever that Narayanaswami Naidu intended that the entire income from the two shops and from the bungalow should be utilised for the purpose of the mandagapadi and that these properties were dedicated in trust for the purpose of mandagapadi pooja.

(7) Relying upon the observations at pages 923 and 924, paragraphs 792 and 793 of Mayne's Hindu Law that the onus of proof of dedication is on the party setting up the trust, the learned counsel contends that the plaintiff has not discharged that onus. It seems to us that in view of the decision of this court to which great evidentiary value should be given contained in Ex. D. 13 we can have no doubt whatever that there has been a complete dedication to trust. We do not think it necessary to expatiate more upon this point as the matter has been elaborately dealt with by the learned Judge in the court below.

(8) It is further contended that whatever might have been the state of the things more than 100 years ago, when the trust was created, at least so far as item 1 of the plaint schedule properties is concerned the first defendant has acquired ownership to it by adverse possession and therefore that property cannot be termed to be trust property at all. What happened was that while the trust was being conducted by Venkataswami Naidu, the father of the plaintiff, he, the plaintiff, and others, were adjudicated insolvents and item 1 of the plaint schedule was taken possession of by the Official Assignee of Madras as being the property of the insolvents; whereupon the present first defendant's brother Meenakshi Naidu, got a release of those properties from the Official Assignee as is shown by Ex. D. 10, which is to the effect that Meenakshi Naidu entered into a guarantee with the official Assignee and thereby got a release of this property from the Official Assignee. According to the learned counsel for the appellant, Ex. D. 10 should be construed as an assignment of this item by Official Assignee in favour of Meenakshi Naidu, and from that date onwards Meenakshi Naidu remained in possession in his own right and prescribed a title against the trust. We do not see any force in this contention because the list of properties in the insolvency as shown by Ex. P. 6(2) contains an entry that the house in the river side Madurai and the two bazars and one abkari distillery in Madurai were properties exempted under S. 52(1) of the Presidency-Towns Insolvency Act. It is therefore clear that these properties were not considered as the properties of the insolvents.

Moreover the first defendant has not produced before us the application which Meenakshi Naidu made to the Official Assignee for getting these properties released from the insolvency. Ex. D. 10 is, on the face of it, not a conveyance. It is a release of the Official Assignee's rights whatever they may be in favour of Meenakshi Naidu on the ground that Meenakshi Naidu has guaranteed the Official Assignee to indemnify him against any possible claims that may be made by the creditors. Ex. D. 10 does not at all show that the Official Assignee transferred this item absolutely to Meenakshi Naidu for any consideration whatever.

We have no hesitation at all in holding that what happened was that when properties in the possession of the insolvents which had been dedicated in trust were taken possession of by the Official Assignee as belonging to the estate of the insolvents, Meenakshi Naidu put in a claim on the footing that the ownership of these properties did not vest in the insolvents and therefore the Official Assignee has neither right nor title to them. When the Official Assignee was satisfied about the trust character of those properties, especially since in the list of the insolvents' properties this was sought to be excluded under S. 52(1) of the Presidency Towns Insolvency Act, the Official Assignee released all his rights in favour of Meenakshi Naidu and allowed him to take possession of them on a guarantee given by him. In pursuance of Ex. D. 10 when Meenakshi Naidu got into possession of item 1, it cannot be said that his possession was in any other capacity except that of a lawful trustee and if that is so there is no animus to possess it adversely to the trust. When a person enters into trust property in the capacity of a trustee lawfully he cannot prescribe against the trust and in our view Exs. P. 6(a) and D. 10 show clearly that the origin of the possession of Meenakshi Naidu was for and on behalf of the trust. Such being the case we feel that no question of adverse possession arises.

Though there was no clear and specific issue on this point regarding the acquisition of title by adverse possession, Mr. Rajagopala Aiyangar contended that certain passages in the learned Judge's judgment afforded material for him to contend that the point was taken in the court below. Whether it is correct or not, we feel that the argument to the effect that under Ex. D. 10 Meenakshi Naidu got an absolute title to item 1 is not entitled to any weight whatever. This contention therefore fails.

(9) The only other point which remains for consideration is one which arose during the course of the arguments, viz., whether a suit for removing a trustee of a private trust and for the framing of a scheme is maintainable. There is no doubt that S. 92, Civil P. C. in terms does not apply because that relates specifically and definitely to the case of public trusts. There are no provisions in the Indian Trusts Act for the framing of a scheme and that Act does not apply to private religious endowments. The distinction between a public trust and a private trust is not so clearly marked in England as in India. At page 11 of Tudor on

Charities, 5th Edition, we find the following statement:

"In the first place it may be laid down as a universal rule that the law recognises no purpose as charitable unless it is of a public character. That is to say, a purpose must, in order to be charitable, be directed to the benefit of the community or a section of the community."

At page 180, the learned author observes:

"The charitable jurisdiction of the Court does not arise where the gift is not charitable in the legal sense as where it is for private charity."

This rule is based upon the doctrine of the rule against perpetuities.

We find in Halsbury's Laws of England, Volume 4, 2nd Edition, at pages 346 and 347 that at present in England there is general jurisdiction to enforce trusts. That is to say, the High Court has jurisdiction to enforce the observance or redress breaches of all trusts, charitable as well as private. The jurisdiction in the case of charities is more extensive than in the case of private trusts. At page 347, the learned author observes:

"After some conflict of judicial opinions the rule is now established that, wherever there is a gift to charity and the donor either created or intended to create a trust, whether the objects are specified or indefinite, the court has jurisdiction to enforce the execution of the trust, and, if necessary, to apply the gift to charitable purposes by means of a scheme."

The earlier law in England can be gathered from the decision of — 'Ommaney v. Butcher', (1823) Turn & R 260: 37 E R 1098 (E). In delivering the judgment of the Court the Master of the Rolls observed as follows at page 1102,

"There is no case in which private charity has been made the subject of disposal in the Crown, or been acted upon by this court. The charities recognised by this court are public in their nature, they are such as the court can see to the execution of. In this case the difference is obvious; if a party is to execute the purpose of this testator he cannot give to public charities; the disposition must be confined to private charity. In what respect does private charity differ from benevolence?"

(10) There used to be some divergence of opinion so far as the Indian Courts are concerned but it seems to us that the more prevalent and satisfactory view is that even in the case of private charities courts can interfere to see that no breaches of trust are created. So far as the members of the family are concerned, who are interested in the trust, if the trustee for the time being mismanages or acts in breach of trust, it is a civil right which is infringed and under S. 9, Civil P. C. they are entitled to seek redress in court for the purpose of remedying the mischief. In — Gopallal Sett v. Purna Chandra', AIR 1922 PC 253 (F), the Judicial Committee had to consider the case of a private trust created by means of a Will which specified the person to conduct the trust and charged him with maintenance of the worship but which did not create any heritable shebaitship. In dealing with that aspect, Lord Buckmaster held that the court had power to appoint a trustee. At page 256 the following observation occurs:

"Their Lordships see no reason to doubt that the court executing the duty of appointing trustees would pay due regard to the claims of that branch of the family with whom the worship was established and by whom the services were performed, but they regard the gift as in effect a private trust to which the provisions of S. 539, Civil Procedure Code, 1882 would not apply, and consequently the establishment of a scheme for its administration, as provided by the decree of the High Court, is 'inappropriate'."

This sentence is very much relied upon by the learned counsel for the appellant for justifying his contention that in the case of a private trust no scheme can be framed at all.

In — Pramathanath v. Pradyumna Kumar', AIR 1925 PC 139 (G), where also the question related to a private trust, their Lordships held that the idol, in a matter where the rival shebaits were agitating their claims, should be represented by a disinterested guardian and remanded the appeal for that purpose to the lower court with this observation at page 145:

"Their Lordships are accordingly of opinion that it would be in the interests of all concerned that the idol should appear by a disinterested next friend appointed by the court. The female members of the family should also be joined, and a 'scheme should be framed', for the regulation of the worship of the idols."

It would seem at first sight that the observations in the two decisions run counter to each other. The matter was discussed at some length in — 'Bimal Krishna v. Jnanedra Krishna', AIR 1937 Cal 338 (H). B. K. Mukherjea J. in delivering the judgment of the court notes the conflict and refers not only to these two decisions but also to another decision by Sir Asutosh Mookerjee J. in — 'Manohar v. Peary Mohan', AIR 1920 Cal 210 (I). He distinguished the case in — 'AIR 1922 PC 253 (F)' in the following manner:

"In a case like this, where a private trust was created not of a purely religious character and the ownership of the property was vested in the trustee in the legal sense of the word, the court could not possibly frame a scheme for the administration of the trust estate. In religious endowment, however, where the deity who is a perpetual infant is the legal owner of the property and the shebaits occupy the position of managers or guardians, the position is different."

Then the learned Judge discusses the observations of Sir Asutosh Mookerjee J. in — 'AIR 1920 Cal 210 (I)'. It would seem from this judgment that if the trust is a private one and not purely of a religious character and the ownership of the property is vested in the trustee, then the court cannot interfere. But this distinction is not supported by any authority.

On the other hand in — 'Rabindranath v. Chandi Charan', AIR 1932 Cal 117 (J), Mullick and Guha JJ. have held that civil courts have jurisdiction to entertain a suit brought by the heirs of the founders of a private debuttar trust, for the framing of the scheme, for the preservation and management of the debuttar estate, on the allegation of mismanagement and maladministration. The learned Judges rely upon the decision of Sir Asutosh Mukherjee J. in — 'AIR 1920 Cal 210 (I)'.

We are not able to appreciate the distinction which B. K. Mukherjea J. seeks to bring out in — 'AIR 1937 Cal 338 (H)'. No such distinction was sought to be made out by Sir Asutosh Mookerjee J. in — 'AIR 1920 Cal 210 (I)'. In — 'Prasaddas Pal v. Jagannath Pal', AIR 1933 Cal 519 (K) which was also a case of private trust, the court gave certain directions for the framing of scheme. In all these cases, the trust was a private one and was purely of a religious character as in the present case. The case in — 'Sathapayyar v. Periasami', 14 Mad 1 (L) also related to a private trust. That was referred to by Sir Asutosh Mookerjee J. in — 'AIR 1920 Cal 210 (I)' at page 215 of the report. Even if the observations of the learned Judge B. K. Mukherjea J. can be accepted, still the trust in the present case is purely of a religious character though the ownership of the property

is not vested in the idol. There are no Madras cases expressing an opinion either way though the case in — '14 Mad 1 (L)' related to a mutt and the learned Judges held that sanction under S. 539, C. P. C. (Sec. 92 of the present C. P. C.) was not a prerequisite for the purpose of filing the suit. In our view the correct position is that even in the case of private trusts it is open to any member of the trustee's family where his rights are impugned to seek redress in courts of law. The public or the intended beneficiaries have no manner of right at all. It seems strange that on a subject like this, there are no direct decisions of our court; at any rate no decision has been brought to our notice and even in — 'AIR 1920 Cal 210 (I)' only a receiver was appointed and no scheme was framed. In partition suits in joint Hindu families provisions are generally made for the conduct of family charities, but in those cases, such trusts form the subject matter of the suit and the suit would not be for framing a scheme simpliciter. Either in principle or in precedent do we find any justification for refusing to frame a scheme in the matter of a private trust. Therefore, the objection regarding the maintainability of the suit fails.

(11) The only other point that needs consideration relates to the details of the scheme which form the subject matter of A. S. No. 799 of 1948. The learned counsel for the appellant contends that so far as trusteeship is concerned, an age limit should be fixed because under the Hindu Religious Endowments Act the age of 70 is fixed for a trustee. We do not find any justification for fixing an age in the case of a private trust like this where properties are not considerable and where the management does not involve any strenuous exertion at all. With regard to the other details of the scheme we have perused them and find nothing to which objection can be taken. The scheme is just and equitable and must be confirmed.

(12) The appeals therefore fail and are dismissed with costs of plaintiff (first respondent) one set only.

B/V.B.B. Appeals dismissed.

A. I. R. 1953 MADRAS 754 (Vol. 40, C. N. 288)

RAJAMANNAR C. J.

Muthu Naicken, Petitioner v. Mariappa Pillai and another, Respondents.

Civil Revn. Petn. No. 875 of 1950, D/- 13-2-1951.

(a) Civil P. C. (1908), S. 115 — Question relating to court-fee and jurisdiction.

It has been the well established practice of the Madras High Court to interfere with an order relating to court-fee and jurisdiction even though the decision on these questions of the lower Court were in favour of the plaintiff. It is only when the question related entirely to court-fee and did not involve any question of jurisdiction that the Court does not interfere at the instance of the defendant. (Para 2)

Anno: C. P. C., S. 115 N. 27b.

(b) Court-fees Act (1870), S. 7(ix) — Suit for redemption of part of property with prayer for partition and separate possession.

A suit for redemption of a portion or a share of the hypothecated property must be valued on the same principle as a suit for redemption of the entire mortgage and the valuation would be the value of the share of the mortgage amount as determined by the share in the mortgage property to which the plaintiff lays claim. Where the plaintiff also adds a prayer for partition and for separate possession of the share he is found entitled to, the court-fee is the same as under S. 7(ix) and it is not necessary to value the suit as a separate suit for partition. 8 All 438 (FB) and 16 Mad 326, Foll. AIR 1918 Mad 1142, Expl. (Paras 5, 6)

Anno: Court-fees Act, S. 7(ix) N. 2.

K. Krishnaswami Iyengar and R. Aravamudha Iyengar, for Petitioner; M. S. Vaidhyanatha Iyer, for Respondents.

CASES CITED:

(A) ('18) AIR 1918 Mad 1142: 32 Mad LJ 489
(B) ('86) 1836 All WN 146: 8 All 438 (FB)
(C) ('93) 16 Mad 326
(D) ('16) AIR 1916 Mad 863: 38 Mad 310

JUDGMENT: This revision arises out of an interlocutory order passed in a suit filed by the respondent for redemption of an 'othi' dated 3-5-1899. He prayed for a decree directing the defendants to receive the 'othi' amount of Rs. 300 and to deliver possession of the properties in Sch. A. 2. In the alternative he prayed for delivery of possession of item 2 of A. 2 schedule and partition of items 1 and 3 of A. 2 schedule into four shares and delivery of possession of three shares to him. This was because there was a claim on behalf of defendant 2 that he had become entitled to a fourth share in these two items. We are not concerned with the other prayers. He valued the reliefs A and B in the principal amount of the 'othi' and for the alternative relief of partition and possession, he valued the relief under Art. 17-B, Court-fees Act. As higher court-fee was payable on the main relief of redemption of the entire property, that court-fee was paid and no court-fee was paid on the alternative relief. Defendant 2 raised objections as regards the valuation of the suit claim and the jurisdiction of the Court. Two of the issues were, therefore, heard as preliminary issues, namely, issues Nos. 14 and 15. They run as follows:

"14. Whether the relief of partition has been properly valued and proper court-fee has been paid?

15. Whether the amended claim for partition is beyond the pecuniary jurisdiction of this Court."

Meanwhile the plaintiff came out with his application I. A. No. 931 of 1949 for an amendment of the plaint, viz., in the place of prayer (b) the following to be substituted,

"In the alternative directing the defendants by way of redemption to deliver possession of item 2 of A. 2 schedule and separate possession of such share in items 1 and 3 of A. 2 schedule as the Court may find that the plaintiff may be entitled to against the defendants."

Consequently, he wanted also an amendment in the particulars of claim and for relief (b) the following to be substituted,

"For relief (b) the alternative relief of redemption and separate possession of such share as the Court may find that the plaintiff is entitled ..... Rs. 600 court-fee under S. 7 cl. (ix) Court-fees Act. Rs. 67-7-0."

The learned District Munsif found in favour of the plaintiff on issue No. 14 and against the defendant on issue No. 15 and granted the amendment of the plaint sought in I. A. No. 931 of 1949. Defendant 2 seeks to have this order revised by this Court.

(2) A preliminary objection was raised by Mr. M. S. Vaidhyanatha Aiyar on behalf of the plaintiff-respondent that no revision petition would lie on a mere finding which allowed the

suit to go on. Assuming that this would be the general practice of this Court relating to more or less the merits, it has been the well established practice of this Court to interfere with an order relating to court-fee and jurisdiction even though the decision on these questions of the lower Court were in favour of the plaintiff. It is only when the question related entirely to court-fee and did not involve any question of jurisdiction that this Court had held that it would not interfere at the instance of the defendant. We are not, therefore, impressed with the preliminary objection.

(3) I do not think that the real quarrel of the petitioner is with the order allowing an amendment of the plaint. It is really against the findings on issues Nos. 14 and 15. The amendments which have been allowed do not change the cause of action on which the suit was originally brought. They do not introduce new pleas. Whether they clarify anything or not it is not for me to say. All that I can say is that the amendments appear to be quite innocuous. In any event I cannot say that the learned District Munsif erred so grossly in the exercise of his discretion that I should interfere.

(4) Then remains the main question raised in this petition by the petitioner, i.e., as to the jurisdiction of the District Munsif to entertain the suit. As a suit for redemption simpliciter, though redemption may involve recovery of possession, there can be no doubt that the value of the suit both for the purposes of court-fee and for purposes of jurisdiction must be determined by the amount secured by the mortgage. Section 7, cl. (ix), Court-fees Act is the provision relating to court-fees and the same valuation would apply even for purposes of jurisdiction. No serious dispute was raised by Mr. K. Krishnaswami Aiyangar learned counsel for the petitioner on this point. He, however, contended that so far as the alternative relief was concerned, namely, the relief for partition and separate possession of a three-fourth share in two of the items, the suit must be valued as if it were an ordinary suit for partition and the subject matter of the jurisdiction being land, the value for purposes of jurisdiction would be the market value of the plaintiff's share which would be in excess over the pecuniary limits of the District Munsif. He has not been able to cite any authority to support his contention except a decision in — 'Narayanan Nair v. Narayanan Nambiar', AIR 1918 Mad 1142 (A) to which I shall presently refer, but which, in my opinion, does not decide this question at all.

(5) On the other hand, Mr. Vaidhyanatha Aiyar for the respondent (plaintiff) has referred me to a Full Bench decision of the Allahabad High Court in — 'Amanat Begam v. Bhajan Lal', 8 All 438 (FB) (B) and to — 'Vasudeva v. Madhava', 16 Mad 326 (C). These were also cited and relied upon by the Court below. I think they do support the respondent's contention that a suit for redemption of a portion or a share of the hypothecated property must also be valued on the same principle as a suit for redemption of the entire mortgage and the valuation would be the value of the share of the mortgage amount as determined by the share in the mortgage property to which the plaintiff lays claim. In 8 All 438 (FB) (B) a deed of mortgage was executed by three persons. A purchaser of the share of one of the three mortgagors brought a suit for recovery of possession of one-third of the mortgaged property against the mortgagees who had purchased the shares of the other mortgagors. It was held by the Full Bench with reference to S. 7, cl. (ix), Court-fees Act that the principal money secured as between the defendants and the plaintiff must be regarded as one-third of the original mortgage amount and court-fees and jurisdiction should be determined on that basis. Learned counsel for the petitioner in trying to distinguish the case said that this was not a case where the plaintiff had sued for part of the mortgaged property, but in this he was wrong. The statement of the facts in the report makes it abundantly clear that the suit was to recover one-third of the mortgaged property on payment of one-third of the principal money due. In 16 Mad 326 (C) the Subordinate Judge passed a decree for redemption of one-fourth of the mortgaged property on payment of one-fourth of the mortgage debt. A question arose whether an appeal from that decree lay in the District Court or to this court. The learned Judges (Muthuswami Aiyar and Wilkinson JJ.) held that the value of the subject matter of the appeal was one-fourth of the mortgage debt.

(6) Now I shall refer to — 'Narayan Nair v. Narayanan Nambiar', AIR 1918 Mad 1142 (A). In that case it was held that in a suit by one co-owner for redemption of the whole mortgage the Court can, if there is no great difficulty in ascertaining the particular share to which the plaintiff was entitled, pass a decree for both the reliefs or partition and redemption. In that case, the plaintiff had prayed originally only for redemption of the entire mortgage. It was found that he would be entitled to a moiety. The learned Judges allowed the plaintiff to amend the plaint by including a prayer for recovery in the alternative of the share to which the plaintiff was found entitled and for partition and redemption of this share on payment of the proportionate amount of the mortgage. I am unable to understand how this decision really helps the petitioner. If at all, I believe, it is against him. On the principle of this decision even if the plaintiff in the present suit had not prayed for the alternative relief and had been content to pray only for the redemption of the entire mortgage, if it was actually found that he was entitled only to a share, he would have been directed to amend his plaint by praying in the alternative for recovery of the share to which he is found entitled. There is nothing about court-fees or jurisdiction raised or decided in the judgment of Sadasiva Aiyar J. on which learned counsel for the petitioner placed great reliance. We are not concerned now with the question whether a suit for redemption by one co-owner is not maintainable at all before there had been a partition between the several co-owners, see — 'Ratna Mudali v. Perumal Reddi', AIR 1916 Mad 863 (D).

(7) The decision of the lower Court was right and the civil revision petition is dismissed with costs.

C/D.R.R.

Revision dismissed.

A. I. R. 1953 MADRAS 755 (Vol. 40, C. N. 289)

SUBBA RAO AND RAMASWAMI JJ.

Sure Subba Rao and another, Appellants v. Sure Venkata Satyanarayana and another, Respondents.

Appeal No. 524 of 1949, D/- 10-12-1952.

(a) Hindu Law — Adoption — Adoption by widow — Consent of sapindas.

Where the widow first approached the nearest 'sapindas', but they improperly refused to receive the notices and give her the requisite consent & therefore she took the consent of the remoter reversioners from the different branches of the family including the two eldest members of the family:

Held that having regard to the circumstances of the case it could not be held that the persons who gave the consent were not competent advisers to the widow. Their advice satisfied the test that the consent required is that of a substantial majority of those agnates nearest in relationship who are capable of forming an intelligent and honest judgment on the matter and the assent must be such as to show that the act was done by the widow in the proper and bona fide performance of a religious duty and neither capriciously nor from a corrupt motive. The adoption made by the widow with the consent of the sapindas was therefore valid. Case law discussed. (Para 15)

(b) Hindu Law — Adoption — Adoption by widow — Consent of sapindas.

It is not the law that if the nearest sapindas refused their consent the widow should consult the other sapindas in the order of the degree of relationship to her deceased husband. (Para 14)

†(c) Registration Act (1908), S. 17(3) — Authority to adopt — (Hindu Law — Adoption).

Section 17(3) should be confined only to authorities conferred upon a widow by her husband. A record of the consent given by the sapindas, does not require registration. (Para 16)

Anno: Registration Act, S. 17, N. 73.

G. Venkatarama Sastry, for Appellants; P. Somasundaram and P. Suryanarayana, for Respondents.

CASES CITED:

(A) ('67-69) 1 Beng LR 1: 12 Moo Ind App 397 (PC)
(B) ('76-78) 4 Ind App 1: 1 Mad 174 (PC)
(C) ('18) AIR 1918 PC 97: 41 Mad 998 (PC)
(D) ('20) AIR 1920 PC 4: 43 Mad 650 (PC)
(E) ('76-78) 3 Ind App 154: 1 Mad 69 (PC)
(F) ('34) AIR 1934 Mad 191: 57 Mad 411
(G) ('47) AIR 1947 PC 124: ILR (1948) Mad 362 (PC)
(H) ('50) AIR 1950 Mad 74: ILR (1950) Mad 461

SUBBA RAO J.: This appeal raises the question of the factum and validity of the adoption of the first defendant by the second defendant. The parties are Vaisyas by caste. In or about 1912 Venkayya, the last maleholder died possessed of a large estate more particularly described in schedules A, B and C appended to the plaint. As he had no issue, his wife Ademma, the second defendant inherited his properties. On 10-2-1947 she is said to have taken the first defendant in adoption to her deceased husband. The plaintiff who is the nearest reversioner along with the third defendant, being Venkayya's brother's son, filed O. S. No. 90 of 1947 on the file of the Court of the Subordinate Judge, Guntur, for a declaration that the adoption of the first defendant by the second defendant was not true, valid and binding on the reversioners to the estate of Venkayya. He questioned the factum of adoption and pleaded that even if it had taken place, it was invalid on the ground that the consent of the next reversioners was not taken.

The first defendant is the alleged adopted son. The second defendant is Ademma, the widow of Venkayya. The third defendant is the son of Venkayya's brother, Guruvayya. The third defendant supported the plaintiff in so far as he questioned the factum and validity of the adoption. Defendants 1 and 2 supported the adopting. They also questioned the correctness of the schedules attached to the plaint. The following issues were framed:

"1. Is the adoption of the first defendant by the second defendant true and valid?
2. Are the stipulations in the compromise in O.S. No. 30 of 1917 under which second defendant could adopt not valid and binding on second defendant?
3. Even so is she bound by them after the death of the third defendant's father; if not is the refusal by the plaintiff and third defendant to consent to adoption by her proper?
4. Are the schedules correct?
5. To what relief is plaintiff entitled?

The learned Subordinate Judge found on issues 1 to 3 in favour of defendants 1 and 2. In the result he dismissed the suit with costs. The plaintiff and the third defendant have preferred the aforesaid appeal.

(2) The first question in the appeal is whether the alleged adoption was true. (His Lordship considered the evidence on the point and concluded:) We therefore hold that the second defendant took the first defendant in adoption on 10-2-1947 after going through the necessary formalities.

(3) The next question is whether the adoption, even if true, is valid. Learned counsel for the appellants contended that the adoption was invalid as the consent of the nearest 'sapindas' — the plaintiff and the third defendant — was not taken. He would also argue that even if for one reason or other they could be ignored the consent given by the other 'sapindas' would not be legal consent within the meaning of the decided cases. At this stage it may be convenient to notice the law on the subject as it would facilitate the application of accepted principles to the facts of this case. The necessity for the consent of the 'sapindas' in the case of an adoption by a widow whose husband died divided was laid down by the Judicial Committee in the Ramnad case — 'Collector of Madura v. Moottoo Ramalinga', 12 Moo Ind App 397 (A), as follows:

"In such a case, therefore, their Lordships think, that the consent of the father-in-law, to whom the law points as the natural guardian and venerable protector of the widow, would be sufficient. It is not easy to lay down an inflexible rule for the case in which no father-in-law is in existence. Every such case must depend upon the circumstances of the family. All that can be said is, that there should be such evidence of the assent of Kinsmen as suffices to show, that the act is done by the widow in the proper and 'bona fide' performance of a religious duty, and neither capriciously nor from a corrupt motive."

Their Lordships stated the reason for the rule in the following terms:

"The assent of the kinsmen seems to be required by reason of the presumed incapacity of women for independence, rather than the necessity of procuring the consent of all those whose possible and reversionary interest in the estate would be defeated by the adoption."

It will therefore be seen that the reason for the rule is not the possible deprivation of the proprietary interests of the reversioner but the state of perpetual tutelage of women under Hindu law. The consent of the kinsmen was considered to be a sufficient guarantee against any capricious action on the part of the widow in taking a boy in adoption. In — 'Vellanki Venkatakrishna Rao v. Venkatarama Lakshmi', 1 Mad 174 (PC) (B), the Judicial Committee proceeded to elaborate on the scope of the consent of 'sapindas'. Their Lordships observed:

"All that which this Committee in the former case — '12 Moo Ind App 397 (A)', intended to lay down was, that there would be such proof of assent on the part of the 'sapindas' as should be sufficient to support the inference that the adoption was made by the widow, not from capricious or corrupt motives, or in order to defeat the interest of this or that 'sapinda', but upon a fair consideration, by what may be called a family council, of the expediency of substituting an heir by adoption to the deceased husband."

(4) This judgment introduces a new concept of a "family council which in its turn gave rise to doubts and conflicts. The concept of a family council has been explained by Mr. Ameer Ali in — 'Veerabasavaraju v. Balasuryaprasada Rao', AIR 1918 PC 97 (C), as follows:

"Division does not affect her personal dependence or give her an independent status to alter by her own authority the succession to the estate which she takes as the widow of her husband. She is still dependant for counsel and protection upon the nearest 'sapindas' of her husband, who are the most closely united to him by ties of blood, or, to use the language of Hindu lawyers by 'community of corporal particles'. The father of the deceased, if still alive, continues to be her 'natural guardian and venerable protector.' He has furthermore a direct interest in the protection of the estate, for in case of her death without leaving her surviving a daughter or the mother of her deceased husband, he has a right to the reversion. His authorisation is, therefore, essentially requisite to the validity of an adoption by her to her husband.

If there is no father the divided brothers take his place by virtue of the tie of blood as her husband's nearest 'sapindas'; they become her natural guardians and the protectors of her interests. They also have an interest in the protection of the inheritance. In the absence, then, of the father the assent of the divided brothers is equally requisite for the validity of the widow's adoption. If a majority assent and one refuses, his objection may be discounted. But the absence of their consent or in case there is only one, of his consent, cannot be made good by the authorisation of distant relatives remotely connected whose interest in the well being of the widow or the spiritual welfare of the deceased, or in the protection of the estate is of minute character, and whose assent is more likely to be influenced by improper motives."

(5) The aforesaid passage indicates that his Lordship laid equal emphasis on the protection of the estate as on the spiritual welfare of the deceased. Indeed his Lordship made his meaning clearer when he said at a later stage, "that rights to property cannot be left out of consideration in the determination of the question." But what is relevant for the present purpose is that this decision seems to indicate that the consent of the remoter relative is not a substitute for the consent of nearer 'sapindas'. But this does not consider the further question, namely, what would be the position if the nearer 'sapindas' refuse to give the consent on improper grounds. That question fell to be considered in — 'Krishnayya v. Lakshmipathi', AIR 1920 PC 4 (D).

There one Narasamma made an adoption on 20th February 1907, with the alleged assent of her husband's 'sapindas'. At the time of the adoption there were five next reversioners, but the adoption was admittedly made with the assent of only one of them and some of the remoter 'sapindas'. Both the courts in India had concurrently found that the widow never applied to the remaining four next reversioners for their assent, and had consequently held that the adoption in question was invalid. At page 4, Viscount Cave dealing with the observations of Mr. Ameer Ali in — 'AIR 1918 PC 97 (C)' made the following observations:

"The reference in the last mentioned case to a 'family council' gave rise to some doubt whether, where there were agnatic relations closely related to the deceased the assent of those standing in a remoter degree was either necessary or sufficient, but this doubt was resolved in the recent case of — 'Veerabasavaraju v. Balasuryaprasada Rao', (C) where it was held that the absence of consent on the part of the nearest 'sapindas' cannot be made good by the authorisation of distant relatives whose assent is more likely to be influenced by improper motives. This does not mean that the consent of a near 'sapinda' who is incapable of forming a judgment on the matter, such as a minor or a lunatic, is either sufficient or necessary; nor does it exclude the view that where a near relative is clearly proved to be actuated by correct or malicious motives his dissent may be disregarded. Nor does it contemplate cases where the nearest 'sapinda' happens to be in a distant country, and it is impossible without great difficulty to obtain his consent, or where he is convict or suffering a term of imprisonment. The consent required is that of a substantial majority of these agnates nearest in relationship who are capable of forming an intelligent and honest judgment on the matter. It must however be added that, save in exceptional cases such as those mentioned above, the consent of the nearest 'sapindas' must be asked, and if it is not asked it is no excuse to say that they would certainly have refused."

(6) The Judicial Committee restated with approval the following extract from — Sri Virada Pratapa Raghunanda Deo v. Brojo Kishore', 1 Mad 69 (PC) (E):

"But it is impossible not to see that there are grave social objections to making the succession of property—and it may be in the case of collateral succession, as in the present instance, the rights of parties in actual possession—dependent on the caprice of a woman, subject to all the pernicious influences which interested advisers are apt in India to exert over women possessed of or capable of exercising dominion over, property. It seems, therefore, to be the duty of the courts to keep the power strictly within the limits which the law has assigned to it."

(7) In the aforesaid extracts the Judicial Committee explained the scope of the passage in — 'AIR 1918 PC 97 (C)' which without the commentary may appear to lay down an implacable rule of law that a widow cannot look up to the consent of a remoter 'sapinda' even if the nearer one is not in a position to give consent or refused to give consent for malicious motives. Madhavan Nair and Jackson JJ. considered the scope of this rule in — 'Murahari Brahma Sastri v. Sumitramma', AIR 1934 Mad 191 (F). There a Hindu widow took a boy in adoption. She did not get the consent of her deceased husband's daughter, one

of the two nearest 'sapindas' and two of the four remoter 'sapindas'. She did not call a family council to consider the propriety of the adoption. It was found that one of the nearest 'sapindas' capriciously withheld his consent. On the evidence the learned Judges found that the consent obtained by her of a majority of her deceased husband's kinsmen would support the adoption. It was argued that the consent of the 'sapindas' should be sought in accordance to the degree of propinquity to the last maleholder. Madhavan Nair J. repelled that argument with the following observations at page 194:

"It is no doubt obligatory on the part of the widow to consult the nearest 'sapindas' but if their consent is capriciously withheld it is not necessary that a family council should be held to consider the propriety of the adoption, or that the reversioners should be consulted in the order of their degree of relationship to the deceased husband, or that even that all the reversioners should be consulted."

(8) After citing the relevant passages from the judgment of the Judicial Committee which we have already extracted above, the learned Judges proceeded to state:

"These passages which form the basis of the law on the point, read together, do not make it obligatory that a family council of the agnates should be called by the widow to consider the propriety of the adoption or even that all the reversioners should be consulted before the adoption is made. The nearest 'sapindas' of course should be consulted; but when it becomes necessary to consult the reversioners all that is wanted is that there should be such evidence of consent as would show that the widow in making the adoption is not acting improperly or capriciously or from a corrupt motive. This would be proved no doubt by showing that the opinion of a substantial majority of the reversioners is in favour of the adoption; but it does not mean that each and every reversioner should be consulted or that if one or two are omitted from consultation the adoption would be necessarily invalid."

(9) This decision was cited with approval by the Judicial Committee in — 'Ramasubbayya v. Chenchuramayya', AIR 1947 PC 124 (G). An exhaustive and, if we may say so, an instructive treatment of the subject is found in the judgment of Satyanarayana Rao and Viswanatha Sastri JJ. in — 'Sundararama Rao v. Satyanarayanamurti', AIR 1950 Mad 74 (H). The question there was whether in the case of an undivided family a widow can travel outside the family and seek the consent of the divided 'sapindas' when the only coparcener improperly refused and withheld his assent for the valid act of adoption. The learned Judges held that she could do so. They traced the law on the subject and restated the principle governing the doctrine of the consent of 'sapindas'. The following relevant portion of the head note brings out clearly their conclusion:

"It is well settled in Southern India that a widow in the absence of an authority from the husband, can make a valid adoption with the assent of her husband's sapindas. The proof of assent on the part of the sapindas was required to establish the inference that the adoption was made by the widow without any capricious or corrupt motive, or with a view to defeat the interests of this or that sapinda. It is not necessary to obtain the consent of all the nearest sapindas; it is enough if they are all consulted. The duty of the widow to ask for the consent of the nearest sapindas as far as possible is imperative. In matters of adoption devolution of property is of secondary importance and the validity of the adoption is to be judged and determined by spiritual rather than by temporal considerations."

The doctrine of consent in adoption had not its origin in any specific Hindu law texts. A remote connection may be discovered in the state of the perpetual tutelage assigned to women by Hindu law expressed so tersely and clearly in the well-known text of Yajnavalkya in Chapter 1, verse 85:

"Let her father protect a maiden; her husband a married woman; sons in old age; if none of these other Gnatis (kinsmen). She is not fit for independence."

Gradually and imperceptibly the Judicial Committee and the High Courts have developed a doctrine of consent affording a suitable substitute in the absence of an express authority by the husband. This doctrine is built upon three principles:

1. The adoption of a son to deceased husband by a widow is a meritorious act conducive to spiritual welfare.
2. The consent of the 'sapindas' is a guarantee against the widow abusing her position and acting with capricious or corrupt motives.
3. The validity of the consent depends upon qualitative and quantitative test laid down by decisions.

But the real difficulty lies not so much in formulating the tests but in applying them to different situations. The words used in various decisions such as kindred, 'sapindas', competent advisers, family council etc., have given rise to doubts and difficulties till the Judicial Committee finally and definitely explained the scope of the doctrine in — 'AIR 1920 PC 4 (D)'. The general principle is that the court in judging the adequacy and the validity of the consent given in a particular case will have to take an over all picture of the entire situation and decide whether the 'sapindas' giving the consent occupy sufficient importance or carry adequate weight in the fictional family council. Judged from the standpoint of propinquity, age, wisdom, availability, numbers and other relevant considerations, so that the consent given by them may establish the inference that the adoption was made by the widow without any capricious or corrupt motive but only in the interests of her husband's salvation. Difficult and delicate questions may arise in drawing the picture.

It is true that the nearest 'sapinda' or 'sapindas' must be consulted; but there may be circumstances where his or their advice is not available. His whereabouts may not be known; he may refuse to give advice; he may improperly refuse to give consent on unjustifiable grounds, he may have left the country for foreign parts with no prospect of early return. The instances are not exhaustive and there may be other instances where a nearest 'sapinda' is not available for consultation. Nor is it possible to give a descending or ascending order fixing grades of consent based upon the law of inheritance to the property of the last maleholder or otherwise. In the final analysis it is a question of fact in each case for the court to come to the conclusion whether the consent of the 'sapindas' is sufficient to validate the adoption having regard to the conditions laid down in the aforesaid decisions. The only legal test is that there should be such evidence of the assent of kinsmen as suffices to show, that the act is done by the widow in the proper and 'bona fide' performance of a religious duty and neither capriciously nor from a corrupt motive.

(10) Bearing the aforesaid principles in mind, we shall now turn to the consent of the reversioners obtained by the widow in the instant case. For convenience of reference and to appreciate the contentions of the parties the following genealogy may be conveniently referred to:

SURE CHENNAM SETTI

- First wife Parvatamma
  - Ramayya
    - First wife Akkalakshmi
      - Guruvayya
      - Kotayya
        - Venkayya
          - Venkatasubbayya
            - Venkayya
              - Venkata Kotayya
            - Kotayya
            - China Ramayya
    - Second wife Mahalakshmi
      - Venkatanarasu
        - Pichayya
          - Venkata Guravayya
          - Subbayya
          - Ramayya
      - Lakshmi Narasu
      - Subbayya
        - Kotayya
  - Appayya
    - Venkayya
      - Venkata Ramudu
        - Narasimham
          - Gurunadham
          - Swami
          - Gopayya
    - Narasimham
      - Guruvayya
        - Nagabhushanam
      - Appayya
        - Kotilingam adopted son
      - Venkata Ratnam
        - Venkata Koti
        - Gurunadham
        - Anjaneyalu (adopted to some other family)
        - Sitaramulu (minor)
        - Panduranga Rao (minor)
    - Mangalagiri
      - Lakshminarasu
        - Subbayya
        - Nagabhushanam
        - Appayya
      - Butchiramayya
        - Apparao
      - Nagayya
      - Appayya
      - Narasimham
  - Venkatachalam
    - Peda Venkatanarasu
      - Guruvayya
        - Venkatanarasu (D. 3)
          - Gurunatham
          - Pullarao
          - Nageswara Rao
      - Ramayya
        - Subba Rao (Plaintiff)
          - Ramulu
          - Venkateswarlu
          - Radhakrishna murthy
      - Lakshminarasimham
        - Appayya (Ad. son)
          - Lakshminarasu
          - Radha
      - Venkayya wife Ademma (A. 2)
    - Venkayya
      - Guruvayya
        - Pentayya
          - Subbayya
          - Hanumayya
        - Pullayya
          - Guravayya
      - Raghavalu
        - Punnayya
          - Satyanarayana
    - Venkayya
      - Krishnayya
        - Subbayya
          - Venkata Subbiah
          - Chinna Venkatasubbayya
        - Ramayya
      - Subbayya
        - Guravayya
        - Perayya
        - Satyanarayana
        - Venkateswarlu
- Second wife Bapakka
  - Subbayya

From the genealogy, it will be seen that the common ancestor is one Sura Chemman Setti. He had six sons, Ramayya, Appayya and Venkatachalam by his first wife, Venkayya, Krishnayya and Subbayya by his second wife. The last maleholder belongs to Venkatachalam's branch. The 'sapindas' with a circle round their names were either present at the adoption or gave their consent in writing. Persons with an "X" mark against their names were either minor or not consulted. The rest of the persons indicated in the genealogy were all dead. We have three generations of 'sapindas'. Pitchayya of Ramayya's branch and Punnayya of Venkayya's branch belong to the generation of the deceased Venkayya. Both of them have since died; but at the time of the adoption they were over 90 years of age and their eye sight was not good.

Pitchayya's son Ramayya and Punnayya's son Satyanarayana were examined as D. Ws. 4 and 5. They deposed that their fathers gave the consent for the adoption, that they were present at the time of the adoption and that they did not sign either the adoption deed or the authority giving consent as they were not in a position to do so. But the learned counsel for the appellants relied upon the evidence of D. W. 1, the second defendant, in support of his contention that she did not ask their consent for the adoption. But a perusal of the evidence of D. W. 1 discloses that Pitchayya and Punnayya were present at the time of the adoption and when she said that she did not ask their consent, she meant only that she did not ask them to sign the authority giving consent to the adoption. It should not be forgotten that the second defendant was an illiterate woman of seventy years and the cross-examination shows that despite her age and illiteracy she stood the test of cross-examination fairly well.

The evidence of D. Ws. 4 and 5 to the effect that their fathers gave consent is therefore reconcilable with the evidence of the old woman D. W. 1. The second generation consists of 'sapindas' in all the branches. Taking the first branch in the above pedigree, i.e., Ramayya's branch, Subbayya and Ramayya the sons of Pitchayya, are alive. D. W. 4, Ramayya, gave his consent in writing. D. W. 1 says that his brother, Subbayya attended the adoption. In the branch of Appayya, Narasimham did not give his consent, nor did he attend the function whereas Nagabhushanam and Kotilingam signed both Exs. B. 11 and B. 16. Appayya's third son, Venkataratnam's sons were not consulted, but the evidence of P. W. 1 and D. W. 3 shows that Anjaneyalu, the second son of Venkataratnam was adopted to a different family and that Sitaramulu and Panduranga Rao, the other two sons were minors.

It will therefore be seen that in Appayya's branch, out of six 'sapindas' available for consultation two of them, Nagabhushanam and Kotilingam were consulted. The rest were either minors or adopted to different families. Coming to Venkatachalam's branch, i.e., the branch of Venkayya, Venkatanarasu (3rd defendant) and Subba Rao (plaintiff) did not give their consent. They are the nearest reversioners to Venkayya. If they were not consulted, the adoption would be invalid. The defendant's contention is that they were consulted but for ulterior motives they refused to take the notices. It will be necessary to trace the history of the disputes between the widow and these two reversioners and their fathers to ascertain which version is true.

In 1917 Guruvayya, the father of the third defendant, and Ramayya, the father of the plaintiff instituted O. S. No. 12 of 1917 on the file of the court of the Temporary Subordinate Judge, Guntur, against Ademma for removing her from the management of the estate and for the appointment of a receiver. Allegations of waste were made against her. In the written statement Ademma pleaded that the suit was

> "the result of ill-feeling consequent on the refusal of the defendant to adopt one of the boys of the plaintiffs and trying to adopt a distant 'gnati'."

This suit was transferred to the court of the Additional temporary Subordinate Judge, Guntur, and numbered as O. S. No. 30 of 1917. Guruvayya and Ramayya filed also O. S. No. 87 of 1917 for setting aside a sale deed executed by her on 10-8-1916 in respect of a small extent of land for a sum of Rs. 90. O. S. No. 87 of 1917 was decreed on 1-2-1918. On 22-2-1919 the parties entered into compromise in O. S. No. 30 of 1917 and Ex. B. 1 was the petition filed under Order 23, R. 1, C. P. C. By the time the compromise was filed Ramayya the father of Subba Rao died. Under the compromise, the alienation made by her, which was the subject-matter of O. S. No. 87 of 1917 was declared valid. Guruvayya was put in possession of 7 acres 30 cents to be enjoyed by him absolutely towards costs alleged to have been incurred by him. The compromise also recorded an agreement between the parties in respect of the rights of the widow to take a boy in adoption. The relevant portion read:

> "That in case the defendant takes a boy in adoption to her husband at any time, that is, if she is willing to take boy in adoption, she shall take in adoption only these persons, that is, either the first plaintiff's son, that or the second plaintiff's son, that she shall not take any other boy in adoption, that in case the first plaintiff consents to another boy being taken in adoption she should obtain permission in writing and then take a boy in adoption."

The decree, Ex. A 3, followed the compromise. Nothing happened till the year 1940. Meanwhile Guruvayya also died. On 25th July 1940 the third defendant issued the notice Ex. A. 9 to the second defendant Ademma. It appears from that letter that the second defendant was contemplating to take the present plaintiff's second son Venkateswaralu in adoption. She must have asked the third defendant to give his consent. In Ex. A. 9 the third defendant stated that in view of the compromise decree she had no power to take any boy in adoption, much less Venkateswarlu. This notice was based upon an interpretation of the compromise decree. As under the compromise decree she agreed to take in adoption the son of either Guruvayya or Ramayya and that in default, an outsider only on a written consent given by Guruvayya and that as Guruvayya was no more it is said that the power conferred on her to take a boy in adoption was exhausted.

A similar notice bearing the same date was given by the third defendant to the plaintiff, Ex. B. 2. Presumably, because of the obstruction caused by the third defendant she slept over the matter for another three years. In 1943, she issued notices to the third defendant and the plaintiff seeking to take a boy in adoption and mentioning that she would like to take plaintiff's son Venkateswarlu in adoption. In this notice she expressed her surprise that the third defendant who was married and had children wanted to be taken in adoption. Learned counsel for the appellants commented upon this statement as based upon a misapprehension of the contents of Ex. A. 9. Literally understood it would be so; but what the old lady meant was that she was anxious to take a boy in adoption and that if the terms of the compromise were insisted upon, she could only take the third defendant in adoption and that

he could not expect her to take a father of children in adoption.

Be it as it may, this statement is not of much relevance. What is important is that in 1943 she asked both the brothers, i.e., the plaintiff and the third defendant, to give their consent for her taking a boy in adoption. Ex. B. 4 dated 11th May 1943 was a similar letter written by her seeking the consent of D. W. 7. Ex. B. 21 series were postal acknowledgments of letters written on her behalf to the other reversioners. Ex. B. 22 dated 23rd May 1943 was the reply given by the third defendant to the second defendant. In that letter the third defendant stated that the second defendant told him that she would take his son in adoption and he consented but Subba Rao refused to give consent unless his son was taken in adoption.

He insinuated that there was a 'lopayakari' arrangement between the second defendant's brothers and the plaintiff. He expressed his view that the contemplated adoption was not intended to be for the salvation of her husband and that it was also inconsistent with the terms of the compromise decree. It would be seen from Ex. B. 22 that the third defendant refused to give his consent mainly on two grounds (1) that there was an arrangement for dividing the properties and (2) she had no power to adopt in view of the express terms of the compromise decree. But neither of those reasons was tenable. The alleged arrangement was not proved; the widow could not have legally contracted herself out of a power to take a boy in adoption. Further, the condition obtaining in the year 1919 when the compromise was entered into had completely changed in the year 1943 and therefore her agreement not to take a boy in adoption without the consent of Guruvayya would no longer hold good.

In our view, this refusal was actuated by an improper motive, namely, that his son was not agreed to be taken in adoption by her. Again for two years, presumably because of the internecine disputes between the brothers, no adoption had taken place. But in the year 1945 the second defendant again issued a notice dated 7-5-1945 to the plaintiff and the third defendant requesting their permission for her adopting Ramulu, the eldest son of the plaintiff. Ex. B. 5 dated 15-5-1945 was the reply given by the third defendant to the 2nd defendant. He again reiterated therein his objections based upon the compromise decree. He also pointed out that there was a collusion between her and Subba Rao. Ex. A. 12 dated 17-5-1945 was a similar notice issued by him to the plaintiff. Ex. B. 6 dated 17-5-1945 was registered notice issued by the plaintiff to the second defendant. The relevant portion of the notice is:

> "Now, you wish to take a boy in adoption for bringing about salvation to your husband Venkayya and perpetuate the family according to the Hindu Dharma sastras, intend to take in adoption my son eldest son Ramulu out of my three sons and as the aforesaid went on and as you have requested me to grant you permission to take a boy in adoption, I have given you permission to take a boy in adoption."

The plaintiff by this letter gave her therefore permission to take a boy in adoption, though the occasion for the permission was that she intended to take his son Ramulu in adoption. The permission was general in terms and it was not strictly confined to the boy in question. But for one reason or other, she did not take the boy Ramulu in adoption. There are conflicting versions why Ramulu was not taken in adoption. The second defendant states in her evidence that she intended to take the boy in adoption and she was keeping the boy in her house for ten months, but thereafter owing to some quarrels between her and his mother the boy was taken back, whereas the plaintiff says that the adoption did not take place as the lady insisted upon Ramulu giving her half the property. P. W. 1 admits that he did not tell this fact to his pleader at the time of drafting the plaint and that he did not give any notice to the second defendant when she sent away her son. The second defendant also denies it.

Except the statements of the plaintiff, there is nothing in the record to show that any such proposal was put forward by the second defendant. We are not satisfied that the dropping of the idea of taking Ramulu in adoption was due to any such proposal on her part. It was likely that because of some disputes between the ladies Ramulu was taken away by his father for the subsequent conduct on the part of the second defendant showed that she was anxious to take Ramulu in adoption. After taking away the boy Ramulu from her house, the plaintiff celebrated his 'upanayanam' on 17-6-1946, and performed his marriage on 19-6-1946. Ex. A. 15 is the printed invitation for the 'upanayanam' and the marriage. Before the 'upanayanam' was celebrated, the second defendant issued a registered notice, Ex. B. 7 dated 14-6-1946 to the plaintiff seeking his consent for taking a boy in adoption. It was also mentioned therein that if no reply was given within a week after the receipt of the letter she would deem it that he had consented for her taking a proper boy in adoption and perpetuate the family.

A similar notice bearing the same date was issued to the third defendant. Ex. B. 8, Ex. B. 9 and Ex. B. 10 dated 14-6-1946 are the postal receipts showing that registered letters were addressed to the plaintiff and the third defendant. (His Lordship considered the evidence and concluded:) We therefore hold on a consideration of the evidence that Exs. B. 7 and B. 8 were issued by the 2nd defendant to the plaintiff and the third defendant and knowing their contents they refused to receive them.

(11-12) So far as the two nearest reversioners are concerned, the position therefore is this: the third defendant had taken a consistent attitude throughout from the year 1943 that the power of the widow to take a boy in adoption was confined to the compromise decree in O. S. No. 30 of 1917 and that power was exhausted, and finally he improperly refused to receive notice knowing fully it contained a request for his consent to adopt. In his previous letters he gave another reason, for his refusal to give the consent, namely, that there was some kind of arrangement between the 2nd defendant's brothers and the boy intended to be taken in adoption. He had failed to establish that fact.

It is therefore clear that his previous attitude and his refusal to receive the notice clearly establish that he improperly refused to give his consent. The plaintiff gave his consent for the 2nd defendant taking a boy in adoption in general terms under Ex. B. 6 dated 17-5-1945 though the occasion for giving the same was an attempt on the part of the widow to take his son Ramulu in adoption. Apart from that, we have also found that he refused to take the notice though the contents of the notice were explained to him by D. W. 10. His conduct also amounted to a refusal to discharge his duty towards the widow. In the circumstances, the widow was entitled to go to the remoter reversioners for their advice and consent.

(13) In Venkayya's branch, Subbayya is D. W. 8. He is one of the signatories to Ex. B. 11. Satyanarayana is D. W. 5. He is the son of Punnayya. He is also one of the signatories of Ex. B. 11.

Both of them gave their consent to the adoption. No member of Krishnayya's or Subbayya's branch is alive.

(14) Now coming to the present generation, they consist of young men and minors. In Ramayya's branch Venkata Kotayya and Chinna Ramayya attended the adoption ceremony. The 3rd defendant's sons are minors. Among the plaintiff's sons, except Ramulu the other two are minors. Lakshminarasu and Radha, grandsons of Lakshminarasimham, the brother of Guruvayya, are also minors. It is in evidence that they and their mother were present at the time of the adoption. In Venkayya's branch Satyanarayana is the first defendant. His brothers are all young men. It will therefore be seen that even among those youngsters, some of them who are not minors were present at the adoption ceremony.

Learned counsel for the appellants contended that Ramulu who was a major should have been consulted. But in the circumstances the non-consultation of Ramulu cannot vitiate the adoption for it is not the law that if the nearest 'sapindas' refused their consent the widow should consult the other 'sapindas' in the order of the degree of relationship to her deceased husband. Further, Ramulu is the son of Subba Rao and he is living with him as a member of his family. He was the boy whom the widow intended to take in adoption, but his father for one reason or other refused to give him. In the circumstances when the plaintiff refused to give his consent, if the widow did not seek the consent of this young man, though a major at the time, in our view it would not affect the validity of the adoption.

(15) Now taking an overall picture, it is clear that the widow first approached the nearest 'sapindas'; but they had improperly refused to receive the notices and give her the requisite consent. She therefore took the consent of the remoter reversioners from the different branches of the family including the two eldest members of the family, Pitchayya and Punnayya. Having regard to the circumstances of the case we cannot hold that the persons who gave the consent were not competent advisers to the widow. Their advice satisfied the test laid down in the decided cases, namely, the consent required is that of a substantial majority of those agnates nearest in relationship who are capable of forming an intelligent and honest judgment on the matter and the assent must be such as to show that the act was done by the widow in the proper and 'bona fide' performance of a religious duty and neither capriciously nor from a corrupt motive. We therefore agree with the court below that the adoption made by the widow with the consent of the 'sapindas' was valid.

(16) Learned counsel for the appellants then contended that the authority embodied in Ex. B. 11 is inadmissible in evidence as it was not registered. In support of this contention reliance is made on S. 17(3) of the Registration Act. It reads:

> "Authorities to adopt a son, executed after the first day of January 1872 and not conferred by a will shall also be registered."

This objection was not raised in the court below. We are not therefore justified in allowing the appellants to raise this point before us. Further, even if Ex. B. 11 is excluded, there is clear evidence on record by the signatories of the document to establish that they all gave consent for the adoption. We cannot also accept the contention as sound. There is an essential distinction in Hindu law between an authority conferred by the husband on a widow to take a boy in adoption and a consent given to her by the 'sapindas' after his death. In the case of a husband, he confers a power or authority upon the widow to take a boy in adoption, whereas in the case of 'sapindas', their assent is required for the purpose of establishing that the act is done by the widow in the proper and 'bona fide' performance of a religious duty and neither capriciously nor from a corrupt motive. Therefore it is not correct to describe the assent given by the 'sapindas' as an authority conferred by them on the widow to take a boy in adoption. Section 17(3) of the Registration Act in our view should be confined only to authorities conferred upon a widow by her husband. Exhibit B. 11 being only a record of the consent given by the 'sapindas' does not require registration.

(17) In the result the appeal fails and is dismissed with costs.

A/V.R.B. Appeal dismissed.

A. I. R. 1953 MADRAS 762 (Vol. 40, C. N. 290)

GOVINDA MENON J.

A. Poongavana Naicker, Petitioner v. S. Muthurama Naidu and others, Respondents.

Civil Revn. Petn. No. 1801 of 1950, D/- 19-4-1951.

Civil P. C., (1908), S. 115, O. 21, R. 84 — Acceptance or rejection of highest bid by Court is a case decided. Case law discussed.

(Paras 3, 5)

Anno: C. P. C., S. 115, N. 4, 6, O. 21, R. 84, N. 2.

P. C. Parthasarathy, for Petitioner; K. Bhimasankaram; Narayanachari; A. Seshachari & A. Srinivasan, for Respondents.

CASES CITED:
(A) ('23) AIR 1923 Pat 525: 2 Pat 548
(B) ('31) AIR 1931 Cal 583: 58 Cal 788
(C) ('25) AIR 1925 Mad 318: 82 Ind Cas 793
(D) ('88) 15 Cal 253

ORDER: In execution of a decree in O. S. No. 13 of 1949 on the file of the Court of the Subordinate Judge, Chingleput, certain properties belonging to the judgment debtor, who had become subsequently insolvent were ordered to be sold by a sale warrant of the sub court dated 27-10-1950 and the Central Nazir of the District Court was authorised to conduct the sale on 1-11-1950 by public auction. Accordingly, the Central Nazir put up the properties for auction and there were bids at that auction. The sale went on for some time and the highest bidder was ascertained on 1-11-1950. It so happened that on that day the Subordinate Judge was on casual leave and on the next day on an application made by the Official Receiver, the Subordinate Judge directed that the sale should be continued from day to day till 6-11-1950. On the same evening the Central Nazir took up the matter before the District Judge who, by an administrative order, held that as the sale conducting officer had no notice of any petition either for adjournment of the sale or for any other relief, when he put up the properties for sale on 1-11-1950, the holding of the sale by him was correct and the conclusion of the sale on that day itself by him was correct. The District Judge further expressed an opinion that there is no rule which prohibits the sale conducting officer duly authorised by warrant from conducting and concluding the sale simply on the ground of the presiding officer's absence on casual leave. The Judge further went on to observe that if the Court which directed the holding of the sale by the Central Nazir thought

that the sale was irregular, it is for that Court to set it aside, but it cannot return the amount of the sale proceeds tendered by the sale officer and received by the Chief Ministerial officer of the Court, completely ignoring the sale held by the Central Nazir on 1-11-1950. These proceedings were administrative in nature and at the time the District Judge professed to pass this order neither party nor counsel was present. On 4-11-1950, one of the creditors of the judgment-debtors, whose estate has become vested in the Official Receiver, applied under S. 151, C. P. C., for directions that the Central Nazir should be ordered not to conclude the sale held on 1-11-1950. The Subordinate Judge on that application held that the remedy of the aggrieved party was to apply to set aside the sale on the ground of material irregularity and therefore, held that the petition was not maintainable. He also held that the Official Receiver who alone can have any grievance in the matter has not applied for that relief and, therefore, the application by the creditor was not maintainable. On both these grounds I. A. No. 719 of 1950 in E. P. No. 130 of 1950 was dismissed by the Subordinate Judge on 6-11-1950. Having been aggrieved by this order of the Subordinate Judge on the ground that the lower Court failed to exercise the jurisdiction vested in it by law, the creditor seeks to revise the order of the lower Court.

(2) Mr. K. Bhimasankaram appearing for the decreeholder raises a belated preliminary objection that the Order of the Subordinate Judge dated 6-11-1950 being administrative in nature is not a case decided within the meaning of S. 115, C. P. C., and that this Court, in its judicial capacity, has no jurisdiction to interfere. The learned counsel contended that on the analogy of orders passed under O. 21, R. 66 and the other provisions of the Code regarding settling of the upset prices and various other details prior to the culmination of the sale, having been held as administrative, it should be deemed that the present order, whereby the Court, which was approached under S. 151, refused the relief asked for, should also be deemed to be an administrative one. I am unable to agree with this contention. What has happened is that when the Court was asked to give directions to the sale conducting officer not to conclude the sale but to continue it 'de die in diem' from 1-11-1950 and when the matter was argued in open Court in the presence of the parties and the procedure laid down for judicial proceedings was followed, it is difficult to say that the order is in the nature of an administrative one. I am definitely of opinion that the order of the Subordinate Judge, dated 6-11-1950, is a case decided within the meaning of S. 115, C. P. C., and is revisable.

(3) The question then arises as to whether the Court below has acted with material irregularity in the exercise of its jurisdiction in holding that the sale has been concluded on 1-11-1950. That the Central Nazir of the District Court is an officer empowered to conduct the sale is clear and evident from R. 200, Civil Rules of Practice which states that the person appointed to sell the property shall conduct the sale in the manner prescribed by the Code for the sale of attached property etc. According to the structure of the administrative machinery at the head quarters of the District, the Cental Nazir of the District Court is a person who is automatically deemed to be appointed for purposes of conducting court sales under R. 200. There is no dispute that the Central Nazir in this case was the proper person to conduct the sale. Appendix E Sch. 1, C. P. C., form No. 29 deals with the proclamation of sale and para. 3 of the conditions of sale states that the highest bidder shall be declared to be the purchaser of any lot, provided always that he is legally qualified to bid and provided that it shall be in the discretion of the Court or the officer holding the sale to decline the acceptance of the highest bid when the price offered appears so clearly inadequate as to make it advisable to do so. This condition, which has a force of law, because it is a form in Appendix E to the Civil Procedure Code, lays down clearly that it is within the discrimination of the Court to accept or reject a bid before the sale conducting officer. Mr. Seshachariar, for the purchaser, very strenuously contends that when the property is knocked down for the highest bid, the Court has no further jurisdiction in the matter to say that the sale has not become complete; that is, automatically the Court must accept the highest bid and hold that the person who has knocked it down is the purchaser and thereby the sale is concluded. I am not able to agree with this contention. Form No. 71, Civil Rules of Practice, relates to the report of the Central Nazir or other auctioneer under R. 200(2) to the Court and there it is laid down as to what the Central Nazir should state to the Court regarding the procedure and the manner in which the sale was conducted. It is not necessary to extract here in detail the various clauses as well as schedules mentioned in that form because para. 3 says that the Central Nazir has to inform the Court that he put up the several lots for sale by auction at so and so and the person who knocked down the several lots. It is then left to the Court to accept the action of the Central Nazir or to reject it. To say that because the sale conducting officer has accepted the highest bid and, therefore, the Court has no further jurisdiction but should, as it were, take upon itself the vicarious duty of confirming the sale, is in my opinion, illogical. It is not as if this decision is bereft of authority. In — 'Jaibhdar Jha v. Matukdhari Jha', AIR 1923 Pat 525 (A), Das and Macpherson JJ. had considered a matter of similar nature. They held that an execution sale, whether held in the immediate presence of the presiding officer of the Court or not, is not complete until the presiding officer of the Court has accepted the bid and declared the purchaser under O. 21, R. 84. A mere order to close the bidding does not complete the sale even though the highest bidder is erroneously permitted to make the deposit required by R. 84. They further held that the formal order declaring who has purchased the property put up for sale should be submitted for signature under R. 84 expeditiously, before the presiding officer rises for the day. The following observations at page 527 are pertinent.

" ..... In fact, the function of the Nazir or other officer appointed by the Court to conduct the auction is of a ministerial character; if he conducts it in presence of the presiding officer, the latter is still in direct charge of it, forthwith declares under O. 21, R. 84, who the purchaser is and signs the formal order (as in fact happened on the

16th November in this case), and the sale is not complete until the declaration has been made and the order signed. Equally when the auction is (for reasons of convenience) not held in his presence, the presiding officer is still in charge of it and the officer conducting the sale is in no more responsible position than if he were conducting it in presence of the presiding officer; that the sale may be completed, not only the order of the presiding officer to close the bidding, but also his order under O. 21, R. 84, formally accepting the bid and declaring the purchaser is required exactly as in the sale proceedings conducted in his presence."

These observations, as I have already stated, are pertinent to the facts of the case. The Central Nazir being an officer immediately subordinate to the District Judge conducts the sale not in the actual presence of the Subordinate Judge, but in a separate place; and even so when the Central Nazir accepts a final bid, the sale will become complete only when the Court, which has directed the sale accepts the final bid. It is open to the Court in its judicial discretion either to accept it or reject it. I need not say under what conditions a Court will reject it, because conditions might be different in different cases. The case in AIR 1923 Pat 525 (A) came up for consideration in — 'Surendramohan v. Manmathanath', AIR 1931 Cal 583 (B) before Sahrawardy and Patterson JJ. and the learned Judges dissenting from an earlier judgment of Panton J. of the same Court and following AIR 1923 Pat 525 (A), held that the sale of property in an auction by the order of a Court, although held by an officer of the Court or by any person appointed in this behalf, is nevertheless a sale by the Court itself. It is not completed until the Court formally accepts the bid and declares the purchaser under O. 21, R. 84, C. P. Code. Prior to such order, the bidder, whose bid was accepted by the officer at the time of the bid, does not acquire any interest in the property and the Court can, for adequate reasons, direct the sale of the property without any notice to the bidder. Since the principles enunciated in these decisions has my complete approval, it is unnecessary for me to elaborate at any length the facts of the particular cases adverted to by me. In our own Court, though on facts not 'ad idem', there is a decision in — 'Ratnasami Pillai v. Sabapathi Pillai', AIR 1925 Mad 318 (C) where Krishnan and Odgers JJ. considered a similar matter and following the decision in — 'Surendro Kesub v. Doorgasoondary Dassee', 15 Cal 253 (D) the learned Judges held that, no doubt, the ordinary rule regarding a private auction is that where an auction is held without any reservation, there is an implied condition that the highest bid will be accepted, but that rule cannot be said to apply to a sale by a Court officer under the directions of the Court. In court sales, it is the acceptance by the Court that constitutes the contract. These observations make it clear that however much the Central Nazir might have thought that the sale was concluded, it cannot become effective and conclusive unless the Court accepts it.

(4) Therefore, the question has to be considered as to what should have been done on the facts of this case. I need hardly advert to the provisions of the Civil Procedure Code, especially O. 21, Rules 65, 69 and 84 regarding the procedure to be followed and the final conclusion of the sale in execution of a decree.

(5) It is not clear from the decision of the learned Judge as to whether he was aware on 2-11-1950, when he directed that the sale should go on from day to day, that the Central Nazir had completed the bid on 1-11-1950. If the subordinate Judge, after knowing that the Central Nazir had completed the sale, or in other words, the properties were knocked down to the highest bidder, still thought that the sale should be held thereafter from day to day, it is tantamount to holding that the Subordinate Judge did not accept the Central Nazir's conclusion of the sale and, therefore, the sale had not become concluded and the order of the Subordinate Judge refusing to interfere at a later stage is erroneous in the exercise of his jurisdiction. If on the other hand, the Subordinate Judge did not know that the Central Nazir had accepted the highest bid and according to the Central Nazir the sale had become complete, and directed the sale to go on, then it is open to the Subordinate Judge, after knowing the correct stage of facts, either to accept the sale as concluded or not. Since it is difficult to find out and the parties are not able to clarify the situation as to under what impression the Subordinate Judge made the order dated 2-11-1950, in my opinion, the order of the Subordinate Judge cannot stand. I therefore set aside the order of the Subordinate Judge and direct him either to accept the final conclusion of the sale by the Central Nazir, if he did not know that at the time he passed the order on 2-11-1950 that the Central Nazir had finally concluded the sale. It is open to the Subordinate Judge in the exercise of his judicial jurisdiction to accept the Nazir's final acceptance or reject the same.

(6) There will be no order as to costs in this civil revision petition.

C/D.H. Order accordingly.

A.I.R. 1953 MADRAS 764 (Vol. 40, C. N. 291)

(FULL BENCH)

RAJAMANNAR, C. J., RAJAGOPALAN AND VENKATARAMA AIYER, JJ.

Crompton Engineering Co., (Madras) Ltd., Applicant v. Chief Controlling Revenue Authority, Madras, Respondent.

Case Refd. No. 61 of 1952, D/- 4-3-1953.

(a) Stamp Act, (1899), S. 2(17) — Specified property — (T. P. Act, (1882), S. 58).

A clause in a mortgage deed was as follows: "That the whole of the borrower's floating assets ..... and comprising lands, buildings and premises bearing door No. 27, Tiruvottiyur High Road, Madras, together with the electrical installation, plants, and machinery, furniture and fittings, office and transport vehicles, loose tools, book debts, imprest cash with employees, investments, interest accrued on investments, cash on hand and with bakers belonging to the borrower and all other stocks and goods of the borrower whether raw or in process of manufacture shall be hypothecated to the company and its assigns by way of first charge as continuing security for the payment by the borrower."

Held, the reference to the premises described in the document as bearing door No. 27 Thiruvottiyur High Road as also to the stock in trade was obviously to "specified" property within the meaning of S. 2 (17): AIR 1916 Mad 374 (2) (FB), Ref. (Para 3)

Anno: Stamp Act, S. 2(17) N. 14; T. P. Act, S. 58 N. 9.

(b) Stamp Act, (1899), S. 2(17) — Mortgage deed neither attested nor registered — (T. P. Act, (1882), S. 59).

The "transfer" provided for in S. 2(17) is a transfer valid in law — To make a document liable to stamp duty as a mortgage deed, it is not enough if the document purports to effect a transfer. It must "transfer". As there can be no transfer unless the requirements of T. P. Act, S. 59, are satisfied where the specified immovable property is worth hundred rupees or upwards, a document purporting to be a mortgage deed of such property is not liable to stamp duty when it is neither attested nor registered. (Para 11)

Anno: Stamp Act, S. 2(17), N. 4.

O. T. G. Nambiar, for Applicant; Govt. Pleader, for Respondent.

CASE CITED:

(A) ('16) AIR 1916 Mad 374(2): 38 Mad 646 (FB)

RAJAGOPALAN J.: Under the orders of Krishnaswami Naidu J. on Appln. No. 1170 of 1951, the Board of Revenue, Madras, as the Chief Controlling Revenue Authority, submitted a statement of the case under S. 57, Stamp Act, (Act 2 of 1899). The question for determination is the liability of the document, executed on 22-3-1948 by the Crompton Engineering Co. (Madras) Ltd., (referred to as the Borrower) to Best and Co., Ltd., (referred to as the company in the document), to be stamped as a mortgage deed under the provisions of the Indian Stamp Act.

(2) The clauses of that document dated 22-3-1948 relevant for the determination of this question ran:

"Clause 1: That the whole of the Borrower's floating assets .....and comprising lands, buildings and premises bearing door No. 27, Tiruvottiyur High Road, Madras, together with the electrical installation, plants, and machinery, furniture and fittings, office and transport vehicles, loose tools, book debts, imprest cash with employees, investments, interest accrued on investments, cash on hand and with bankers belonging to the Borrower and all other stocks and goods of the Borrower whether raw or in process of manufacture, and all articles manufactured therefrom which now or hereafter from time to time during the security shall be brought into, stored or be in or about the Borrower's warehouse, godowns, buildings or premises aforesaid or wherever else the same may be including any such goods in course of transit or delivery, shall be hypothecated to the company and its assigns by way of first charge as continuing security for the payment by the Borrower ..... Clause 9: That this Agreement shall operate as a continuing security for all monies, indebtedness and liabilities aforesaid notwithstanding the existence of a credit balance on the said account at any time or any partial payments or fluctuations of accounts."

The document dated 22-3-1948 was not attested. It was not registered.

(3) "Mortgage deed" is defined for the purposes of the Stamp Act, and for the purposes of that Act only, in S. 2(17) of the Act:

"'Mortgage deed' includes every instrument whereby for the purpose of securing money advanced, or to be advanced, by way of loan, or an existing or future debt, or the performance of an engagement, one person transfers, or creates, to, or in favour of, another, a right over or in respect of specified property."

Of the arguments advanced by Mr. Nambiar for the borrower in support of his contentions, that the document was not a mortgage deed as defined by S. 2(17) of the Stamp Act only two need be considered: (1) there was no 'transfer' of right and (2) there was no transfer of right over or in respect of 'specified' property.

(4) The reference to the premises described in the document dated 22-3-1948 as bearing door No. 27 Thiruvottiyur High Road, is obviously to a "specified" property within the meaning of S. 2(17), Stamp Act. Even with reference to the stock-in-trade the — 'Secretary of Commissioner of Salt, Abkari and Separate Revenue, Madras v. Mrs. E. W. Orr and Bank of Madras AIR 1916 Mad 374 (2) (F.B.) (A), should suffice to conclude the question whether it is "specified property" within the meaning of S. 2(17), Stamp Act. White C. J. observed at page 376 :

"It seems to me that so far as the stock-in-trade etc. which are described in the deed as trust property are concerned, the trust property is specified."

(5) Various other items of properties of the Borrower were no doubt enumerated in the document dated 22-3-1948. But the transaction was one and indivisible, and, the document to evidence that was equally one and indivisible. It is on that basis we have to determine its liability to be stamped under the provisions of the Indian Stamp Act.

(6) Mr. Nambiar was well-founded in his contention, that there could be no transfer of rights over or in respect of the specified premises No. 27 Thiruvottiyur High Road, unless the requirements of S. 59, T. P. Act, were satisfied.

(7) Section 59, T. P. Act, runs :

"Where the principal money secured is one hundred rupees or upwards, a mortgage other than a mortgage by deposit of title deeds can be effected only by a registered instrument signed by the mortgagor and attested by at least two witnesses."

That the specified immoveable property was worth over Rs. 100 was not in dispute. But the document dated 22-3-1948 was neither attested nor registered.

(8) That the transfer contemplated by S. 2(17), Stamp Act, is a transfer valid in law, should be obvious. Such a valid transfer would not have been effected under the document dated 22-3-1948, which was neither attested nor registered. Under S. 59, T. P. Act, a valid mortgage can be effected only when the instrument is (1) signed by the mortgagor; (2) attested by at least two witnesses; and (3) registered. Leaving aside the question of registra-

tion of an insufficiently stamped document, no one can claim that a document not signed by the mortgagor is an instrument of mortgage liable to be stamped. That the attestation need not be contemporaneous with the signature of the mortgagor in no way affects the question at issue in this case; the document was not attested. The law embodied in S. 59, T. P. Act, necessitates the signature of the mortgagor and the attestation by at least two witnesses in equal degree. To ensure the validity of the instrument as a mortgage, attestation is made as much a part of the execution as the signature of the mortgagor.

(9) The learned Government Pleader pointed out that, on 29-5-1948, when the document was impounded under S. 33, Stamp Act, the time for effective registration of that document had not expired. The document was not attested, and it was not registered. The impounding authority could not have enforced registration. In any case, it could not cure the failure to attest, which by itself was enough to invalidate the document as an instrument of mortgage.

(10) The learned Government Pleader urged that it was as an "instrument" that the document of 22-3-1948 was impounded under S. 33, Stamp Act. The definition of "instrument" under S. 2(14), Stamp Act, runs:

> "An instrument includes every document by which any right or liability is or purports to be created, transferred, limited, extended, extinguished or recorded."

The document certainly purported to transfer the right in the immoveable property among other things, though in law it could not and did not transfer that right. Even S. 33 refers to an instrument chargeable with duty, that is, stamp duty payable under the provisions of the Indian Stamp Act. The document dated 22-3-1948 may be an instrument; but it is not an instrument chargeable with duty, that is, chargeable, as a mortgage deed as defined by S. 2(17), Stamp Act.

(11) The very difference between the definition of an instrument in S. 2(14) and a mortgage deed in S. 2(17) should show that the "transfer" provided for in S. 2(17) is a transfer valid in law. To make a document liable to stamp duty as a mortgage deed, it is not enough if the document purports to effect a transfer. It must "transfer."

(12) We hold that the document dated 22-3-1948 is not a mortgage deed within the meaning of S. 2(17), Stamp Act, and it is not, therefore, liable to be stamped as a mortgage deed under the provisions of the Indian Stamp Act.

(13) No order as to costs.

A/G.M.J. Reference answered.

A. I. R. 1953 MADRAS 766 (Vol. 40, C. N. 292)

MACK J.

Ponnuswami Gounder, Appellant v. Rengaswamy and others, Respondents.

A. A. O. No. 21 of 1950, D/- 6-2-1953.

(a) Workmen's Compensation Act (1923), S. 2(1)(d) — "Wholly or in part dependent."

Whether a person is partially dependent on the earnings of a deceased workman is a matter essentially of fact to be decided in the circumstances of each case. (Para 9)

Anno: Workmen's Compensation Act, S. 2(1)(d), N. 1.

(b) Workmen's Compensation Act (1923), S. 2(1)(d) — "Wholly or in part dependent." AIR 1953 Mad 206, Dissented from.

Even though the earnings of the deceased workman were hardly sufficient for his maintenance and no balance left which would contribute to the family fund, the parent can be said to be a dependent. (Para 6)

Anno: Workmen's Compensation Act, S. 2(1)(d) N. 2.

T. S. Krishnamurthy Iyer, for Appellant; R. Krishnaswami Iyer, for Respondents.

CASES CITED:

(A) ('53) AIR 1953 Mad 206: 1952-2 Mad LJ 436
(B) (1900) 69 LJ QB 755: (1900) AC 358
(C) (1925) 1 KB 399: 94 LJ KB 497

JUDGMENT: The appellant is a P. W. D. contractor who appeals against an order by the Commissioner for Workmen's Compensation directing him to pay a sum of Rs. 550 as compensation to the father of a road employee who was killed by a stone roller while working on road laying. The accident was reported by the Superintending Engineer of the PWD to the Commissioner and an enquiry was held by the Revenue Divisional Officer, Tindivanam, under R. 23(1), Workmen's Compensation Rules. The enquiry disclosed that the deceased had a father, mother and a minor brother aged 11 and a minor sister aged 2 alive. There is on record a statement by the father recorded by the village Magistrate and statements recorded from the contractor and one of his witnesses by the Revenue Divisional Officer.

According to the father's statement, the son was 25 years old, but according to the contractor he was 16. According to one of the contractor's witnesses, the deceased was an emaciated boy who was prior to his employment by him as a road cooly earning six annas daily as wages. The report of the Revenue Divisional Officer, accepted by the Commissioner, was to the effect that the deceased was earning at least eight annas a day and as he was living with his parents his father was partially dependent on him.

(2) No appearance has been made on this appeal by the respondent-father, who engaged an advocate, Mr. R. Krishnaswami who, however, reported no instructions when this appeal was taken up for hearing two weeks ago. I allowed some time for appearance by any other advocate as Mr. Krishnaswami said that the papers were taken from him, but no appearance has yet been made.

(3) Mr. Krishnamurthi Aiyar for the appellant has contended that, in the circumstances, the father cannot be deemed to be even partially dependent on his son's earnings. He has relied on a decision reported in — 'St. Joseph's A. and M. Works v. Maria Soosai Pillai', AIR 1953 Mad 206 (A), by Chandra Reddi J. in which some English decisions were considered. The facts there were rather different, the deceased workman being a child of tender years, working as a cleaner on a daily wage of four annas. In that case the finding of the Com-

missioner that the father of the child was partially dependent on his earnings was reversed on the ground that the earnings of the child far from being an asset to the family were not sufficient to maintain him and, in fact, that the father had to spend a portion of his own earnings on the maintenance of his son. Whether a person is partially dependent on the earnings of a deceased workman is a matter essentially of fact to be decided in the circumstances of each case.

(4) In — 'Main Colliery Co. v. Davies', (1900) AC 358 (B), the son killed was 16 years old and was earning on an average 8 sh. a week but lived at home with his father and mother and gave them all his wages. They fed him, clothed him and housed him and gave him a little pocket money. The father was a collier earning about 25 sh. a week. The County Court Judge, held that he was a partial dependent and awarded him compensation. This finding was reversed in the Court of Appeal but the House of Lords restored the finding of the County Court Judge. The Earl of Halsbury L. C. made the following observations which appear to be particularly appropriate to a Hindu joint family :

> "Therefore, the burden being upon the father of the family the father of the family in his turn obtains from the wages of those who are being maintained by him a partial contribution to the general family fund. Why is not the father in the discharge of that burden partly dependent upon the earnings which he receives from his children? I am not able to answer that question. It appears to me that he must be relying or dependent — call it what you please — for the means by which he discharges his legal obligation upon the funds supplied to him, or partly supplied to him, by the children who earn those funds."

Lord Shand, who concurred in the decision said he agreed with the County Court Judge in thinking that there was mutual dependency between the parties — that each depended to some extent upon the other — and that the father was to some extent dependent upon his son's wages. It was emphasised in that decision that each case must depend on its own facts.

(5) In — 'Peart v. Bolckow, Vaughan & Co.', (1925) 94 LJ KB 497 (C), two cases were considered by the Court of Appeal, both, it would appear, somewhat similar. In the one case the deceased was 14 years old earning 15 sh. 3 d. a week and the father earning £3, 11 sh. a week. In the second case a boy aged 11 was contributing 11 sh. 10 d. a week and the father £1 a week. The County Court Judge found in the former case that the father was entitled to compensation but not in the latter case. The Court of Appeal confirmed his findings of fact decided after taking into consideration all the circumstances of the case and not merely by striking a balance between the earnings and cost of living per head. The Court of Appeal also held that the County Court Judge was entitled to apply his judicial experience and knowledge of the standard of living among the industrial population of the district over which he has jurisdiction, and is also entitled to and should take into consideration not only the present earnings of the deceased, but any prospective increase of earnings in the near future.

(6) Coming to the facts of the present case we have a poor family eking out its livelihood by doing cooly work, the father claiming he earns only eight annas a day, though he probably in fact earns a little more than this on days he can get work and the son also earning eight annas a day. It is extremely difficult to lay down any hard and fast rule about what is sufficient for the maintenance of an individual person, and to work out an excess out of his earnings available for the father and mother and the other members of the family to enjoy. I find it not easy with great respect to express complete concurrence with the following observation of Chandra Reddy J. who considered the two decisions I have cited and also some others :

> "The principle deducible from the various decisions is that when the earnings of the deceased workman were hardly sufficient for his maintenance and no balance left which would contribute to the family fund the parent cannot be said to be a dependent within the meaning of S. 2, cl. (1)(d)."

In cases of poor working families, particularly those living jointly all the earnings come into a common pool and it may often happen that the common pool is actually quite insufficient to maintain the members at a bare standard of existence.

(7) I have given careful consideration to the case of the respondent although he has not been represented by an Advocate. It is unreasonable to expect a cooly working in the mofussil several miles away to engage an advocate on any substantial fee to make an appearance in this Court and fight out the matter of compensation. Nor can I fairly make any inference that from the fact that the advocate he engaged reported no instructions, he had not a good case to present in this Court. I can see no legal grounds for any interference with the finding of fact by the learned Commissioner. Section 30 specifically lays down that no appeal lies against any order unless a substantial question of law is involved in the appeal. It cannot be said that in view of the undisputed material in the case, there was insufficient evidence to justify the learned Commissioner's finding.

(8) The appeal is dismissed but without any order as to costs.

A/V.R.B. Appeal dismissed.

A. I. R. 1953 MADRAS 767 (Vol. 40, C. N. 293)

CHANDRA REDDI J.

James Manickam, Petitioner v. Jaya Narayan Daga, Respondent.

Civil Revn. Petn. No. 1686 of 1952, D/- 5-3-1953.

†Civil P. C. (1908), O. 37, R. 2 — Power to condone delay — (Limitation Act (1908), Art. 159). AIR 1949 Mad 742, Dissented from.

A court has no power to condone the delay in filing and obtaining leave to defend suits filed under O. 37, R. 2. (Paras 9, 11)

Anno: Limitation Act, Art. 159 N. 2 Pt. 1.

Jan and San, for Petitioner; V. Krishnaswami, for Respondent.

CASES CITED :

(A) ('49) AIR 1949 Mad 742: 1949-1 Mad LJ 514

(B) ('51) AIR 1951 Mad 895: 1951-1 Mad LJ 676

ORDER : This revision petition is filed by the defendant against the order of the Principal Judge, City Civil Court, refusing to extend time for leave to appear and defend the suit instituted by the respondent under the summary provisions of O. 37, Civil P. C. The suit was laid for the recovery of Rs. 1905 due on a promissory note executed by the defendant for Rs. 6000 on 4-6-1951. The suit amount was claimed after giving credit for Rs. 4700 paid by the defendant on various dates subsequent to the execution of the promissory note. Summons was issued in form No. 4 in Appendix B of the Civil Procedure Code, and the defendant was called upon to obtain leave to appear and defend within ten days from the service of the summons, if need be. Although the defendant filed a 'Vakalat' on 29-1-1952, he did not make an application for leave to appear and defend the suit. He merely filed a written statement on 13-3-1952.

(2) When the suit came on for hearing on that date, the plaintiff asked for a decree as the defendant had not applied for leave to defend the suit. Thereupon the defendant filed an application for permission to defend the suit and also for excusing the delay in doing so.

(3) This was opposed by the plaintiff. It was contended on behalf of the plaintiffs that the court had no jurisdiction to enlarge the time for application for leave to defend and secondly the affidavit in support of the petition to excuse delay, did not disclose sufficient cause to condone the delay. The reason given by the defendant in the application to excuse delay was that he mislaid the summons and focusses all his attention on a garnishee summons and never noticed the circumstance that the suit had been filed under O. 37, R. 5, Civil P.C.

(4) The trial court while overruling the objection as to the jurisdiction, dismissed the petition holding that he did not believe the defendant's story that the summons was mislaid and that the neglect was so culpable as to disentitle the defendant to all relief. The aggrieved defendant has filed this revision petition.

(5) Mr. Subramaniam urged that the reasons given by the learned City Civil Judge for dismissing the petition are untenable. On the other hand Mr. Krishnaswami maintained that the view of the trial court that it had jurisdiction to extend time and to condone delay is erroneous, and there is no basis for this under the provision of O. 37 and it is not necessary to canvass the finding on the merits.

(6) So the main point for consideration is, whether it was competent for the trial court to extend time for filing an application, for leave to defend. In support of the view that the court has got power to enlarge time in such cases, reliance was placed on the ruling of Mack J. in — 'Murahari Rao v. Bapayya', AIR 1949 Mad 742 (A). In that case a suit was filed on a promissory note under O. 37, R. 2, C. P. C. Summons was issued to the defendant calling upon him to apply within ten days for leave to defend if he should choose to do so. On the 11th day after service of notice, the defendant appeared and asked for leave to defend. The District Munsif in whose court the suit was instituted granted him leave asked for disagreeing with the objection raised on behalf of the defendant that there was no provision in Chapter 37, Civil P. C. to excuse delay or to extend time beyond the ten days prescribed in the summons. It may be stated here, incidentally, that the ten days time mentioned in the summons in form No. 4 is prescribed by Art. 159, Limitation Act.

(7) In a revision petition against the order of the District Munsif, Mack J. laid down that if under O. 37, R. 4, a court could set aside a decree under special circumstances, it can 'a fortiori' have power to give the defendant leave to defend although the time mentioned in the summons had expired. I must express my respectful disagreement with this view of the learned Judge.

(8) There can be no controversy that O. 37 does not contain any provision for extending the time prescribed in the summons in form No. 4, Sch. B. Nor has S. 5, Limitation Act, been extended to this chapter of the Civil Procedure Code. It does not follow that a court has power to extend time or condone delay in filing an application for leave to defend within the prescribed time, merely because the court is invested with power to set aside decrees under special circumstances under O. 37, R. 4.

(9) When a period has been fixed for the purpose of doing an act or taking a proceeding under the statute of limitations or under any other enactment, courts do not possess the power to extend the time unless and until such a power is specifically conferred upon them. In this case, the courts have not been invested with such a power. That being so, in my opinion, it is not competent for a court acting under O. 37, C. P. C., to excuse delay in filing an application for leave to appear and defend in a suit under the summary chapter.

(10) This view gains support from the observations of the learned Chief Justice who delivered the judgment on behalf of the Bench in — 'Kamalamma v. Ismail Isphani', AIR 1951 Mad 895 (B). The point for consideration in that case was whether the provisions of O. 37, R. 4 were applicable to suits filed on the original side of this court. An argument was advanced on behalf of the defendant that that rule was applicable to suits on the original side, because O. 7 of the Original Side Rules which deals with the procedure for suits to be filed under that order was silent on the subject and also for the reason that the applicability of O. 37, R. 4 had not been specifically excluded. The learned Chief Justice has remarked that although O. 7 of the Original Side Rules deals with the procedure for summary suits like O. 37, C. P. C., it differs in material particulars from O. 37, R. 4 of the Code. One of such differences, the learned Chief Justice has pointed out is that while there is no provision under O. 37 of the Code for enlargement of time over and above ten days for applying and obtaining leave to defend, there is a provision under O. 7 of the Original Side Rules for extension of time.

(11) I am clearly of opinion that the City Civil Court to which the provisions of O. 37, C. P. C., apply has no power to condone the delay in filing and obtaining leave to defend suits filed under R. 2 of O. 37, Civil P. C. It follows that the order under revision has to be confirmed though for different reasons.

(12) In the result, the civil revision petition is dismissed without costs.

A/V.R.B. **Revision dismissed.**

AIR 1953 MADRAS 769 (Vol 40, C. N. 294)

RAJAMANNAR C. J. AND
VENKATARAMA AYYAR J.

M. Delli Gramani and another, Appellants v. C. R. Ramachandran, Respondent.

O. S. Appeal No. 8 of 1949, D/- 31-8-1951.

(a) Transfer of Property Act (1882), S. 55 — Error in statement of extent of property sold — Compensation — Specific Relief Act (1877), S. 14.

If there is any error in the statement of the extent of the property agreed to be sold the purchaser can claim specific performance with compensation if he can bring his case under S. 14, Specific Relief Act but if the contract has been completed by the execution of the sale deed then the purchaser can claim compensation if he establishes fraud or if there is a special agreement for making compensation for errors in quantity or if there is a warranty that the extent conveyed by the sale deed is correct. Apart from such cases he has no right to compensation. Case law discussed. (Para 28)

Anno: T. P. Act, S. 55, N. 2, 9, 21; S. R. Act, S. 14, N. 1.

(b) Transfer of Property Act (1882), S. 55 — Implied warranty — Proof — (Evidence Act (1872), S. 92).

An agreement as to implied warranty regarding the correctness of the extent of the property sold should be established on the terms of the sale deed and it is not open to the plaintiff to travel outside the deed & adduce evidence to prove that there was a warranty, dehors the instrument. Such evidence is inadmissible under S. 92, Evidence Act. AIR 1938 Mad 81 and (1884) 13 Q. B. D. 351, Rel. on. (Para 31)

Anno: T. P. Act, S. 55, N. 9; Evidence Act, S. 92, N. 1.

(c) Transfer of Property Act (1882), S. 8 — Discrepancy between boundaries and area.

Where on a construction of the sale deed the intention of the parties was to sell a parcel of land within well-defined boundaries, the measurements should be rejected as 'falsa demonstratio'. 41 Cal 493 (PC), Rel. on. (Para 32)

Anno: T. P. Act, S. 8, N. 20.

K. V. Ramchandra Iyer and A. Dorairaj, for Appellants; M. S. Venkatarama Iyer and S. Ramayya Nayak, for Respondent.

CASES CITED:
(A) ('13) 40 Ind App 223: 41 Cal 493 (PC)
(B) (1811) 17 Ves Jun 394: 34 ER 153
(C) (1848) 1 HLC 605: 9 ER 897
(D) (1880) 5 AC 925
(E) (1883) 52 LJ QB 609: 11 Q BD 255
(F) (1890) 61 LT 69: 41 Ch D 103
(G) (1880) 49 LJ Ch 114: 13 Ch D 130
(H) (1830) 30 RR 184: 3 Sim 447
(I) (1886) 143 RR 817: 2 Ex 72
(J) ('96) 1896 All WN 81: 18 All 322
(K) ('02) 29 Cal 370
(L) ('75) 12 Bom HCR 10
(M) ('32) AIR 1932 Bom 449: 137 Ind Cas 583
(N) ('16) AIR 1916 Mad 526: 29 Mad LJ 122
(O) ('38) AIR 1938 Mad 81: 46 Mad LW 797
(P) (1905) 74 LJ Ch 475: (1905) 2 Ch 164
(Q) ('41) AIR 1941 Nag 162: 1941 Nag LJ 242
(R) (1884) 53 LJ QB 348: 13 QB D 351

VENKATARAMA AYYAR J.: The defendants are the appellants. On 30-4-1945 they entered into an agreement with the respondent Ex. P. 4 for the sale of a cocoanut thope for the price of Rs. two lakhs. An advance of Rs. 25000 was paid on that date. The respondent made further payments towards the sale price and got into possession of the properties on 14-7-1945: vide Exs. D. 1 and D. 2. The transaction itself was completed by the execution of a sale deed Ex. P. 15 by the appellants on 20-7-1945. On 2-9-1946 the respondent sent a notice, Ex. P. 16, wherein he complained that the extent of the property given in the sale deed was not correct, that there was a deficiency of about 21 grounds and that the appellants should pay Rs. 32500 by way of compensation.

(2) The appellants sent a reply, Ex. P. 17, on 12-10-1946. They stated that what was sold was a cocoanut thope within well-defined boundaries, that the extent of the properties was immaterial and that the purchaser was not entitled to any compensation. Thereupon the respondent filed the present suit for recovery of a sum of Rs. 24097 by way of compensation and damages. It is alleged in the plaint that the appellants represented and assured the purchaser that the property was of the extent of 6 cawnies, 5 grounds and 1035¼ square feet, that on the basis of this assurance the price was fixed at Rs. 1325 per ground, that in fact there was a deficiency to the extent of 15.4 grounds, that the representations of the appellants aforesaid were fraudulent and that they were liable in damages. The amount of compensation claimed was Rs. 24097 particulars for which were given in para. 2 of the plaint. The defendants denied that they made any specific representations as regards the extent of the property and stated that they took the measurements only from the previous title deeds, that what was agreed to be sold was only the cocoanut thope and that the extent was a mere misdescription, that there was no fraud on their part and that the plaintiff was not entitled to any compensation.

(3) The following issues were framed:

(1) Did the defendants represent that the suit property which they sold as per the sale deed executed by them on 20-7-1945 consisted of 6 cawnies 5 grounds 1035¼ sq. ft. and was the sale price arrived as on the basis of the extent as alleged by the plaintiff or was the extent inadvertently inserted and the boundaries alone being the criterion as alleged by the defendants in para. 9 of their written statement?

(2) Are the defendants liable for compensation for the deficiency in extent and if so to what extent?

(3) Are the defendants liable for extra charges incurred by the plaintiff by way of stamp and registration and interest and loss of profits claimed by the plaintiff?

(4) Is the suit bad for non-joinder of parties?

(5) To what relief is the plaintiff entitled?

(4) The suit was tried by Bell J. As appears from the judgment two contentions were urged before him. One was that the property conveyed was a parcel of land within well-defined boundaries and that the mention of the area was a mere misdescription and that the plaintiff had got what all he had bargained for namely, all the properties within the stated boundaries and that, therefore, he was not entitled to any compensation. The learned Judge agreed with this contention and observed as follows:

"He (advocate for the defendants) says that if one takes the sale deed alone and disregards all the surrounding circumstances, letters and other documents in accordance with the rule indicated in — 'Durga Prasad v. Rajendra Narayanan', 41 Cal 493 at p. 507 (PC) (A) then the fact that

there is an inaccurate description of the area of the land in question does not matter, because in the sale deed the property is otherwise clearly described by boundaries.

Undoubtedly, if that were all that was to be said about this case, he would be right; unfortunately, however, there is another element which has entered into the transaction and that is the element of fraud."

(5) Then the learned Judge dealt with the contention of the plaintiff that the defendants had committed fraud; examined the documentary evidence in the case and came to the conclusion that the appellants knew the real extent of the property conveyed under Ex. P. 15 and that they made deliberately false statements giving a larger extent for the purpose of inducing the plaintiff to enter into the transaction and he accordingly granted a decree in favour of the plaintiff for the amount claimed by way of damages for fraud. It is against this decree that the defendants have preferred this appeal.

(6) Mr. K. V. Ramachandra Aiyar, the learned advocate for the appellant, argues that the finding of the learned Judge that his clients had been fraudulent is not justified by the evidence.

(7) The first question that has to be determined is whether the appellants knew the real extent of the property and whether they were guilty of fraud in describing the property as of the extent of 6 cawnies 5 grounds, 1035¼ sq. ft. We have been taken through the entire record. We are of opinion that the evidence does not justify this finding. In fact the learned advocate for the respondent made no serious attempt at supporting the judgment on this point. We shall, therefore, briefly refer to the broad features of the case bearing on this question. The property which is the subject matter of the sale was purchased by Munuswami Gramani, the father of the appellants, on 2-2-1926 under Ex. P. 1. It is there described as a cocoanut garden and its boundaries are well-defined and its extent is stated to be about 6 cawnies 5 grounds and 1035¼ sq. ft. Munuswami Gramani paid only a small portion of the price under Ex. P. 1 and for the rest he executed a mortgage. Shortly thereafter he died and the appellants became entitled to the property. They were minors and their mother was acting as their guardian. The mortgage executed by Munuswami Gramani was never redeemed and it was being renewed from time to time in favour of various persons and the respondent actually took delivery of the title deeds from the mortgagee.

(8) It is thus clear that the title deeds relating to the suit property never came into the possession of the appellants. The extent of the property as given in Ex. P. 4, the agreement dated 30-4-1945 was copied from Ex. P. 1 and in all the documents relied on by the plaintiff the same extent is repeated. The appellants gave a statement to the respondent on 7-5-1945, during the progress of the negotiations. That is Ex. P. 6. There they say:

"We were very young when our father died. We had no opportunity to handle the title deeds of 59, 60, 60A Edward Elliots Road, Mylapore, such of the title deeds as were available were all with the mortgagees."

The correctness of this statement has not been impugned and it strongly negatives the supposition that the appellants must have had knowledge of the true extent of the property.

(9) Some comment was made on the fact that while in some documents the extent is given as "about" no such qualification is to be found in some other documents but we are unable to draw any conclusion from this variance, because both these kinds of statements occur indiscriminately at all stages of the correspondence. On 30-4-1945 two documents come into existence, Ex. P. 4, agreement and Ex. P. 5 receipt for payment of Rs. 25000 by way of advance. In Ex. P. 4 the property is described as measuring about 6 cawnies 5 grounds and 1035¼ sq. ft. whereas in Ex. P. 5 the word "about" is omitted. Then again Exs. P. 6, P. 7 and P. 7 (a) are all of them dated 7-6-1945 and delivered to the plaintiff for investigation of title. While Exs. P. 6 and P. 7 omit the word "about" in describing the extent, Ex. P. 7 (a) mentions the property as measuring about 6 cawnies 5 grounds and 1035¼ sq. ft. It is, therefore, not possible to draw any inference that the appellants knowing the real extent deliberately omitted the word 'about" and thereby practised fraud on the plaintiff.

(10) Exhibit P. 9 is a letter dated 16-9-1945 sent by the appellants to the plaintiff. Therein they ask for advance payment of portion of the consideration so as to enable them to discharge their debts. The statement in Ex. P. 9 which is relied on by the plaintiff is "the monthly rent for the garden is Rs. 800, extent 150 grounds". The extent given in this letter differs from that given in the other letters and can only be regarded as approximate.

(11) The document most relied on against the appellants is Ex. P. 10, which is a copy of a letter addressed by the appellants to the Tahsildar of Madras. It is as follows:

"To

The Tahsildar of Madras.

Sir,

Sub: Patta for R. S. Nos. 1064, 1071, 1074, 6 cawnies, 5 grounds, 1035¼ sq. ft.

Please issue a patta for the above property. Our mother was the guardian and we are the only sons who have since become adults. The matter is urgent as we are arranging for sale of the property.

Yours faithfully,
Sd. M. Delli Gramani, and
Sd. M. Purushotham."

(12) The argument for the plaintiff is that in 1932 the register in the Collector's office gave the correct extent of the cocoanut thope which is the subject matter of the sale, that the appellants must have had knowledge of it and that Ex. P. 10 was given to the plaintiff with a view to put him off the track and mislead him into thinking that the correct extent was six cawnies, 5 grounds and 1035¼ sq. ft. and prevent him from ascertaining the correct extent from the office of the Collector. Defendant 2 as D. W. 1 has deposed that the original of Ex. P. 10 was taken by the plaintiff for the purpose of being despatched to the Tahsildar and that he signed it and the original only at the instance of the plaintiff. Plaintiff as P. W. 2 has denied this.

(13) We find it difficult to impute to the appellants knowledge of what had taken place in the Tahsildar's office in the year 1932. They were then minors. Their mother put her thumb impression in the register in the Collectorate, Ex. P. 11. There is no proof that an extract of this was obtained by the mother or that the appellants were aware of it. In view of the fact that title deeds had all along been with the mortgagees, the evidence on the side of the defendants that they did not know of this seems probable. The extent appears to have been taken from Ex. P. 1 and repeated in all the subsequent correspondence. On the materials, therefore, we are unable to hold that the appellants had become aware of the true extent of the property before

the date of sale and that they had made a fraudulent statement about the extent of the property in Ex. P. 15. The plaintiff is, therefore, not entitled to compensation on the ground of fraud.

(14) It is, however, argued by Mr. M. S. Venkatarama Aiyar, the learned advocate for the respondent, that the plaintiff is entitled to compensation even apart from any question of fraud. He contends that the extent of the property is a material factor in fixing the price and if there is an error in the statement of that extent the vendor must submit to a proportionate reduction of the price even if he was himself honest and mistaken and that on this principle the plaintiff is entitled to compensation. In support of this contention a number of authorities, English and Indian, and passages from text books were cited but they mostly deal with claims for specific performance and under the law the rights of a purchaser under a contract of sale materially differ from those of a purchaser under a deed of conveyance. While the matter is still in the stage of an agreement and if an error is discovered in the quality of the estate or in its quantity, the purchaser is entitled either to rescind the contract or to claim specific performance thereof with abatement of price on account of shortage in extent. In such a case if the deficiency was small in relation to the total extent of the property, Courts of Chancery granted specific performance with compensation. But where the deficiency was considerable, the relief by way of specific performance was refused, the party being left to his remedy at common law for damages.

(15) —'Hill v. Buckley', (1811) 34 ER 153 (B), is the leading case on this point. There the agreement described the property as of the extent of 217 acres and 10 perches but on measurement it was found to be less by 26 acres. The purchaser claimed specific performance and abatement of price on account of the deficiency. There was a finding that there was no fraud on the part of the vendor. In granting a decree for specific performance and compensation, the Master of the Rolls observed as follows:

"Where a misrepresentation is made as to the quantity, though innocently, I apprehend the right of the purchaser to be to have what the vendor can give; with an abatement out of the purchase money for so much as the quantity falls short of the representation. That is the rule generally, as, though the land is neither bought nor sold professedly by the acre, the presumption is that in fixing the price regard was had on both sides to the quantity which both suppose the estate to consist of. The demand of the vendor and the offer of the purchaser are supposed to be influenced in an equal degree by the quantity which both believe to be the subject of their bargain. Therefore a rateable abatement of price will probably leave both in nearly the same relative situation in which they would have stood if the true quantity had been orginally known".

(16) The passages in the text books which were quoted on behalf of the respondent all deal with this question and refer to the relief which may be granted in suits for specific performance when there is innocent misrepresentation and they are based on the statement of law in — '(1811) 34 ER 153 (B)'. This is what Darts says in his work on "Vendors and Purchasers", Edn. 8, Vol. I, p. 565:

"The purchaser will be entitled to compensation for a deficiency in quality even though the estate is not sold professedly by measurement."

This passage occurs in Chap. 12 which deals with matters relating to completion of the contract of sale and the authority cited is — '(1811) 34 ER 153 (B)', and similar cases. The same remark applies to the following passages from Williams on Vendor and Purchaser, Edn. 4 p. 725:

"The purchaser, therefore, is as a rule entitled if it turns out that there is a mere deficiency whether of area, estate or right and whether substantial or not between the property described in the contract and that offered in fulfilment thereof to enforce the specific performance of the contract, taking such interest in the property sold as the vendor has and receiving compensation for the deficiency. For example, where a vendor described the land sold as containing a much greater quantity than its actual area, he was obliged at the purchaser's suit to convey what estate he had and to allow compensation for the deficiency."

The passages from Sugden's "Vendors and Purchasers" are in the same terms and based on the statement of law in — '(1811) 34 ER 153 (B)' and relate to claims for specific performance. In the Indian law this principle is embodied in S. 14, Specific Relief Act.

(17) But when once the matter has passed beyond the stage of contract and the transaction has resulted in a conveyance it is well established that the purchaser has no longer the right to rescind the transfer on the ground that the representation is erroneous or claim compensation for the same. In — 'Wilde v. Gibson', (1848) 9 ER 897 (C), Lord Campbell observed:

"If there be in any way whatever, misrepresentation or concealment, which is material to the purchaser a Court of equity will not compel him to complete the purchase but where the conveyance has been executed, I apprehend, my Lords, that a Court of equity will set aside the conveyance only on the ground of actual fraud."

In — 'Brownlie v. Campbell', (1880) 5 AC 925 (D), Lord Selborne observed as follows:

"The contract is ultimately entered into upon those terms. Passing from the stage of correspondence and negotiation to the stage of written agreement, the purchaser takes upon himself the risk of errors. I assume them to be errors unconnected with fraud in the particulars and when the conveyance takes place, it is not so far as I know, in either country the principle of equity that relief should afterwards be given against that conveyance, unless there be a case of fraud, or a case of misrepresentation amounting to fraud."

These are cases in which the purchaser sought to rescind the conveyance but the same principle applies as regards claims for compensation. In discussing the rights of a purchaser after conveyance, Darts states the law in the following terms:

"A claim after conveyance, simply for compensation in respect of defects in the estate, will be dismissed in the absence of an express condition for compensation' (Chapter 13 at p. 683, Vol. II).

(18) In Halsbury's Laws of England, Vol. 29, paragraph 669 is as follows:

"After completion of the contract, the transaction is at an end as between vendor and purchaser, and as a general rule, no action either at law or in equity can be maintained by either party against the other for damages or compensation on account of errors as to quantity or quality of the property sold unless such error amounts to a breach of some contract, or warranty contained in the conveyance itself, or unless some fraud has been practised by the purchaser."

— 'Jolliffe v. Baker', (1883) 11 QBD 255 (E), is a direct decision on this point. There it was found

that the actual extent of the property was less than what was specified in the sale deed and the error was discovered after the conveyance was executed. It was also found that there was no fraud on the part of the vendor. On these facts it was held that the purchaser was not entitled to compensation. In — 'Clayton v. Leach', (1890) 41 Ch D 103 (F), the lessor granted sub-lease stating that it was for 21 years. In fact it was only for a period of 14 years. The under-lessee claimed compensation on the ground of misdescription. It was held that inasmuch as the transaction had been completed by the conveyance the claim for compensation was not maintainable in the absence of any agreement therefor in the deed of conveyance. It was observed by Cotton L. J. that "There was no contract to make compensation for defects", and by Lindley L. J. that "The covenants in the lease give him no remedy". These authorities clearly establish the position that after conveyance a claim for compensation for errors is not maintainable apart from the terms of the deed.

(19) As against these cases, the learned advocate for the respondent relied on the decision in — 'In re Turner and Skelton', (1880) 13 Ch D 130 (G), as an authority for the position that such compensation should be claimed. In that case the agreement which preceded the conveyance contained a clause that if there was any error or misstatement the sale should not be annulled but compensation made. The error in quantity was discovered after the conveyance and a claim for compensation was made in terms of the above clause. It was resisted on the ground that that clause in the agreement ceased to have any operation after the conveyance was executed. In repelling this contention, Jessel M. R. observed as follows:

> "No book can be produced to show that it was thought to be settled law that a purchaser loses his right to compensation by taking a conveyance, and on what principle should he do so. The theory is that he has contracted to take compensation if there is any variation from the particulars. Why, then should he lose it by taking a conveyance? The only reason that can be alleged is that everything is supposed to be settled between the parties but why should there be an obstacle to the right of the purchaser when the defect is discovered afterwards?"

(20) The 'ratio decidendi' of this case is that if in an agreement to sell there is a provision by the vendor to make compensation for deficiency it is not annulled or superseded by the conveyance. In coming to this conclusion the learned Master of the Rolls followed the decisions in — 'Cann v. Cann', (1830) 3 Sim 447 (H) and — 'Boss v. Helsham', (1886) 2 Ex. 72 (I). In both these cases, the agreement to sell contained a clause for compensation in case of error. The deficiency in extent was discovered after the conveyance and compensation granted in terms of the agreement. The following observation of Kelly C. B. in — '(1866) 2 Ex 72 at p. 77 (I), may in this connection be particularly referred to:

> "I acquiesce in the general doctrine laid down on the subject in Sugden's Vendors and Purchasers, and in the difference which the author points out between objections entitling a purchaser to annul a contract before completion of the conveyance, and those which may be raised after completion, where a Court of Equity will not interfere, and there is no remedy at law, even though the objections are well-founded, because they have not been taken in proper time. But in this case, as if with a view of avoiding these distinctions and differences, the parties themselves have expressly contracted that if any mistake be made in the description of the property, or any error occurs in the particulars of sale, such mistake or error shall not annul the sale, but a reasonable compensation to be assessed in a specific manner, is to be given. Now, here it is to be observed that no distinction is made, though it would have been easy to make it, between an error or mistake discovered before, and one discovered after, the execution of the conveyance."

(21) These cases proceed on the basis of an express agreement for compensation and do not touch the position that apart from any special contract the purchaser has no claim for compensation. It is scarcely necessary for us to add that the right to compensation recognised in these decisions has no legal relation whatsoever to the award of compensation by Courts of Chancery in actions for specific performance, where the relief was granted not in the enforcement of any agreement, express or implied, of the parties but in the exercise of an equitable jurisdiction to mould the relief according to the justice of the case.

(22) Now we shall examine the Indian authorities that have been cited before us. In — 'Abdulla Khan v. Abdur Rahman Beg', 18 All 322 (J), the plaintiff discovered after the conveyance that the actual extent of the property was less than what was mentioned in the sale deed. He sued for compensation. The finding was that there was no fraud on the part of the vendor. In holding that the plaintiff was not entitled to compensation the learned Judges observed as follows:

> "There was no agreement to make compensation in case of misdescription such as one finds as a rule in conditions of sale or agreements of sale in England. Consequently the plaintiff can only succeed if he makes out a case of fraud, and that he was damnified by reason of fraud."

This decision is directly opposed to the contention of the learned advocate for the respondent, who however referred to — 'Doyal Krishna Naskar v. Amrita Lal Das', 29 Cal 370 (K), as dissenting from this decision. But that was a case of a court sale in which the auction purchaser claimed compensation from the decree-holder on the ground that the misdescriptions in the sale proclamation were fraudulent. The Court negatived that claim. Bannerjee J. based his decision on the ground that the considerations applicable to a private sale do not apply to a court sale. There is a passing observation by Maclean C. J. which might seem to throw a doubt on the correctness of the decisions in — '18 All 322 (J)', but there is no decision that a claim for compensation can be maintained on facts as in the present case.

(23) A case strongly relied on by the respondent is the decision in — 'Suleman Vadu v. Trikamji Velji', 12 Bom HCR 10 (L). There, there was a sale of 30 acres, the price having been fixed at Rs. 500 per 'bigha'. After the sale the plot was measured and found to contain 19 acres. The purchasers claimed compensation for deficiency. West J. granted a decree and observed:

> "The question seems to be whether the area of the field, as specified, was an essential part of the consideration for the payment made by the plaintiff or whether, although the area is set down as a matter of description he bought and took the field as a particular object identified and estimated for the purpose of the contract independently of the circumstance of its area being or not being so much as 30 acres. Prima facie the specifications of the area implies we

think that the area is regarded as material by the parties and is the quality, or one of the qualities specifically had in view as the basis of their contract."

(24) The decision in this case is clearly right, because when price is fixed in terms of area such as acre or bigha and the total area is mentioned, then the extent is a material term and the vendor by implication warrants that the property is of a particular extent. The cause of action would then be really damages for breach of warranty contained in the sale deed. Moreover the reasoning in — '12 Bom HCR 10 (L), proceeds not upon the general principle that in all cases of deficiency the purchaser is entitled to compensation but upon a construction of the terms of the particular sale deed. It is implicit in this decision that if the terms of the sale deed did not warrant a right to compensation the vendor cannot claim it as a matter of law and it appears to have been so understood in the case in — 'Maharudrappa v. Lakshman', AIR 1932 Bom 449 (M).

(25) We shall now consider the decision in — 'Venkatareddi v. Jamal Ahmed Saheb', AIR 1916 Mad 526(N). That was also a case in which the price was fixed in terms of acreage and deficiency was discovered after the execution of the sale deed. On the facts this case is similar to the one in — '12 Bom HCR 10 (L)', and the decision that the plaintiff was entitled to compensation is clearly right because having regard to the method by which the price was ascertained it might be taken that the vendor warranted the correctness of the extent but there are observations in the judgment of Napier J. with which we find it difficult to agree. The learned Judge holds and in our opinion rightly that the claim for compensation could not be rested upon covenant for title, but after stating that the plaintiff would have been entitled to compensation if it had been a suit for specific performance Napier J. goes on to ask why the same claim should not be available after the conveyance. The decision in — '(1883) 11 QBD 255 (E)', is cited before him, but he prefers to follow — '(1880) 13 Ch D 130 (G).

(26) We are unable to agree that the rights of the purchaser remain the same after conveyance as before thereto and we further fail to see that there is any conflict between — '(1880) 13 Ch D 130 (G)' and — '(1883) 11 QBD 255 (E)'. If there is an express agreement — '(1880) 13 Ch D 130 (G)' will apply. If not the matter will be governed by — '(1883) 11 QBD 255 (E). While we agree with the decision in — 'AIR 1916 Mad 526 (N)', we must respectfully dissent from the reasoning on which the decision is based. There is a later decision of this Court reported in — 'Kondal Rao Naidu v. Dhanakoti Ammal', AIR 1938 Mad 81 (O), where the rights of a purchaser to claim compensation on the ground of misdescription in circumstances similar to the present case were considered. Gentle J. as he then was held, following the decision in — '(1883) 11 QBD 255 (E)', that the plaintiff was not entitled to any such relief. We agree with this decision.

(27) The learned advocate for the respondent also relied on certain observations in — 'Mellor v. Walmesley', (1905) 2 Ch 164 (P). There the point for decision was whether the property which was the subject-matter of the litigation passed to the grantee under the terms of the deed. Vaughan Williams C. J. held that the general description was cut down by the dimensions which formed a material part of the description and that the grantee was not entitled to the property while Romer L. J. took a different view. The observations relied on for the respondent occur at page 174:

"I cannot, however, agree with the learned Judge that the present case is one in which the undoubted rule that, when you have in the words of description a sufficiently certain definition of what is conveyed inaccuracy of dimensions or of plans as delineated will not vitiate or affect that which is there sufficiently defined, applies because the description itself is a description of a piece of land situate on the seashore of certain dimensions which are set forth. These dimensions, in my opinion, are not an addition to something which has already been certainly described, but are part and parcel of the description itself. The words are not inaccurate statement of a quality of that which had already been certainly described or defined, but are part and parcel of that description or definition."

The case has no relevance to the point which we have to determine which is whether the plaintiff is entitled to compensation and not whether a disputed plot has passed to him under the conveyance. The same remarks apply to the case in — 'Mohamed Abdul Karim v. Abdul Sattar', AIR 1941 Nag 162 (Q). There also the point for determination was as to what passed under the sale deed.

(28) To sum up if there is any error in the statement of the extent of the property agreed to be sold the purchaser can claim specific performance with compensation if he can bring his case under S. 14, Specific Relief Act but if the contract has been completed by the execution of the sale deed then the purchaser can claim compensation if he establishes fraud; or if there is a special agreement for making compensation for errors in quantity or if there is a warranty that the extent conveyed by the sale deed is correct. Apart from such cases he has no right to compensation.

(29) We have found that there was no fraud. Nor is there any agreement to make compensation for errors in extent. Can the plaintiff claim any compensation on the ground that there is a warranty as to the correctness of the extent. The case put forward in the plaint is that the price was fixed at Rs. 1325 per ground. If this is established it may be possible to grant relief to the plaintiff on the footing that there was an implied warranty that the extent mentioned in the sale deed was correct, but does the evidence establish it? We are of opinion that it does not. The agreement, Ex. P. 4, the sale deed, Ex. P. 15 and the entire correspondence between the parties, Exs. P. 5 to P. 9 refer only to the cocoanut garden and a lump sum as the price therefor. Nowhere do the documents suggest that the price per ground is entered into calculation. In Ex. P. 16 the notice sent by the plaintiff on 2-9-1946 it is merely stated that the price of two lakhs was arrived at on the basis of the extent. It is not stated that the price was calculated at Rs. 1325 per ground. That comes in for the first time only in the plaint.

(30) It must be mentioned that there were on the property certain structures and an oil engine and their value was also included in the price. The plaintiff may be right when he deposed that their value was not considerable but the existence of these properties is sufficient to throw considerable doubt on the case of the plaintiff that there was a fixation of price in terms of per ground value. There is also a qualification of the extent by the word 'about' and the plaintiff states that that qualification was made for the purpose of covering small deficiencies. The defendants deny that the price was fixed on the basis of per ground value and D. W. 1 has also given evidence to that effect. We think that this is probable. Bell J. did not base his conclusion on the existence of

any such agreement as is pleaded in the plaint and as stated already he would have dismissed the suit but for the finding of fraud. We are of opinion that the plaintiff has not established that the price was fixed at Rs. 1325 per ground and that no relief could be granted to him on the basis of breach of implied warranty as to the correctness of the extent.

(31) We are further of opinion that such an agreement should be established on the terms of the sale deed, Ex. P. 15 and it is not open to the plaintiff to travel outside the deed and adduce evidence to prove that there was a warranty, 'de hors' the instrument. In — 'AIR 1938 Mad 81 (O), already cited the price of the land was shown at a lump sum of Rs. 17500 and oral evidence was tendered for providing how the price was fixed. It was held that such evidence was inadmissible. Reliance was placed on the observations of Fry L. J. in — 'Palmer v. Johnson', (1884) 13 QBD 351 at p. 351 (R):

"When a preliminary contract is afterwards reduced into a deed and there is any difference between them the mere written contract is entirely governed by the deed."

We think that such evidence is inadmissible under S. 92 of the Evidence Act. The result then is that the plaintiff has not established any ground entitling him to compensation for the error in the extent.

(32) It remains only to add that Bell J. held on a construction of the sale deed that the intention of the parties was to sell a parcel of land within well-defined boundaries namely walls on the north, west and south and a row of houses in the east whose backyards form the eastern limit of the plot and that the measurements should be rejected as 'falsa demnostratio' and for this conclusion he relied on the observations of the Judicial Committee in — '41 Cal 493 at p. 507 (PC) (A)'. We agree with this conclusion. As no argument has been addressed to us disputing the correctness of this construction we do not find it necessary to discuss the question at any length.

(33) In the result this appeal will be allowed and the suit dismissed with costs throughout.

B/D.H. Appeal allowed.

A. I. R. 1953 MADRAS 774 (Vol. 40, C. N. 295)

SOMASUNDARAM J.

In re Intoor John, Accused-Appellant.

Criminal Appeal No. 469 of 1950, D/- 12-12-1950.

Penal Code (1860), S. 304A — Rash and negligent driving.

At the time of the day when the road is likely to be used frequently by others the driving of a bullock cart at terrific speed by letting loose the reins of the bulls amounts not only to rashness but also to negligence on the part of the driver of the cart. (Para 4)

Anno: Penal Code, S. 304A N. 1.

M. Damodharan Naidu, for Appellant; The State Prosecutor, for the State.

CASES CITED:
(A) (1937) 106 LJ KB 370: (1937) AC 576
(B) (1925) 94 LJ KB 791: 19 Cr App Rep 8

JUDGMENT: The appellant in this case has been convicted by the Second Presidency Magistrate for an offence under S. 304A and sentenced to nine months' rigorous imprisonment.

(2) The appellant is a cart driver employed by the Madras Corporation for driving double bullock rubbish cart. On 21-1-1950 at about 10-30 A.M. the appellant and D. W. 1 another bullock cart driver of the Corporation were driving the carts along the Kathiavakkam High Road. They were driving at a terrific speed racing with one another one trying to overtake the other. The evidence of P. Ws. 1 and 3 who are eye-witnesses shows that the two drivers were not only driving bullock carts at terrific speed and racing with one another but the appellant let loose the reins of the bulls and was whipping the animals with a view to overtake the other bullock cart. Suddenly a cry was heard 'child, child' and then when the bullock cart was made to stop, they found a child under one of the wheels of the accused's cart. It was taken out and it died within a few minutes thereafter. The appellant himself made a statement to the police which is Ex. P-2 in the case. In it, without admitting his reckless and rash driving, he speaks to other facts in the case as to how the child came and hit itself on the right side of the wheel and that the right wheel of the cart ran upon the child from the hip to the breast. P. W. 2 the doctor who conducted the post mortem examination found the following injuries:

"(1) An abrasion over the inner aspect of the left wrist 2 inches by one inch.
(2) There was extravasation of blood over left side of the skull on the head. There was a fissured fracture of the left side of the temporal bone extending to the base of the skull. The stomach was empty. In my opinion the deceased would appear to have died of basal fracture of the skull. The injury to the skull is necessarily fatal. The injury could have been caused by being hit and knocked down by a cart."

In cross examination he says that there was no evidence of any cart wheel having run over the body either on the skull or over the chest of the boy. His opinion regarding the death of the child is that it is due to the basal fracture of the skull and that the mere hitting of the cart might not have caused the fracture but it is the consequential fall that would have caused it. On these facts the learned Second Presidency Magistrate convicted the appellant of an offence under S. 304A.

(3) It is contended by learned counsel for the appellant that the medical evidence shows that the wheel could not have run over the body of the child as the basal fracture was due to the fall of the child and not directly due to the hitting and the appellant cannot be convicted under S. 304A. It is further contended that the witnesses would not have seen the accident but were drawing on their imagination. Taking the second point first the witnesses are disinterested and nothing was suggested in their cross-examination as to why they should depose differently from what they have seen. Their evidence is consistent and I agree with the appreciation of their evidence by the learned Magistrate. In my opinion, their evidence sufficiently establishes this fact namely, that the two drivers were racing with one another at terrific speed and that the appellant had let loose the reins of the bulls and was whipping the animals with a view to overtake the other. This shows that he was not only rash but was also negligent. The degree of negligence that is required in such

cases has been laid down by Lord Atkin in —'Andrews v. Director of Public Prosecutions', (1937) A. C. 576 (A). After approving the principle laid down in —'Rex v. Bateman', (1925) 19 Cr. App. Rep. 8 (B), Lord Atkin says at page 583 :

"The principle to be observed in cases of manslaughter in driving motor cars are but instances of a general rule applicable to all charges of homicide by negligence. Simple lack of care such as will constitute civil liability is not enough : for purposes of the criminal law there are degrees of negligence : and a very high degree of negligence is required to be proved before the felony is established. Probably of all epithets that can be applied "reckless" most nearly covers the case. It is difficult to visualize a case of death caused by reckless driving in the connotation of that term in ordinary speech which would not justify a conviction for man slaughter."

(4) There can be no doubt that in this case the driving of the cart by the appellant falls clearly within this principle of reckless driving. That at that part of the day when the road was likely to be used frequently by others the driving by letting loose the reins of the bulls amounts not only to rashness but also to negligence on his part is clear. Therefore that this act amounted to rash and negligent driving cannot be disputed and this point must be found against the appellant.

(5) As regards the question whether the death was caused by this act of the driver, as already stated, the main contention on behalf of the appellant is that basal fracture was caused not by the hitting of the wheel but by the fall. Any hitting of the child by the wheel of such a cart would necessarily involve a fall and it is really a miracle as to how the child when it was taken out by pushing one of the wheels did not sustain more serious injuries. It can only be attributed to mystery and accident. There can be no doubt that on account of the hitting of the wheel the child fell down and died. Death is therefore directly attributable to the act of the driver. The offence, therefore, of causing death by rash and negligent driving has been made out and the appellant has been rightly found guilty of the offence under S. 304-A, Penal Code.

(6) As regards the sentence the conviction no doubt involves the dismissal of the driver from his employment. Taking that into consideration a sentence of six months in my opinion, will meet the ends of justice. I, therefore, reduce the sentence to six months rigorous imprisonment. With this modification the appeal is dismissed.

C/V.S.B. Sentence reduced.

A. I. R. 1953 MADRAS 775 (Vol. 40, C. N. 296)

RAJAMANNAR C. J. AND
SOMASUNDARAM J.

V. Srinivas, Petitioner v. The Director of Controlled Commodities, Madras, Respondent.

Civil Misc. Petn. No. 10787 of 1950, D/-20-3-1951.

Cotton Textile (Control) Order (1948), Cl. 30 —Clause does not contemplate irrevocable fixing of any "quota" — Though Director of controlled commodities would not normally interfere with normal channels of distribution he can still interfere — Director directing Mills not to sell or deliver yarn to petitioner — Court will not question the reasons for the order.

(Para 5)

R. Viswanatha Iyer, for Petitioner; The State Counsel, for Respondent.

RAJAMANNAR C. J.: This application is filed by one V. Srinivas who has been doing the business of a Master Weaver according to him for over 10 years. He was permitted by an order of the Provincial Textile Commissioner to take from three mills certain quantity of yarn per month. In June 1949 he found it difficult to continue his business and so he decided to suspend his business temporarily and intimated his decision to do so to the Collector of Coimbatore in July 1949. In his affidavit he states that in or about March 1950 he decided to resume his business as a weaver and applied to the Director of Controlled Commodities to allocate to him the quota which was being allowed to him. He was eventually informed that this quota had been cancelled. There was an application for review, but the Collector refused to reconsider the case. By this application he seeks to have the order of the Director of Controlled Commodities cancelling his quota quashed and he seeks a direction from this Court to restore to him the quota which he was enjoying prior to that cancellation.

(2) It is necessary to briefly refer to the statutory provisions and connected Government Orders which have a material bearing on the disposal of this application. In exercise of the powers conferred by sub-r. (2) of R. 81, Defence of India Rules, the Central Government published an order on 21-7-1945 called the Cotton Cloth and Yarn (Control) Order, 1945. In this Order a dealer was defined as a person carrying on the business of selling cloth or yarn or both, whether wholesale or retail, and included Master Weavers of Handloom cloth. Clause 18(A) (1) of the order provided,

"No manufacturer shall, save in accordance with a general or special permission of the Textile Commissioner or in compliance with a direction given under cl. 18(B)

"(a) sell or agree to sell cloth or yarn to any person who

"(1) is not a licensed dealer (or is not in possession of a certificate of Registration issued) under the rules framed in this behalf by the Provincial Government; and

"(II) did not as a dealer buy any cloth or yarn from him at any time during the years 1940, 1941 and 1942.

"(b) during any quarter deliver to any dealer, whether in pursuance of a pre-existing contract or otherwise, cloth or yarn in excess of his quota determined under sub-cl. (2)."

The method of ascertaining the quota to which any dealer including a Master Weaver was entitled was set out in sub-cl. (2) of the same clause which ran as follows:

"(2) For purposes of sub-cl. (1)(b), a dealer's quota shall bear to the value of the total deliveries of cloth made to all dealers during the quarter by the manufacturer concerned the same proportion as the value of the total deliveries of cloth made to that dealer during the years 1940, 1941 and 1942 bore to the value of the total deliveries of cloth made to all dealers during the same years by the same manufacturer; and a dealer's

quota of yarn shall be similarly determined." On 19-2-1948 a notification was issued by the Government of India, in exercise of the powers conferred by S. 3, Essential Supplies (Temporary Powers) Act, 1946 (24 of 1946), publishing an order called the Cotton Textiles (Control) Order, 1948. This order, however, was shortly thereafter repealed by another order of the same name published by a Notification dated 2-8-1948 which is now in force. Clause 3, sub-cl. (c) of this Order defines "dealer" as including master weavers of handloom cloth. Clause 30 of this Order is most material for the purpose of this application.

(3) Clause 34 provides for the delegation of the powers of the Textile Commissioner on any officer authorised in that behalf. By a Notification dated 27-4-1948 published in the Fort St-George Gazette of 24-6-1948 the powers of the Textile Commissioner were delegated to (1) the Secretary to Government, Development Department, Madras and (2) the Provincial Textile Commissioner so far as this Province was concerned. On 1-10-1948 the Madras Government passed an order approving the proposals made by the Provincial Textile Commissioner that the master weavers who were getting supplies of yarn direct from the mills during the previous control period would not be shown any concession and they should be made to obtain their requirements at retail selling rates like all other master weavers. This order was, however, partially modified by a subsequent order dated 8-11-1948 which runs thus:

"In partial modification of the orders in para. 1(8) of the G. O. read above His Excellency the Governor of Madras hereby directs that all master weavers in the Province who were enjoying consumer quotas during the last control by virtue of their direct dealings with Mills during 1940, 1941 and 1942 may be allowed to get their supplies of yarn direct from mills. The quantity to be supplied to each consumer will be fixed by the Provincial Textile Commissioner with reference to their quotas during the last control. The Provincial Textile Commissioner is requested to prescribe suitable accounts to be maintained by the said master weavers so as to ensure that the yarn allotted to them is utilised properly."

In accordance with this order of the Government the Provincial Textile Commissioner proceeded by his order dated 29-11-1948 to specify the quantities and counts of yarn to be supplied to the master weavers who were enjoying consumer quantities during the last control period. It appears from the schedule to this order that the petitioner before us was allowed a total of 19 bales from three different mills.

(4) As already mentioned, the petitioner suspended his business in or about June 1949. He was asked to explain why he did not purchase his quota for several months. The petitioner had an interview with the Director of Controlled Commodities on 16-5-1950. The next day after the interview he addressed a letter to the Director informing him that he had written to the Collector of Coimbatore and was enclosing a copy of that letter for favour of his perusal. In this letter of the 17th May addressed to the Collector he explained that due to heavy accumulation of stocks of handloom cloth with dealers and weavers, there was no demand and as there was no likelihood of improvement, he suspended his business for some months and that was the reason why he was unable to take advantage of the quota allotted to him. This explanation was considered by the Collector who made also a confidential enquiry and made a report to the Director of Controlled Commodities on 5-7-1950. In this report the Collector mentioned that not only had the petitioner not been drawing his supplies since June 1949 but that his conduct was suspicious and he had been misusing his entire quota during the last control with the help of another person. It was also pointed out by him that the weavers to whom he was making supplies had all become members of a Co-operative Society of the place and were getting their supplies through that society. The Collector was of opinion that in the circumstances it was not desirable to reallot the quota to him. It was in pursuance of this report of the Collector that the quota of 15 bales of yarn from one of the mills was cancelled on 18-7-1950 and after receiving a further report, the consumer quota in respect of the other mills was also cancelled. The petitioner filed a petition on 20-7-1950 requesting that his quota may be restored, but this was rejected on 27-7-1950 as there were no grounds for restoration.

(5) It is clear from the provisions of cl. 30 of the Control Order of 1948 dated 2-8-1948 that the Textile Commissioner or such officer to whom his functions and powers have been delegated in accordance with cl. 34 may with a view to secure a proper distribution of cloth and yarn and with a view to securing compliance with these provisions of the order direct any manufacturer not to sell or deliver cloth or yarn of a specified description except to such person or persons and subject to such conditions, as he may specify. He can also direct the manufacturer to sell to such person or persons such quantities of cloth or yarn as he may specify. He may also issue such further instruction as he thinks fit regarding the manner in which the direction is to be carried out. This clause does not contemplate an irrevocable fixing of any "quota" to which it can be said that any person is entitled as of right. No doubt, ordinarily the Director of Controlled Commodities who is the officer performing the functions of the Textile Commissioner in this State would not interfere with the normal channels of distribution. That is a question of policy. But it cannot be contended that the pursuit of such a policy renders the authority powerless to make alterations. So long as the alteration is not mala fide or perverse, it cannot be said that it is an improper exercise of the general power conferred in the widest terms possible on him by cl. 30. It is presumably in exercise of this power that the Director of Controlled Commodities directed the mills not to sell or deliver any yarn to the petitioner. It is not for us to say whether the grounds on which the Director of Controlled Commodities came to the conclusion that it was not desirable to reallot the old quota to the petitioner were sound or not. Nor can we find it out on evidence whether the grounds are made out. The entire distribution is entrusted to the officer and it is not for us to question any action of his in exercise of his powers. In this case, it appears from the counter-affidavit, supported as it is by the Report of the Collector that there were good grounds on which the Director of Controll-

ed Commodities refused to make an order reallotting the quota to the petitioner. The order, therefore, cannot be quashed.

(6) It was contended that the order of cancellation violated principles of natural justice. We fail to see any such violation.

(7) The application is dismissed. There will be no order as to costs.

C/R.G.D. Application dismissed.

AIR 1953 MADRAS 777 (Vol. 40, C. N. 297)

KRISHNASWAMI NAYUDU J.

K. Jagannatham Chetty, Plaintiff v. V. Parthasarathy Iyengar (dead) and others, Defendants.

C. S. No. 42 of 1933; Appln. No. 2844 of 1950, D/- 27-9-1950.

(a) Debt Laws — Madras Agriculturists' Relief (Amendment) Act (23 of 1948), S. 16 Cl. (ii) — "Proceeding."

Execution proceedings are not contemplated by the word "proceedings" in Cl. (ii) of S. 16 of the amending Act. The proceedings in S. 16 must relate to proceedings instituted for repayment of a debt and not to execution proceedings which are for enforcement for a decree or order which have become final before the commencement of the Act. (Para 3)

(b) Debt Laws — Madras Agriculturists' Relief (Amendment) Act (23 of 1948), S. 16 Cl. (iii).

Section gives retrospective operation only in regard to suits and proceedings before the Act in which the decrees or orders had not become final and also had not been fully satisfied. C. M. A. Nos. 316 and 391 of 1947 (Mad), Relied. AIR 1951 Mad 635, Considered. (Para 4)

(c) Debt Laws — Madras Agriculturists' Relief Act (4 of 1938), Ss. 19, 8 Expl. I — Application under S. 19 decided finally — No similar application lies — Advantage of amending Act cannot be taken retrospectively — (Debt Laws — Madras Agriculturists' Relief (Amendment) Act (23 of 1948), S. 16). (Para 7)

(d) Debt Laws — Madras Agriculturists' Relief Act (4 of 1938), S. 7 — "Decree" refers to decree passed prior to Act.

Where a preliminary mortgage decree had been passed prior to the commencement of the Act and had not become final, the final decree cannot come within the scope of a decree in S. 7 as a final decree has nothing to do excepting to direct the sale of property and taking of accounts. (Para 8)

(e) Debt Laws — Madras Agriculturists' Relief Act (4 of 1938), S. 8, Expl. I — Does not give any new right.

There is specific mode of appropriation that is provided for and directed to be followed under Explanation (I). It does not confer any new right. (Para 9)

T. G. Aravamudha Iyengar, for Plaintiff; D. Ramaswami Iyengar and K. Srinivasa Rao, for Defendants.

CASES CITED:

(A) ('47) C M A Nos 316 and 391 of 1947 (Mad)

(B) ('51) AIR 1951 Mad 635: 1950-1 Mad LJ 224

(C) (1912) 81 LJ PC 173: 1912 AC 400

(D) ('12) 16 Ind Cas 1002: 36 Bom 617

(E) (1830) 6 Bing 576

(F) ('27) AIR 1927 PC 242: 9 Lah 284 (PC)

(G) (1905) 74 LJ PC 77: 1905 AC 369

ORDER: This application is for scaling down the mortgage decree debt in C. S. No. 42 of 1933, and the applicants are some of the judgment-debtors. Preliminary decree in the above suit was passed on 31-7-1934, and the final decree was passed on 12-2-1935. There was a balance of Rs. 6,759-5-0 claimed under the decree. The mortgage property was brought to sale and the proclamation was settled on 25-4-1950. The sale has been stayed by my order in view of this application. The judgment-debtors took out application No. 1147 of 1938 under S. 19 of Act 4 of 1938 and an order was made on 4-9-1939 scaling down the debt. An appeal was preferred, O. S. A. No. 57 of 1940 by one of the judgment-debtors against the order scaling down the debt and on 28-2-1941, the appellate Court found on scaling down the debt that a sum of Rs. 3,391-8-0 was due on 1-10-1937 and further ordered the judgment-debtors to pay interest thereon at 6 per cent per annum from 1-10-1937 with proportionate costs of the parties. The amount now under the proclamation of sale represents the said sum of Rs. 3,391-8-0 with interest and costs of further proceedings.

(2) Objection is raised to this application on the ground that the decree debt having once been scaled down by virtue of an order of this Court in O. S. A. No. 57 of 1940, there can be no further application for scaling down. The applicants contend that by reason of the amending Act (Act 23 of 1948) they have become entitled to apply and if the amended provisions as to the method and principles are applied for the scaling down, there will be nothing due under the decree and the whole amount as it stood on 1-10-1937, would stand wiped out. Learned counsel for the applicants relies on S. 16, cls. (ii) and (iii) of the amending Act (Act 23 of 1948) and states that he is entitled to maintain this application and if this application is held to be maintainable, by virtue of the application of the provisions of Explanation 1 which have been newly incorporated in the amending Act, the amounts paid towards the decree must be appropriated towards the principal and if so appropriated there will be nothing due, since under Cl. (i) of S. 8, all interest due up to 1-10-1937 must be deemed to have been discharged.

(3) The first point for consideration is whether the present suit out of which this application is taken out comes under that class of suits mentioned in S. 16 of the amending Act 23 of 1948. Clause (ii) of S. 16 states that the amendments made by this Act shall apply to all suits and proceedings instituted before the commencement of this Act, in which no decree or order has been passed or in which the decree or order passed has not become final, before such commencement. This clause is relied upon and it is submitted that even though the decree in C. S. No. 42 of 1933 has become final before the commencement of this Act, still the execution proceedings are pending and as such they have not become final and that therefore the applicants are entitled to maintain this application for scaling down. I am unable to agree with the learned counsel that execution proceedings are contemplated in the word "proceedings" in cl. (ii). The proceedings in S. 16 must relate to proceedings instituted for repayment of a debt and not to execution proceedings which are for enforcement of a decree or order. That by "proceedings" execution proceedings are not intended is also clear if reference is made to cl. (3) when execution of a decree or order arising out of a suit or proceeding is separately contemplated. In any event, the present execution proceedings commenced after the-

commencement of the Act, that being an application of 1949.

(4) Learned counsel for the applicants contends that in any event the applicants will come under the ambit of cl. (iii) of S. 16. Clause (iii) says that the amendments made by this Act shall apply to all suits and proceedings in which the decree or order passed has not been executed or satisfied in full before the commencement of this Act (Amendment Act 23 of 1948). If it refers to a suit instituted before the commencement of the Act and the decree has not been satisfied before the commencement of the Act, namely, before January 1, 1949 the date of the coming into force of Act 23 of 1948, then the applicants will be entitled to apply and get the benefit of the extended provisions of S. 8. Learned counsel for the respondent has drawn my attention to a Bench decision of this Court in — 'C. M. A. Nos. 316 and 391 of 1947 (A)' in which the scope of S. 16 of the amending Act was considered. Their Lordships in the course of the judgment state as follows:

"Section 16 deals with three categories of proceedings. Clause (i) deals with suits and proceedings after the commencement of the Act. Clause (ii) with suits and proceedings instituted before the Act but the decree or order had not become final, and clause (iii) with suits and proceedings instituted before the Act but the decree or order was not fully satisfied. This clear-cut classification indicates that clauses (ii) and (iii) are distinct and mutually exclusive and are not intended to overlap. If the argument of Mr. Ramachandra Rao be accepted, clause (ii) of S. 16 would become unnecessary as all possible cases coming under clause (ii) would equally be covered by clause (iii). On the other hand, the contention on behalf of the decree-holder would give effect to all the provisions of the Act, at the same time avoiding conflict between the various clauses of the section. If under clause (ii) suits and proceedings wherein decrees or orders have become final are excluded from the operation of the Act, it would be unreasonable to hold that under clause (iii) they are brought in. On the other hand, it would be giving full effect to clause (iii) and avoiding conflict between the provisions if it was confined to suits and proceedings in which the decree or order had not become final. In other words the section gives retrospective operation in regard to suits and proceedings before the Act in which the decrees or orders had not become final and also had not been fully satisfied. If the decree or order has become final clause (iii) has no application, as clause (ii) saves such decree or order. We therefore hold that under S. 16 the retrospective operation of the Act is only confined to suits and proceedings before the Act in which decrees or orders have not become final and also not fully satisfied"

In view of this Bench decision the applicants are out of Court, since it is a case where the decree had become final before the commencement of the Amending Act though not fully executed. What the learned Judges say is that the section gives retrospective operation only in regard to suits and proceedings before the Act in which the decrees or orders had not become final and also had not been fully satisfied.

In — 'Ramaswami Pillai v. Sankara Mudaliar', AIR 1951 Mad 635 (B) which is another decision of the same Bench, the scope of S. 16 of the amending Act was considered, but not fully as had been considered in the judgment which has been referred to. In that case there was a prior mortgage decree in 1934 to which the second mortgagee was added as a party defendant. A decree was passed in favour of the mortgagee plaintiff and the amount that was due to the second mortgagee was declared under that decree at the sum of Rs. 6,933-6-0. But by reason of sale proceeding after payment to the mortgagee decree holder a sum of Rs. 3,477-13-8 alone was available for payment to the second mortgagee defendant. The second mortgagee, after appropriating the said amount which was paid out of the balance of the sale proceeds in pursuance of the mortgage decree, crediting a portion of it towards interest and a portion to the principal, and for the balance of the sum due under his mortgage as declared in the earlier mortgage suit, he instituted a fresh suit in 1944 long after the decree in the earlier mortgage suit was executed and properties sold. By the time the matter came up on appeal the amending Act (Act 23 of 1948) had been passed and the question arose there on behalf of the judgment-debtors whether, under S. 16 of the Act, it would be open to them to to re-open the payment of money and the appropriation of the same made in the earlier suit. In the course of the judgment the learned Judges state as follows:

"Mr. Bashyam Iyengar's argument was that in so far as the payment of Rs. 3,477-13-8 was concerned it was paid in execution of the decree in O. S. No. 50 of 1934 (earlier suit) and that the decree was satisfied and therefore it could not be re-opened. Some of the relevant facts may usefully be recapitulated....There is an underlying fallacy in the argument of Mr. Bhashyam Iyengar. For the purpose of Section 16 the suit we are concerned with is the suit wherein we are asked to apply the provisions of the Madras Agriculturists relief Act and therefore clause (2) of Section 16 directly applies. The only question with regard to those proceedings is whether the pendency or the closure of the proceedings in O. S. No. 50 of 1934 has any bearing on the application of Section 16. The only question with regard to those proceedings is whether the payment of money and the appropriation of the amount by the creditor can be reopened under the Madras Agriculturists' Relief Act or whether this Court is precluded from doing so by virtue of some principle other than that contained in the provisions of the Madras Agriculturists Relief Act. We cannot see any principle which compels us to hold that the appropriation made in O. S. No. 50 of 1934 cannot be re-opened in this suit, if Explanation (I) applied; nor Mr. Bashyam is able to suggest one."

While stating that what they were called upon to consider was the scaling down of the decree, the learned Judges at the end of the judgment observe as follows:

"Assuming that Bhashyam's argument is sound, even then, it would not advance his case any further. As we have already stated, the decree was for a sum of Rs. 6,933-6-0 (decree in the earlier suit) but what was paid towards the decree was only Rs. 3,477-13-8 and therefore there was a large amount still due to the decree-holder. Clause (3) of the Act would apply to all suits and proceedings in which the decree or order passed has not been executed or satisfied, in full before the commencement of the Act. As the decree has not been satisfied in full, the Act applied."

The learned Judges were apparently referring to the decree in the earlier suit O. S. No. 50 of 1934 when they made these observations, holding impliedly that clause (3) of the Act related not only to suits which had become final but also to all suits instituted prior to the commencement of the Act, but so long as the decrees had not been executed or satisfied, in full. By virtue of their observations in the last paragraph, the learned Judges were of opinion that clause (3) of the Act has an

extended scope which covers all such suits. There is a conflict of the conclusions arrived at in — 'AIR 1951 Mad 635 (B)' with the subsequent judgment in — 'C. M. A. Nos. 316 and 391 of 1947 (Mad) (A)'. But as already pointed out the latter judgment is a considered judgment on the scope and extent of S. 16.

(5) It is, however, contended by Mr. Aravamuda Ayyangar that the position as taken in — 'AIR 1951 Mad 635 (B)' is the correct one in view of the language of cl. (iii) of S. 16. There was no reason, it is urged and there is force in this argument for the enactment of a separate sub-clause, sub-clause (iii) if it were intended that what was contemplated in sub-clause (iii) had already been covered by sub-clause (ii). There is equally force in the observations of the learned Judges in — 'C. M. A. Nos. 316 and 391 of 1947 (Mad) (A)' that:

"Clause (ii) of Section 16 would become unnecessary as all possible cases coming under clause (ii) would equally be covered by clause (iii)."

It is enough to state that cl. (iii) as it is worded does not prima facie exclude the class of cases referred to by the learned counsel for the applicants namely, all suits and proceedings in which decrees or orders are passed instituted before the commencement of the Act or in which the decrees or orders passed have not been satisfied in full before the commencement of the Act. In view of the Bench decision, I do not propose to give any opinion on the construction of the Act, but I proceed to consider the application on the assumption that it comes under either cl. (ii) or cl. (iii) of S. 16.

(6) An agriculturist debtor is entitled, under S. 19(1) of the Act, to make an application to apply the provisions of the Act to any decree passed before the commencement of the Act (Act 4 of 1938) and ask that the decree may be amended consequent on the application of the provisions of this Act. Such an application had been made by the applicants in application No. 1147 of 1938 and the order had become final, by virtue of the final order in O. S. A. No. 57 of 1940. A sum of Rs. 9,000/- was paid prior to the date of the application No. 1147 of 1938 towards the decree, and the question that called for decision in that appeal was in what manner the said amount was to be appropriated. The learned Judges held that in respect of Rs. 8,500/- Rs. 5,000/- was to be appropriated towards the principal and Rs. 3,500 towards the interest. But there was the question of appropriation towards costs and it was observed that it was equitable that the amount appropriated towards principal and the amount appropriated towards interest should contribute rateably in making up the amount required for reappropriation towards costs. There has therefore been a conclusive finding as to how the appropriation ought to be made in respect of payments already made, namely Rs. 9,000/- before the date of the application, i.e., the application for scaling down was heard and applying the provisions of Act 4 of 1938, the debt was scaled down and the decree was directed to be amended with the findings thereon.

(7) Learned counsel for the applicants relies on Explanation I to S. 8 and wants the same to be applied to the present application. The question is whether, after an application under S. 19 of the Act had been taken, heard and decided finally, it would be open to the applicants to file a similar application subsequently, taking advantage of certain amendments in the method of scaling down which have been introduced by the later amending Act. It may be pointed out that neither S. 16 of the amending Act nor Explanation I to S. 8 of Act 4 of 1938 gives in express terms retrospective operation to matters which have been decided prior to the date of the amendment. It is a well established principle which is stated succinctly in Broom's Legal Maxims:

(1) that no statute shall be construed so as to have retrospective operation, unless its language is such as plainly to require that construction and this involves the subordinate rule that a statute is not to be construed so as to have a greater retrospective operation than its language renders it necessary....."

I do not think the language of either S. 16 or Explanation I to S. 8 compel me to construe that these provisions have a retrospective effect. In the absence of a retrospective effct, would it be necessary, or even proper, to apply this provision so as to re-open and unsettle matters which have been finally concluded by judgment of the court? The following passage from the judgment of Lord Robson in — 'Lemm v. Mitchell', (1912) A C 400 at pp. 405 and 406 (C) may be quoted:

"In the absence of appeal the judgment was a final determination of the rights of the parties and the ordinary principle that a man is not to be vexed twice for the same alleged cause of action applies unless it be excluded by the Legislature in explicit and unmistakable terms .....This language is only an expansion in rather emphatic terms, of the statement of principle affirmed by Tindal C. J. and is subject to the same qualification or exception as he expressed, namely, that it must not be taken to deprive persons of vested rights acquired by them in actions duly determined under the repealed law. It would require language much more explicit than that which is to be found in the Ordinance of 1908 to justify a Court of law in holding that a legislative body intended not merely to alter the law; but to alter it so as to deprive a litigant of a judgment rightly given and still subsisting."

These observations have been cited with approval in — 'Lakshman Krishnaji v. Balkrishna Rangnath', 36 Bom 617 (D) where the legal proceeding on a mortgage bond was rejected as the mortgage bond was held to be invalid & not enforceable, because it was attested by only one witness and not by two as required by S. 59, Transfer of Property Act. The plaintiff, thereupon, brought a suit in the year 1905 for a declaration that his mortgage bond was valid and operative according to law and therefore enforceable. The suit came up in second appeal to the High Court which finally decided that the plaintiff's mortgage was void and therefore inoperative under S. 59, Transfer of Property Act. In the meanwhile, the Government of Bombay issued a notification exempting certain Districts including the Poona District in which the mortgaged property was situate, from the operation of S. 59, Transfer of Property Act. The notification was given a retrospective effect from 1-1-1893. On the strength of the said notification, the plaintiff applied to the High Court for review of judgment and his application being rejected he, in the year 1910, instituted the suit to enforce his mortgage and both the lower Courts having rejected the claim on the ground of res judicata, the plaintiff preferred a second appeal. It was held in that case

"that the decree passed by the High Court in 1908 still subsisted and was not affected by the Government notification although the notification had retrospective effect. The notification could not abrogate rights which had been judicially declared and had been merged in the decree."

Chandavarkar, Acting C. J. in the course of his judgment observes at page 621 as follows:

"But the Government Notification cannot have a higher operation than a legislative enactment, which repeals a previous law either par-

tially or wholly, the principle is that it cannot affect vested rights acquired under decrees. That principle, enunciated by Tindal C. J. in — 'Kay v. Goodwin', (1830) 6 Bing 576 (E), has been followed recently by the Privy Council in — '(1912) AC 400 at p. 405 (C)'."

Citing Tindal C. J. with approval, their Lordships of the Judicial Committee of the Privy Council say in — '(1912) AC 400 at p. 405 (C)', that explicit language on the part of the legislature is necessary to warrant a Court

"in holding that a legislative body intended not merely to alter the law, but to alter it so as to deprive a litigant of a judgment rightly given and still subsisting."

As to the scope of retrospective operation of the statute certain observations of the Privy Council in — 'Delhi Cloth and General Mills Co. v. Income Tax Commissioner, Delhi', AIR 1927 PC 242 (F), may usefully be extracted:

"The principle which their Lordships must apply in dealing with this matter has been authoritatively enunciated by the Board in — 'Colonial Sugar Refining Co. v. Irving', (1905) AC 369 (G), where it is in effect laid down that, while provisions of a statute dealing merely with matters of procedure may properly, unless that construction be textually inadmissible, have retrospective effect attributed to them, provisions which touch a right in existence at the passing of the statute are not to be applied retrospectively in the absence of express enactment or necessary intendment. Their Lordships can have no doubt that provisions which, if applied retrospectively, would deprive of their existing finality orders which, when the statute came into force were final, are provisions which touch existing rights."

Here the order in O. S. A. No. 57 of 1940 having become final, the present applicants want to deprive the finality of that order and, in the words of their Lordships of the Privy Council such interference would touch the existing rights which had accrued to the respondent by virtue of the judgment of the appellate Court.

(8) It is however stated by Mr. Aravamuda Ayyangar relying on Section 7 of the Act that effect may be given to the words "Notwithstanding any law, custom, contract or decree of Court to the contrary", and "decree of Court to the contrary"—would include the decree or order of the appellate Court in O. S. A. No. 57 of 1940. But so far as Section 7 is concerned, the decree that is referred to in S. 7 is a decree passed prior to the commencement of the Act as regards payment of money due by any debtor to a creditor and it does not relate to any order passed after the commencement of the Act. Even if a preliminary mortgage decree had been passed prior to the commencement of the Act and has not become final, it has been held that the final decree cannot come within the scope of a decree in S. 7 as a final decree has nothing to do excepting to direct the sale of property and taking of accounts. But the language of S. 7 is clear and it has been held by decision of this Court that the decree in S. 7 refers to decrees passed prior to the commencement of the Act for repayment of a debt. Section 19 of the Act as it stood, only enabled the applicants judgment-debtors to apply for scaling down of a debt in respect of a decree passed before the commencement of the Act. That was the reason why clause (2) to S. 19 has been enacted by virtue of the amendment Act, XXIII of 1948, whereby the provisions of sub-section (1) are also held to apply to cases where, after the commencement of this Act a Court has passed a decree for repayment of a debt payable at such commencement. The decree that was referred to either in S. 7 or in S. 19 was not a decree or order passed as a result of invocation of the provisions of this Act, or as a result of an application made under S. 19 to decrees of Courts passed either before the commencement of the Act or after the commencement of the Act.

Here what is final is an order passed by this Court on an application made under S. 19 and not a decree passed by any Court either before or after the commencement of the Act relating to the repayment of a debt. There is nothing express or implied in the language of either S. 16 of the amending Act or in Explanation (1) to S. 8 of the Act to warrant or justify any number of applications being made under S. 19. I therefore consider that it is not open to the applicants, by virtue of the order in O. S. A. No. 57 of 1940, to file another application, they having already exercised their right in filing an application and having the decree scaled down.

(9) It is further argued on behalf of the respondent that either S. 16 or Explanation I to S. 8 does not confer any new right, that the right, if any, is conferred under S. 19 and that right having already been exercised, no new rights are conferred the only right conferred now is under S. 19 (2) which however, does not apply to the present case, and that in any event, the application is unsustainable. I agree with Mr. Ramaswami Ayyangar learned counsel for respondent, that Explanation (1) to S. 8 does not confer any new right. Explanation (I) only states that instead of leaving the question of appropriation to be worked out in accordance with the principles of general law, a particular mode of appropriation should be made whereby every payment made by a debtor shall be credited towards the principal, unless he has expressly stated in writing that such payment shall be in reduction of interest. There is specific mode of appropriation that is provided for and directed to be followed under Explanation (I). It does not confer any new right. If there was a right to be exercised for the first time after the amending Act of XXIII of 1948, certainly it would be open to such an applicant to invoke the provisions of Explanation (I) and apply the same towards appropriation and not leave the matter to be decided by the general law as it was a case prior to the amendment. Excepting a sum of Rs. 425/- which has been paid after 1-10-1937 and adjustments of some small amounts which, however, would go towards the costs which have accrued since that date there is nothing which could be appropriated. The sum of Rs. 9,000/- paid had been directed to be appropriated and by reason of the direction, the decree having been amended, it is not open to the applicants to re-open the question of adjustment and appropriation.

(10) In the result, the application is dismissed with costs. Advocates fee is fixed at Rs. 100/-.

B/R.G.D. Application dismissed.

A. I. R. 1953 MADRAS 780 (Vol. 40, C. N. 298)

SOMASUNDARAM J.

In re Kottapalli Raghaviah, Petitioner.

Criminal Revn. Case No. 1505 and Cri. Misc. Petn. No. 1424 of 1949, D/- 22-11-1950.

Public Safety — Madras Maintenance of Public Order Act (1 of 1947), S. 2A — For conviction under S. 2A prosecution must prove that accused had knowledge or had reason to believe that an order of detention had been passed in respect of person harboured by him — Original order of detention not produced by

prosecution — Proof of order by newspaper evidence is not sufficient when case does not fall under S. 65, Evidence Act — Conviction cannot be sustained — Evidence Act (1872), Ss. 64, 65. AIR 1944 PC 54, Foll. (Para 2)

Anno: Evi. Act, S. 64 N. 1; S. 65 N. 1.

Row and Reddy, for Petitioner; The Public Prosecutor, for the Crown.

CASE CITED:

(A) ('44) AIR 1944 PC 54: ILR (1945) Mad 237: 1944-1 Mad LJ 515: 45 Cri LJ 721 (PC)

ORDER: The petitioner in this case has been convicted of an offence under S. 2-A Madras Maintenance of Public Order Act, 1947, and sentenced to simple imprisonment of six months by the trial Court which was reduced to three months by the appellate Court.

(2) The petitioner can be convicted under S. 2-A only if he knowing or having reason to believe that an order for detention has been passed in respect of the person who is said to have been harboured by the petitioner. The order of detention passed by the Government has not been filed in this case. Under S. 64, Evidence Act the order must be proved by filing an order itself. No secondary evidence of the order is permissible unless the conditions mentioned in S. 65 are satisfied. It is not the case of the prosecution that their action falls within the scope of S. 65, Evidence Act. The evidence of a newspaper in which it was stated that a person was wanted is not sufficient, especially when knowledge or reason to believe has to be proved by prosecution. The case is covered by the Privy Council ruling in — 'Iswaramurthi Goundan v. Emperor', reported in AIR 1944 P. C. 54.

(3) The conviction and sentence are set aside and the accused is acquitted.

C/K.S. Accused acquitted.

A. I. R. 1953 MADRAS 781 (Vol. 40, C. N. 299)

(FULL BENCH)

RAJAMANNAR, C. J., RAJAGOPALAN AND VENKATARAMA AYYAR, JJ.

Abdul Rahman Sahib, Petitioner v. Muhammad Siddig and another, Respondents.

Civil Rev. Petn. No. 1785 of 1949, D/-6-3-1953.

†**Arbitration Act (1940), S. 47, Proviso — "Consent" to record award as compromise must be after the award — (Civil P. C. (1908) O. 23 R. 3) I.L.R. (1946) Mad 39: AIR 1945 Mad 294: 1945-1 Mad LJ 463, Overruled.**

Under the proviso to S. 47, an arbitration award obtained otherwise than in proceedings taken in accordance with the Act cannot without more be recognised as a compromise or adjustment of the suit; no decree can be passed thereon under provision of O. 23, R. 3, Civil P. C.

But if, after an award is made, the parties thereto agree to accept it, that will be a compromise and a decree based thereon can be passed under O. 23 R. 3. That the parties had consented to the reference is not such a consent. I. L. R. (1946) Mad 39: AIR 1945 Mad 294: 1945-1 Mad LJ 463, Overruled. (Para 11)

Anno: Arbitration Act, S. 47 N. 1; Civil P. C., O. 23 R. 3 N. 5c.

K. S. Desikan, for Petitioner; K. G. Srinivasa Ayyar, for Respondents.

CASES CITED:

(A) ('28) AIR 1928 Mad 1025: 51 Mad 800 FB
(B) ('45) AIR 1945 Mad 294: ILR (1946) Mad 39: 1945-1 Mad LJ 463
(C) ('51) AIR 1951 Mad 281: 1950-2 Mad LJ 372
(D) ('51) AIR 1951 Mad 387: 1950-2 Mad LJ 632
(E) ('50) AIR 1950 Orissa 169: ILR (1950) Cut 1
(F) ('46) C M A No 623 of 1946 (Mad)
(G) ('27) AIR 1927 Bom 565: 51 Bom 908 (FB)
(H) ('25) AIR 1925 All 503: 47 All 637 (FB)
(I) ('21) AIR 1921 Cal 238: 61 Ind Cas 919
(J) ('22) AIR 1922 Cal 404: 49 Cal 608
(K) ('27) AIR 1927 Cal 887: 55 Cal 538
(L) ('34) AIR 1934 Cal 643: 151 Ind Cas 661
(M) ('35) AIR 1935 Cal 239: 62 Cal 229
(N) ('21) AIR 1921 Lah 232: 3 Lah LJ 162
(O) ('30) AIR 1930 Lah 860: 127 Ind Cas 705
(P) ('36) AIR 1936 Lah 374: 160 Ind Cas 287
(Q) ('35) AIR 1935 Pat 243: 14 Pat 799
(R) ('39) AIR 1939 Rang 300: 1939 Rang LR 280 (FB)
(S) ('39) AIR 1939 Nag 186: ILR (1939) Nag 250 (FB)
(T) ('51) AIR 1950 Mad 728: 1950-1 Mad LJ 524
(U) ('36) AIR 1936 Mad 347: 70 Mad LJ 471
(V) ('50) C M A No 15 of 1950 (Mad)
(W) ('52) AIR 1952 Pat 258: 30 Pat 985
(X) ('47) AIR 1947 All 178: ILR (1947) All 221
(Y) ('42) AIR 1942 All 145: ILR (1942) All 357 (FB)

ORDER OF REFERENCE

VENKATARAMA AYYAR J.: The facts leading up to these revisions are these: The petitioner filed O. S. No. 154 of 1945 on the file of the Court of the District Munsif of Tiruchirapalli to recover possession of immoveable property. He also claimed mesne profits. There was also a prayer for injunction. The defendants contested the claim. While the suit was pending the parties agreed to refer the matters in dispute between them in the suit and various other matters as well to arbitration and on 14-10-1945 they executed a muchilika in favour of five named arbitrators containing 'inter alia' the following statement:

> "We two parties shall accept the decision of the panchayatdars regarding the said suits and assets etc."

In pursuance of this reference the panchayatdars pronounced an award on 18-11-1945, Ex. P. 2 and applied under S. 14 (2), Arbitration Act, to file the same into Court, I. A. No. 1627 of 1945. The plaintiff being dissatisfied with the award applied to set it aside under Ss. 30 and 33 of the Act, I. A. No. 51 of 1946, on the ground that there was no proper enquiry and that arbitrators were guilty of misconduct. The plaintiff also contended that as the reference related to matters pending in a suit and as there was no order of reference through Court under S. 23 the award was void. The defendants filed I. A. No. 364 of 1946 for recording the award as a compromise under O. 23 R. 3, Civil P. C.

All these applications were heard together by the learned District Munsif. He held that as there was no order of reference through Court the award could not be upheld as such and he accordingly dismissed I. A. No. 1627 of 1945. He further held that the charges of misconduct against the arbitrators had not been established and he, therefore, dismissed I. A. No. 51 of 1946. He, however, held that the award could be treated as a compromise under O. 23, R. 3, Civil P. C. and ordered I. A. No. 364 of 1946. In the result the suit was decreed in terms of the award treating it as a compromise.

(2) The plaintiff took up the matter in appeal to the District Court. In C. M. A. No. 12 of 1947 the District Judge confirmed the order in I. A. No. 1627 of 1945, on the ground that the reference not having been through Court, the award could not as such be upheld. In C. M. A. No. 13 of 1947 the learned District Judge agreed with the learned District Munsif that the charges of misconduct against the arbitrators were not made out and he confirmed the order of dismissal of I. A. No. 51 of 1946. In C. M. A. No. 43 of 1946 he agreed with the order of the learned District Munsif in I. A. No. 364 of 1946 that the award though not valid as such could be upheld as a compromise under O. 23, R. 3, Civil P. C. In the result the decisions of the lower Court were confirmed. The plaintiff has preferred the above civil revision petitions against the orders in C. M. A. Nos. 12 of 1947, 13 of 1947 and 43 of 1946. Before me no attempt was made to attack the finding that the award is not vitiated by the misconduct of the arbitrators, nor has the award been sought to be supported on the ground that it would be valid as such notwithstanding that there is no order of reference through Court. It would follow that C. R. P. Nos. 1783 and 1784 of 1949 must be dismissed.

(3) In C. R. P. No. 1785 of 1949 which is against the order directing the award to be recorded as adjustment under O. 23, R. 3, Civil P. C., the petitioner contends that an award which is not valid qua award could be treated as a compromise only under S. 47, Arbitration Act, which is in these terms:

"Subject to the provisions of S. 46 and save in so far as is otherwise provided by any law for the time being in force, the provisions of this Act shall apply to all arbitrations and to all proceedings thereunder; provided that an arbitration award otherwise obtained may with the consent of all the parties interested be taken into consideration as a compromise or adjustment of a suit by any Court before which the suit is pending."

He argues that as the petitioner consented only to a reference to an arbitration and not to the award itself, it could not be taken into consideration as a compromise under O. 23 R. 3, Civil P. C.

In — 'Subbaraju v. Venkataramaraju', AIR 1928 Mad 1025 (A), a Full Bench of this Court held that when the parties agreed to refer the matter pending in a suit, to a private arbitrator and to abide by his award, the award when pronounced could be treated as an agreement under O. 23 R. 3. That, however, was a case of reference under Sch. 2 of the Civil P. C. in which there was no provision corresponding to S. 47 and it was observed that Sch. 2 was not mandatory and that it does not say that there should be no arbitration other than that which is dealt with by that schedule.

After the enactment of the Arbitration Act the question was raised in the case in — 'Arumuga Mudaliar v. Balasubramania Mudaliar', AIR 1945 Mad 294 (B). There the learned Judges were called upon to decide whether the law was governed by the Arbitration Act having regard to the enactment of S. 47. In holding that the Arbitration Act had not made any difference in the law the Court observed as follows:

"We are merely concerned with the proviso in S. 47 which plainly indicates that an arbitration award obtained otherwise than under the Act may with the consent of the parties interested in it be regarded as a compromise of a pending suit. There is nothing in the proviso which precludes antecedent consent. Order 23 R. 3 says that where it is proved to the satisfaction of the Court that a suit has been adjusted wholly or in part by a lawful agreement or compromise or where the defendant satisfies the plaintiff in respect of the whole or a part of the subject-matter of the suit, the Court shall order the agreement, compromise or satisfaction to be recorded, and shall pass a decree in accordance therewith so far as it relates to the suit. The proviso to S. 47 leaves this provision of law untouched. In fact it would appear to be likely that it was inserted by the legislature in order to allow the Court unfettered action under O. 23 R. 3."

In the result it was held that the decision in — 'AIR 1928 Mad 1025 (A)', remained good law under the Arbitration Act and that the consent given for reference might be treated as consent to the award to be pronounced on the reference and that it would fall within O. 23 R. 3.

In — 'Palaniandichetti v. Kandappa Goundan', AIR 1951 Mad 281 (C), the question again came up for consideration and in following the decision in — 'AIR 1945 Mad 294 (B), as he was bound to sitting as single Judge, Viswanatha Sastri J. observed as follows:

"Sitting singly I am bound by this decision though I consider that it is probable that the legislature intended that a private reference to arbitration in a pending suit without the knowledge of the Court and without its direction which results in an award should not be made a rule of Court unless all the parties interested in the suit consent to the award being filed into Court as a compromise or adjustment of the suit. Indeed the Calcutta High Court had consistently taken that view before the Arbitration Act of 1940 and the proviso to S. 47 appears to confirm that view."

My attention has also been drawn to a case reported in — 'Pagammal v. Kasi Goundan', AIR 1951 Mad 387 (D), where Raghava Rao J. sitting singly followed the decision in — 'AIR 1945 Mad 294 (B).

The Orissa High Court had recently occasion to go into this question fully and after an elaborate review of the case law it held that a consent to the reference was not sufficient to make the award an adjustment within the meaning of O. 23 R. 3, Civil P. C., and that unless there is agreement to the award after it is pronounced it could not be regarded as a compromise under O. 23 R. 3. Vide — 'Indramoni v. Nilamoni', AIR 1950 Orissa 169 (E). The decision in — 'AIR 1945 Mad 294 (B)' is expressly dissented from.

In — 'C. M. A. No. 623 of 1946 (F)', a Bench of this Court consisting of Happell and Govindarajachari JJ. referred to a Full Bench the question whether an award not agreed to could be regarded as compromise under O. 23 R. 3 and whether — 'AIR 1945 Mad 294 (B)', was correctly decided. But the appeal, however, was not prosecuted and the question was not determined. It appears to me that the question is one of considerable importance and having regard to the divergence of judicial opinion there ought to be an authoritative pronouncement on the question. The papers will accordingly be placed before His Lordship the Chief Justice for orders as to the posting of the case before a Bench or Full Bench.

JUDGMENT OF THE FULL BENCH

(4) VENKATARAMA AYYAR J.: The facts leading up to this reference have been fully stated in the order of reference and there is no need to recapitulate them. The question that arises for determination is, whether when parties

to a suit refer their disputes to arbitration without the intervention of the Court and that results in an award, a decree can be passed under O. 23 R. 3, Civil P. C., in terms of the award, treating it as an adjustment or compromise of the suit. The answer to it depends on the construction of the proviso to S. 47, Arbitration Act 10 of 1940.

To begin with, it will be useful to examine what the law on the subject was before the enactment of S. 47. That was contained in two statutes: The Indian Arbitration Act 9 of 1899 and the second schedule to the Code of Civil Procedure, Act of 1898. Leaving out the former enactment as not material to the present discussion the latter contained provisions for these classes of arbitration: (1) where in a pending suit the parties thereto agree to refer the matter to arbitration through Court, that is provided in paras. 1 to 16 of the second schedule corresponding to Ss. 506 to 522 of Act 14 of 1882 and Ss. 312 to 325 of Act 8 of 1859; (2) where in pursuance of an agreement to refer, the parties move the Court to refer the matters in dispute to arbitration that is provided in paras. 17 to 19 in the Second Schedule corresponding to Ss. 523 and 524 of Act 14 of 1882 and S. 326 of Act 8 of 1859; and (3) where there is a private reference and an award and the parties apply to the Court for filing the award — provision for this is made in paras. 20 and 21 of the Second Schedule corresponding to Ss. 525 and 526 of Act 14 of 1882 and S. 327 of Act 8 of 1859. There were provisions in all these three classes of arbitration for the Court enquiring into the validity of the award and passing suitable orders, either passing a decree in terms of it or setting it aside or remitting it for reconsideration. None of these provisions had any application where in a pending action the parties referred their disputes to the decision of an arbitrator not through Court but privately and there was an award passed on such reference. In the absence of an express provision in the Code as to how such an award was to be dealt with, the question frequently came up for determination whether it could be regarded as a compromise under O. 23 R. 3, Civil P. C., even when one of the parties refused to accept the same; and on that there was a sharp difference of opinion among the several High Courts. That it could be recorded as an adjustment of the suit under O. 23 R. 3 notwithstanding that one of the parties refused to accept it, was the view taken by a Full Bench of this Court in — 'AIR 1928 Mad 1025 (A); of the Bombay High Court in — 'Chanbasappa v. Basalingayya', AIR 1927 Bom 565 (G); and of the Allahabad High Court in — 'Gajendra Singh v. Durgakunwar', AIR 1925 All 503 (H). The contrary view that such an award could not be given effect to as a compromise or adjustment under O. 23 R. 3 was maintained by the Calcutta High Court in a number of cases. Vide — 'Dekari Tea Co. Ltd. v. Indian General Steam Navigation Co., Ltd.', AIR 1921 Cal 238 (I); — 'Amarchand v. Banwarilal', AIR 1922 Cal 404 (J); —'G. Dasi v. Tarini Charan', AIR 1927 Cal 887 (K); — 'Rohini Kanta v. Rajani Kanta', AIR 1934 Cal 643 (L) and — 'Mahammad Mia v. Oosman Ali', AIR 1935 Cal 239 (M), by the Lahore High Court in — 'Hari Parsad v. Soogni Devi', AIR 1921 Lah 232 (N); — 'Nihal Singh v. Ashtawakar', AIR 1930 Lah 860 (O) and — 'Sitaram v. Harbans Lal', AIR 1936 Lah 374 (P) by the Patna High Court in — 'Bhimraj Kanailal v. Munia Sethani', AIR 1935 Pat 243 (Q), by a Full Bench of the Rangoon High Court in — 'Maung Hlay v. U. Ge', AIR 1939 Rang 300 (R); and by the Nagpur High Court in — 'Ramdayal v. Sheodayal', AIR 1939 Nag 186 (S).

(5) This was the state of the law when the Arbitration Act was passed. Section 47 which deals with this question runs as follows:

"S. 47: "Subject to the provisions of S. 46, and save in so far as is otherwise provided by any law for the time being in force, the provisions of this Act shall apply to all arbitrations and to all proceedings thereunder;

Provided that an arbitration award otherwise obtained may with the consent of all the parties interested be taken into consideration as a compromise or adjustment of a suit by any Court before which the suit is pending."

Now, the point for determination is whether under the proviso to this section an award passed on a private reference in pending suits can be enforced as a compromise of the suit even when one of the parties refuses to accept it. This question came up for decision before this Court in — 'AIR 1945 Mad 294 at p. 295 (B). There, the parties to an action which was pending referred their disputes for the decision of an arbitrator not through Court but privately and that resulted in an award. Some of the parties having refused to be bound by it, an application was taken out by the other parties to record it as a compromise under O. 23 R. 3. That was resisted on the ground that by reason of the proviso to S. 47, the decision in — 'AIR 1928 Mad 1025 (A), was no longer good law and that under that section unless there was a consent to the award it could not be filed as an adjustment of a suit under O. 23 R. 3.

In rejecting this contention, Leach C. J. observed:

"We are merely concerned with the proviso in S. 47, which plainly indicates that an arbitration award obtained otherwise than under the Act may with the consent of the parties interested in it be regarded as a compromise of a pending suit. There is nothing in the proviso which precludes antecedent consent..... The proviso to S. 47 leaves this provision of law (O. 23 R. 3) untouched. In fact it would appear to be likely that it was inserted by the Legislature in order to allow the Court unfettered action under O. 23 R. 3."

After referring to certain observations in — 'AIR 1928 Mad 1025 (A), the learned Judge concludes:

"There is here clear indication that an agreement to accept a future award can be treated as a compromise in the suit and, in our judgment, the Arbitration Act of 1940 in no way alters the position."

If this reasoning is correct, then it must be held that in enacting the proviso to S. 47, the Legislature adopted the views held by the High Courts of Madras, Bombay and Allahabad in preference to those held by the other High Courts.

(6) Examining first the language of the proviso to S. 47, it enacts that an "arbitration award" may be taken into consideration as a compromise or adjustment of a suit only "with the consent of all the parties interested". The consent here referred to must be something other than the consent to refer the dispute for arbitration because without such a consent there can be no arbitration proceedings and in requiring that an 'arbitration award' may be taken into account only with the consent of the parties, the plain intendment of the enactment is that, to do so, there must be something more than a consent to refer to arbitration, that it must be a consent to the arbitration award itself. If this is the correct interpretation of the proviso, the result is that where there is a private reference in respect of a matter pending in the suit, the award which is given thereon cannot as such be filed as an adjustment under O. 23 R. 3. But if subsequent to

the award the parties agree to accept it, that could be recorded as a compromise under O. 23 R. 3. That was the view taken by Rankin J. in — 'AIR 1921 Cal 238 (D)' and — 'AIR 1922 Cal 404 (J)', and followed in later decisions of the Calcutta High Court.

The view expressed in — 'AIR 1945 Mad 294 (B)', that the proviso to S. 47 does not alter the law as laid down in — 'AIR 1928 Mad 1025 (A) does not, with all respect, give sufficient weight to the words "with the consent of all the parties interested". It does not answer the question to state that the proviso does not preclude antecedent consent. If the consent required by the proviso is to the arbitration award which is to be filed as compromise under O. 23 R. 3, it is difficult to see how there can be such a consent when there is no award in existence. In reason, a party can be said to agree only to something which is put before him and not to something which is non-existent. The decision in — 'AIR 1928 Mad 1025 (A)', proceeds on the view that when once the parties agree to refer their disputes to arbitration, that amounts to an agreement to accept the award as an adjustment of the claim and that, therefore, the award could be filed under the provisions of O. 23 R. 3. If it was the intention of the Legislature to adopt this view, it would have been sufficient to say that any arbitration award might be taken into account as an adjustment or compromise. The further condition that there should be consent of the parties would be redundant and meaningless. The Calcutta High Court had held in — 'AIR 1927 Cal 887 (K) and — 'AIR 1934 Cal 643 (L), that though the award passed on a private reference in a pending action could not by itself be regarded as a compromise under O. 23 R. 3, it could be so treated if subsequent to the award the parties agreed to accept it. In enacting the proviso to S. 47 the Legislature would clearly appear to have adopted this view.

(7) The decision in — 'AIR 1928 Mad 1025 (A)', it may be noted, was to a large extent based on the view that the provisions relating to arbitration contained in the Second Schedule to the Civil Procedure Code were not exhaustive Phillips J. observed,

> "The second schedule, Civil Procedure Code, is not mandatory, but provides for reference to arbitrators at the will of the parties and also provides that certain procedure must be followed if they take action under that schedule. It does not, however, say that there shall be no arbitration other than what is dealt with by the second schedule, and if parties to the suit choose to refer to arbitration it is open to them to adopt the provisions of the second schedule or not as they please."

This reasoning would be inapplicable to the Arbitration Act, 1940, because its scope is statedly "to consolidate and amend the law relating to Arbitration in British India". Section 89 of the Civil Procedure Code provides that "save in so far as is otherwise provided by the Arbitration Act, 1899, or by any other law for the time being in force, all references to arbitration whether by an order in a suit or otherwise, and all proceedings thereunder, shall be governed by the provisions contained in the second schedule", and in — 'AIR 1928 Mad 125 (A), it was held that O. 23 R. 3 was "other law for the time being in force" which was saved by S. 89, Civil P. C. In the Arbitration Act of 1940 S. 47 which corresponds to S. 89 of the Code enacts that "save in so far as is otherwise provided by any law for the time being in force, the provisions of this Act shall apply to all arbitrations and to all proceedings thereunder". That the "other law for the time being in force" in this section cannot take in O. 23 R. 3 is clear from the proviso, which makes provision for "an arbitration award otherwise obtained" being treated as a compromise — a provision which would have been wholly unnecessary, if "any law for the time being in force" comprehended O. 23 R. 3, and which in its scope and tenor is different from, if not inconsistent with, the terms of O. 23 R. 3.

(8) It should be remembered that under the Arbitration Act there is no machinery provided for going into the question of validity of awards passed in private references in pending suits. Section 47 renders the provisions of the Act as such inapplicable to them. What then happens if the award is attacked on the ground of legal misconduct. It was observed in — 'AIR 1945 Mad 294 at p. 295 (B),

> "Of course, a party cannot be compelled to accept an award which is unlawful. The agreement to accept an award yet to be made presupposes that it will be a lawful award."

But the question is whether the binding character of the award could be gone into in proceedings under O. 23 R. 3. It is no doubt laid down therein that the compromise should be lawful. Does that contemplate an enquiry into the validity of the award when it is challenged on the ground of misconduct of arbitrator. There is ample authority for the position that the word "lawful" in O. 23 R. 3 has reference to the terms of the agreement and not to its binding character. Vide — 'Kuppuswami v. Pavanambal', AIR 1950 Mad 728 (T) and — 'Surappa Raju v. Venkataratnam', AIR 1936 Mad 347 (D). Enquiry into legal misconduct would, on this principle, be outside the scope of O. 23 R. 3. There is also no provision for the Court remitting an award for reconsideration; it can only either record it as an adjustment or reject it. The parties to such an award, therefore, have not the same rights with reference thereto as parties to the awards in arbitration proceedings which fall within the scope of the Act; and the successful party to such an award would be in a better position, and the unsuccessful party in a worse position than if the award had been made in a reference through Court. It is difficult to believe that all this was intended by the Legislature.

(9) It is also significant that the proviso requires the consent of the "parties interested". If the consent contemplated by the proviso is merely to the agreement to refer to arbitration, then the words "consent of parties" simply would have been sufficient and appropriate. If the consent required is for the award itself, then the use of the words "parties interested" becomes apt and intelligible.

(10) Turning next to the authorities bearing on the question, disagreement with the decision in — 'AIR 1945 Mad 294 (B), was expressed by Happell and Govindarajachari JJ. in their referring judgment in — 'C. M. A. No. 623 of 1946 (F)', by Viswanatha Sastri J. in — 'AIR 1951 Mad 281 (C), and by Mack J. in — 'C. M. A. No. 15 of 1950 (V)'. In the Orissa High Court in — 'AIR 1950 Orissa 169 (E)', and the Patna High Court in — 'Raghunandan Rai v. Sukhlal Rai', AIR 1952 Pat 258 (W), have held that having regard to the proviso to S. 47, an award in a private reference in a pending action cannot be regarded as a compromise under O. 23 R. 3; and the decision in — 'AIR 1945 Mad 294 (B)' was dissented from. A single Judge of the High Court of Allahabad held in — 'Shiam Kishore v. Ramnarain Singh', AIR 1947 All 178 (X), that an award passed in an arbitration with reference to a matter pending in succession certificate proceedings could, by reason of S. 46 of the Act, be regarded as an adjustment under O. 23 R. 3, Civil P. C. and reliance was placed on the

decision in — 'Dular Koeri v. Payag Koeri', AIR 1942 All 145 (Y), as supporting that position. But then the award in question in that case had been made before the enactment of the Arbitration Act, and the learned Judges merely observed:

"We need not go into the merits of the dispute because it is sufficient for us to say that for all future practical purposes the difficulty has now been removed by S. 47 of the new Arbitration Act of 1940, which not only repeals S. 89 of the Code, but replaces it by a new section which makes the matter quite clear."

Then they refer to the decision of the Full Bench in — 'AIR 1925 All 503 (H), and followed it on the principle of 'stare decisis' again observing that "the matter is not one of practical importance for the future". We do not read these observations as meaning that under S. 47 an award in a private reference is a pending suit and could be regarded as a compromise or adjustment.

(11) We are accordingly of opinion that under the proviso to S. 47, an arbitration award obtained otherwise than in proceedings taken in accordance with the Act cannot without more be recognised as a compromise or adjustment of the suit; that no decree can be passed thereon under the provision of O. 23 R. 3; and that the decision in — 'AIR 1945 Mad 294 (B)', should be overruled. But if, after an award is made, the parties thereto agree to accept it, that will be a compromise and a decree based thereon could be passed under O. 23 R. 3.

(12) In the result, C. R. P. No. 1785 of 1949 will be allowed; the order made in I. A. No. 364 of 1946 passing a compromise decree under O. 23 R. 3 in terms of the award is set aside and the suit O. S. No. 154 of 1945 on the file of the Court of the District Munsif, Tiruchirapalli, directed to be heard in accordance with law. The parties will bear their costs throughout.

A/R.G.D. Order accordingly.

A.I.R. 1953 MADRAS 785 (Vol. 40, C. N. 300)

RAMASWAMI J.

The Public Prosecutor, Appellant v. G. Sadagopan, Accused-Respondent.

Criminal Appeal No. 289 of 1952, D/-15-1-1953.

(a) Evidence Act (1872), Ss. 35, 65(c) and 74 — Official register containing copies of communication.

File of papers containing official communications maintained according to practice — Such Official register is official document within S. 35 and public document within S. 74 — Copy of sanction for prosecution lost — Case comes under S. 65 (c) — Original from file can be produced as secondary evidence. (Para 4)

Anno: Evid. Act, S. 35 N. 20; S. 65 N. 5, 14; S. 74 N. 1.

(b) Prevention of Corruption Act (1947), S. 6 — Sanction — Requirements.

All that the order of sanction must show is that all relevant materials were placed before the authority sanctioning the prosecution and that the authority considered those materials and the order sanctioning prosecution resulted therefrom. The sanction need not set out the reasons for the sanction. The object of this sanction is nothing more than to ensure the discouragement of frivolous, doubtful and impolitic prosecutions. (Sanction held proper) (Para 5)

(c) Criminal P. C. (1898), S. 238 — Accused charged under S. 5(2), Prevention of Corruption Act for habitually taking bribes, read with S. 161, I.P.C. — Three complete minor offences of bribe-taking committed within space of 12 months included — Only one offence proved — Acquittal under S. 5(2) — Accused can be convicted under S. 161, I.P.C. — (Prevention of Corruption Act (1947), S. 5) — (Penal Code (1860), S. 161). (Para 6)

Anno: Penal Code, S. 161 N. 14; Cr. P. C., S. 238 N. 1, 2.

The Public Prosecutor, for Appellant; The Advocate General, for the Complainant; P. Basi Reddi, for Respondent.

CASES CITED:

(A) ('40) AIR 1940 Mad 273: 1939 Mad WN 841
(B) ('25) A S No 261 of 1925 (Mad)
(C) ('18) AIR 1918 Mad 889: 40 Mad 871
(D) ('48) AIR 1948 PC 82: 1948 Mad WN Cr 56: 49 Cri LJ 261 (PC)
(E) ('49) AIR 1949 Mad 710: 1949 Mad WN Cr 122: 51 Cri LJ 156
(F) ('50) AIR 1950 Mad 450: 1951 Mad WN Cr 97: 51 Cri LJ 1061
(G) ('51) AIR 1951 Mad 258: 1950 Mad WN Cr 274

JUDGMENT: This is an appeal preferred by the State against the acquittal by the learned Sessions Judge, Coimbatore in C. A. No. 69 of 1951, reversing the conviction and sentence of the Assistant Sessions Judge, Coimbatore, in S. C. No. 55 of 1951.

(2) The facts are: The respondent G. Sadagopan was the Head Clerk of the District Engineer's Office, Podanoor, South Indian Railway. On information received that this Sadagopan was a bribe-taker, investigation was started by the Special Police Establishment, Madras. It is enough for the purpose of this case that this Special Police Establishment, Madras, unearthed 3 instances against him, viz., that he accepted on 1-5-1950 at Podanur Rs. 30/- from K. Rajgopal for transferring him from Udumalpet; accepted in January 1950 Rs. 25/- from Swami for giving a permanent vacancy and demanded in or about November 1949 from Sri Narasimhalu at Podanur 20 per cent. of the travelling allowance bills for passing the same. On the foot that each of these accusations which constituted an offence under S. 161, I.P.C. amalgamated together made up the offence of criminal misconduct punishable under S. 5(2), Prevention of Corruption Act, this accused was tried before the learned Assistant Sessions Judge on these instances of bribe-taking, constituting an offence under S. 5(2), Prevention of Corruption Act read with S. 161, I.P.C. The learned Assistant Sessions Judge, who carefully went into the matter found that the prosecution had affirmatively and satisfactorily proved beyond doubt the accusation relating to the acceptance of a bribe of Rs. 30/- from Rajagopal (P. W. 1) on 1-5-1950 for transferring him to Podanur and that in regard to the other two counts, held that he was not inclined to hold that the prosecution had so established the accused's guilt. Therefore, he convicted the accused for the offence proved under S. 161, I.P.C. and sentenced him to undergo rigorous imprisonment for a period of six months.

(3) There was an appeal therefrom and the learned Sessions Judge, Coimbatore, did not go into the merits of the case but acquitted the accused on two short grounds, viz., that firstly Ex. P. 4 cannot be accepted as a secondary evidence of the previous sanction of the General Manager

of the South Indian Railway, and now the General Manager of the Southern Railway, and secondly that when the charge was for criminal misconduct under S. 5(2), Prevention of Corruption Act and the trial Court found that two of the counts had not been satisfactorily proved and the charge of criminal misconduct failed, resultantly the accused could not be convicted on the count proved under S. 161, I.P.C. but must have been acquitted in entirety.

(4) The State has preferred this appeal from this incomprehensible acquittal and I shall examine the sufficiency of the two grounds on which this acquittal has been rested by the learned Sessions Judge.

Point 1:—In regard to Ex. P. 4, the following facts should be borne in mind. On 27-7-1950, the General Manager, Mr. K. R. Ramanujam has passed the following order:

"South Indian Railway.

Office of the General Manager, (Anti-Corruption), Tiruchirapalli, 27-7-1950

Confidential

No. G/CB/PTJ/2

The Superintendent of Police, Special Police Establishment, Madras.

Case against G. Sadagopan, Establishment Head Clerk, Office of the District Engineer, Podanur — Sanction order of prosecution. Your letter No. BI. 1861/50 of 12-7-1950.

By virtue of the authority vested in me by the Government of India under S. 6(c), Prevention of Corruption Act, 1947 (Act 2 of 1947), I, Sri K. R. Ramanujam, the General Manager, South Indian Railway, Tiruchirapalli, applied my mind before giving sanction for initiation of the prosecution against the accused after considering all the facts and circumstances of the case and hereby sanction the initiation of criminal proceedings against G. Sadagopan, Establishment Head Clerk, Office of the District Engineer, Podanur (an employee of the South Indian Railway X X) who is alleged to have been in the habit of receiving bribes and on 1-5-1950 to have demanded and accepted Rs. 30/- from one K. R. Rajagopal, a gangman to transfer him from Udumalpet to Podanur and thereby committed an offence punishable under S. 5(2) read with S. 5(1) (a) of Act 2 of 1947 and S. 161, I.P.C.

(Initialled) K. R. R.
General Manager

Copy forwarded to the G. E., TPJ for information in continuation of this letter No. G/CB/-PTJ/2, dated 10-5-1950

(Initialled) K. R. R.
General Manager"

The copy of the order received by the Special Establishment of Police, Madras, got lost and there is no dispute as frankly conceded by the learned counsel for the accused, Mr. Basi Reddi, about the truth of this allegation. Therefore, the Special Police Establishment. Madras, secured the original office copy of the order & it is exhibited as P. 4. Once again, there is no dispute that this Ex. P. 4 coming from proper official custody and proved through P. W. 4, the confidential clerk attached to the Anti-Corruption section of the Manager's office, South Indian Railway, is the genuine original office copy. P. W. 4 testified that Ex. P. 4 is the order sanctioning prosecution of the accused and he was not cross-examined in the first instance and subsequently in the further cross-examination he has testified: "The sanction was given after perusing all relevant papers. I know the signature of the General Manager. He has signed (it ought to have been initialled) Ex. P. 4".

Therefore the only point for determination is whether this Ex. P. 4 can be accepted as secondary evidence. Section 65, Evidence Act deals with cases in which secondary evidence relating to documents may be given. The instant case falls under sub-cl. (c), viz., when the original, which is practically a copy here, has been destroyed or lost. The section proceeds to state that in cases falling under cl. (c) any secondary evidence of the contents of the document is admissible. It is only in the cases falling under cl. (e) or (f), with which we have now nothing to do here, a certified copy of the document, but no other kind of secondary evidence is admissible. The best kind of secondary evidence has been produced in this case, viz., paradoxically the original. In —'Sevugan v. Raghunatha', AIR 1940 Mad 273 (A), Varadachariar J. (as he then was) pointed out that where according to the official practice a book (we may add a file of papers) is maintained containing the copies of the communications sent, the book of copies thus maintained is itself an official register within the meaning of S. 35 and a public document within the meaning of S. 74, Evidence Act. The decisions of this Court in 'A. S. No. 261 of 1925 (B)' and in — 'Navaneetha Krishna Thevar v. Ramaswami Pandia', AIR 1918 Mad 889 (C) were relied on. There is no substance therefore in the conclusion of the learned Sessions Judge that Ex. P. 4 cannot be accepted as satisfactory secondary evidence.

(5) Incidentally, it seems to have been argued before the Assistant Sessions Judge and it was mentioned before me that the sanction order is defective in the light of the decision in — 'Gokulchand Dwarkadas v. The King', AIR 1948 PC 82 (D), in that it does not show that the General Manager had applied his mind to the facts in issue and granted the sanction. I have purposely re-produced the order of the General Manager and also the testimony of P. W. 4 in cross-examination. There is no dispute that for this prior sanction no type-design form or particular of words has been prescribed. Therefore, in accordance with common sense and the requirements of justice all that the order of sanction must show is that all relevant materials were placed before the authority sanctioning the prosecution and that the authority considered those materials and the order sanctioning prosecution resulted therefrom. The sanction need not set out the reasons for the sanction because if the Legislature had intended it, it would have added the appropriate form of words. The object of this sanction is nothing more than to ensure the discouragement of frivolous, doubtful and impolitic prosecution. Therefore, applying these tests we find that the sanction order reproduced above complies with all the requirements of a valid sanction. In other words, the sanction in this case fully complies with the requirements laid down in the decision of Somasundaram J. in — 'Subbarao v. The King', AIR 1949 Mad 710 (E) and Chandra Reddi J. in — 'Shah Vajanji Kasturchand v. King', AIR 1950 Mad 450 (F). The sanction order in this case is irreproachable.

(6) Point 2: The learned Sessions Judge has entirely overlooked that the charge framed in this case is a composite charge. It is an admixture of the various elements constituting by themselves separate minor offences and which by such mixture make out an aggravated offence. In other words, criminal misconduct under S. 5, Prevention of Corruption Act is an amalgam of bribe-

taking plus habitually doing so. Therefore, the charge when analysed into component parts is made up of an aggravated offence consisting of several particulars and on a resolving of the same several complete minor offences. In such a case S. 238, Cri. P. C., is clearly applicable and it has been so applied in not dissimilar circumstances by Govinda Menon and Basheer Ahmed Sayeed JJ. in — 'Raman Ambalam v. State', AIR 1951 Mad 258 (G). Of course this is subject to two limitations, viz., the complete minor offences put together should not exceed three and must have been committed within a space of 12 months from the first to the last of such offences; and secondly, that no prejudice should have been caused to the accused by the course taken in the trial Court. In this case the three complete minor offences of the same kind have all been committed within the space of 12 months as laid down in S. 234, Cri P. C. and no prejudice is made out or is apparent from the record. Therefore, the learned Sessions Judge was wrong in finding that when the accused got acquitted under S. 5(2), Prevention of Corruption Act, he should have been acquitted in entirety and could not have been convicted for a complete minor offence.

(7) In the result, the acquittal by the learned Sessions Judge is set aside and inasmuch as the appeal was not heard on merits, it is remanded to be taken on file and disposed of afresh on merits and according to law by the Sessions Judge, or by the Additional Sessions Judge, other than the Sessions Judge who has so unsatisfactorily disposed of this case.

B/R.G.D. Acquittal set aside.

A. I. R. 1953 MADRAS 787 (Vol. 40, C. N. 301)

GOVINDA MENON AND BASHEER AHMED SAYEED JJ.

In Re N. H. M. Pandian, Petitioner.

Criminal Revn. Case No. 102 of 1951, (Criminal Revn. Petn. No. 101 of 1951), D/- 12-12-1952.

(a) Trusts Act (1882), S. 6 — Creation of — Admission and mere entries.

The mere fact that the property has been treated by the District Court as a trust property cannot amount to dedication in favour of the trust. Mere entries in the account books by themselves cannot also amount to dedication. Similarly the admissions based on a mistake of fact or law will not be of any avail to make the property dedicated in favour of the temple. (Para 10)

Anno: Trusts Act, S. 6, N. 1.

(b) Public Debts (Central Government) Act (18 of 1944), S. 19 — Criminal breach of trust by holder of Govt. security — (Negotiable Instruments Act (1881), S. 13) (Securities Act (1920), S. 5) — (Penal Code (1860), S. 405).

Reserve Bank of India vesting and recognizing securities in petitioner — It operates to confer on him title to securities subject to personal liability to rightful owner — Petitioner negotiating securities as negotiable instruments — Rightful owner (a trust in this case) has only a civil claim enforceable against petitioner, as for money had and received on account of rightful owner by the holder of security — No prosecution for criminal breach of trust is maintainable. (Para 13)

Anno: Penal Code, S. 405 N. 1, 9; Negotiable Instruments Act, S. 13 N. 1; Securities Act, S. 5 N. 1.

K. S. Jayarama Aiyar and C. K. Venkatanarasimham, for Petitioner; The Public Prosecutor, for the State.

CASES CITED :

(A) ('47) AIR 1947 PC 88: 1947-1 Mad LJ 400
(B) ('52) AIR 1952 Mad 650: 1951-1 Mad LJ 588
(C) ('36) AIR 1936 PC 150: 63 Ind App 248 (PC)
(D) (1849) 12 QB 971: 18 LJ QB (NS) 59
(E) ('29) AIR 1929 Mad 409: 52 Mad 207 (FB)
(F) (1914) 83 LJ Ch 465: 1914 AC 398
(G) ('31) AIR 1931 Mad 235: 1930 Mad WN Cr 182: 32 Cri LJ 743
(H) (1914) 83 LJ PC 116: (1914) AC 221

BASHEER AHMED SAYEED J.: The petitioner in this criminal revision case has been convicted and sentenced to rigorous imprisonment for one year and to pay a fine of Rs. 1000/- and in default of payment of the fine to undergo rigorous imprisonment for six months, under S. 409 I. P. C. by the learned Sessions Judge of Tirunelveli division, who confirmed the conviction and sentence by the learned District Magistrate of Tirunelveli.

(2) The petitioner the present Zamindar of Uthumalai estate, is said to be a premier citizen of the District of Tirunelveli. The said Zamindar is the trustee of Navaneetha Krishnaswami temple at Veerakeralampudur. Before him, his father was the trustee for a short time. The latter was shot dead on 18-9-1942. Before his death, the grand-father of the present petitioner, one Subbiah Thevar, was the zamindar. The said grandfather of the present petitioner died on 1-1-1941. The said Subbiah Thevar was the brother of Rani Meenakshisundara Nachiar, who was the zamindarini for a long time till her death on 4-7-1921. From 1902 upto 1922 the estate as well as the Devasthanam were under the management of the Court of Wards. During this period and immediately on the death of the Zamindarini, there were three claimants who filed O. S. Nos. 1, 2 and 3 of 1922 on the file of the District Court of Tirunelveli. Subbiah Thevar, the paternal grandfather of the present petitioner, filed O. S. No. 3 of 1922. His suit was for a declaration of his title to succeed in preference to the other claimants who had filed O. S. Nos. 1 and 2 of 1922. On 3-1-1929, the District Court decided and decreed the suit brought by the paternal grandfather of the present petitioner and dismissed the other two suits. His title was also upheld by the High Court on 2-4-1935 in appeals preferred by the parties, slightly modifying the decree of the District Court with regard to the personal property of the zamindarini. The matter went up to the Privy Council on appeal from the decrees of the High Court. The Privy Council affirmed the decrees of the High Court on 3-12-1937. The grandfather of the present petitioner had been appointed receiver by the District Court during the pendency of the suits in the District Court to manage the estate and the Devasthanam. The order of appointment was dated 10-11-1930 and his possession as receiver became possession in his own right when the appeal was finally disposed of by the Privy Council.

(3) During her management as a limited owner of the Uthumalai zamin, the Zamindarini, Rani Meenakshisundara Nichiar, had alienated seven

villages of the estate in favour of the Navaneetha Krishnaswami temple, with the permission of the then Collector of Tirunelveli. This was under a deed dated 15-6-1921, and during the period the Court of Wards was in management, these villages were formally got transferred in the name of the said temple and an inam title was issued by the Government to the temple of the villages. Accumulations of income during the receivership of the grandfather of the present petitioner and also the surplus income derived during the management of the Devastanam by the Court of Wards, had all been invested by the District Court in Government securities and these amounted to a sum of Rs. 6,12,100. The securities of the face value of the said amount stood in the name of the District Judge. There was also a balance of Rs. 30,882-0-4 which remained in cash.

(4) The grandfather of the present petitioner, after he ceased to be the receiver, filed an application before the District Court (Ex. P-89) on 3-3-1939 in which, after setting out the facts, he had prayed to the District Court to tax and ascertain from the accounts and registers maintained in the District Court in O. S. Nos. 1 to 3 of 1922, the amounts invested in Government securities and cash in deposit in the Imperial Bank at Tirunelveli belonging to the Devasthanams appertaining to the Uthumalai Estate, to deliver the said Government securities to the petitioner therein (the grandfather of the present petitioner) or his advocate Sri A. S. Narayanaswami Iyer or to assign them to the petitioner, to order the payment of the cash balance amount belonging to the Devasthanams of the Utthumalai estate by cheque on the Imperial Bank of India, Tirunelveli in the name of his advocate Sri A. S. Narayanaswami Aiyar and to make or pass such other orders as the District Court might seem fit and proper. After this application had gone through various stages, the District Court addressed the Reserve Bank of India, Madras, for assignment of the bonds of the face value of Rs. 78,300 bearing interest at 4 per cent, Rs. 5300 bearing interest at 4½ per cent and Rs. 5000 bearing interest at 5 per cent, and the bonds were actually endorsed and delivered over to the advocate for the petitioner (Subbiah Thevar) on 19-1-1940. The advocate received the said Government bonds for the value of Rs. 88,600 and filed a stamped receipt to that effect on the 27th January 1940. On the death of the said Subbiah Thevar, his son, the father of the present petitioner, put in an application in the District Court, Tirunelveli, in O. S. No. 3 of 1922, as may be seen from Ex. P. 90 (a) praying to the Court that the endorsements made by the District Judge on the three Government securities should be amended as pointed out in the petition, Ex. P. 90. The amendment prayed for was ordered by the District Judge on 5-9-1941.

(5) Subsequently, the present petitioner took out a petition, O. P. No. 1 of 1944, in order to obviate the difficulties raised by the Reserve Bank, for the issue of a Succession Certificate. This was ordered by consent subject to the terms endorsed by the petitioner and the respondents on the back of the petition. Ex. P. 92 is the Succession Certificate actually issued in favour of the petitioner. The point to be noted in that Succession Certificate is that it directed the petitioner to deposit the amount in Court after collection. As the succession certificate issued was limited in its scope and as the Reserve Bank raised difficulties again, the present petitioner filed a petition for extension of the certificate and obtained on 18-2-1947 the extended certificate, Ex. P. 93, in respect of both the principal and interest covered by the promissory notes. Thereafter the present petitioner corresponded with the Reserve Bank and the Government of India and, as a final result of such correspondence, fresh bonds were issued in favour of the present petitioner by the Reserve Bank of India for the sums of Rs. 78,300 and Rs. 5,300 respectively. These bonds covered by Exs. P. 80 and 94. The third promissory note which stood originally for Rs. 5000 bearing 5 per cent interest is not now in question as the amount thereof was collected by the petitioner on its maturity and credited in the Devasthanam's accounts.

(6) After obtaining the said fresh bonds, namely, those covered by Exs. P. 80 and P. 94, for the total sum of Rs. 83,600, the petitioner in this criminal revision case, pledged them with the Punjab National Bank Ltd, at Mathurai Branch, on 4-3-1948, for raising a loan thereon in the sums of Rs. 75,000 and Rs. 4770. The sums so raised were utilised by him for his own purposes. As the petitioner was unable to discharge the loan, he obtained from the Punjab National Bank on the security of the said bonds, the Punjab National Bank sold the said promissory notes to realise the debts due to them.

(7) On 12-7-1949, the Registered Accountant and Auditor who audited the accounts for faslis 1355 and 1356 of the Sri Navaneethakrishnaswami temple brought to the notice of the President of the Hindu Religious Endowments Board that the Devastanam's securities to the extent of Rs. 83,600 which were shown in the monthly current account, were not found in the treasury and that, on confidential enquiry, he came to know that the zamindar had encashed the bonds in 1948 himself and appropriated the amount. On this report, the President of the Board directed the Accountant to go at once and verify the Government promissory notes. This is evident from Ex. P. 6. On 14-7-1949, the petitioner was addressed by P. W. 1, the Assistant Commissioner of the Hindu Religious Endowments Board, East Tanjore, by Ex. P. 7, whereby the petitioner was requested to arrange to produce the two bonds detailed in the said letter, of the face value of Rs. 78,300 and Rs. 5,300 respectively, and in default steps would be taken against him.

(8) On 27-7-1949, by Ex. P. 9, the petitioner explained his position vis-a-vis the two promissory notes and stated that as there was urgent need for money for payment of peishcush and cess and other unavoidable expenses of the estate, the two promissory notes were pledged by him and a loan was obtained and that, contrary to his expectations, the conditions then prevailing made it difficult for him to redeem the bonds and hand them back to the Devasthanam. Along with this letter, the petitioner also enclosed a promissory note executed by him for the face value of the bonds and subsequent interest, agreeing to pay interest at 6 per cent on the aggregate amount. He also undertook to make efforts to raise a loan to repay the debt to the Devasthanam. He further requested the Assistant Commissioner of the H. R. E. Board, Tirunelveli, to accept the note for the present and promised that, in any event, he would repay the debt from out of the compensation amount payable by the Government under the Zamin Abolition Act. In the meanwhile, the Zamin Abolition Act had come into operation and the Zamin had been abolished by the Government and the Zamindar, the petitioner, became entitled to the payment of compensation by the Gov-

ernment. The promissory note executed by the said zamindar, Ex. P. 10, is in favour of the hereditary trustee of Sri Navaneethakrishnaswami temple, for the total sum of Rs. 83,600 with interest at six per cent per annum.

(8a) On 3-8-1949, as could be seen from the enclosure Ex. P. 87 the President of the H. R. E Board made a report to the Government of Madras sending the entire file of papers including the promissory note executed by the petitioner and requesting the Government to direct such action as they might deem fit in the circumstances set out in his letter. By Ex. P. 87 (a), a complaint was sent to the Inspector General of Police, for investigation into the alleged criminal breach of trust or misappropriation by the petitioner. Thereupon, a complaint was lodged against the petitioner in C. C. No. 94 of 1950 before the District Magistrate, Tirunelveli, under S. 409 I. P. C. The charge was framed against the petitioner on 13-5-1950 and it was to the following effect:

"That the petitioner, on or about the 4th March 1948 and 3rd June 1948, at Mathurai, being the hereditary trustee in management of Nevaneetha Krishnaswami temple at Veera-Keralampudur and in such capacity entrusted with G. P. note M. S. No. 016900 for Rs. 78300 (Ex P 80) and G. P. Note M. S. No. 003281 for Rs 5300 (Ex. P. 94) and retained at Uthumalai, committed breach of trust with such property by pledging them in the Punjab National Bank Limited, branch at Mathurai, and thereby committed an offence punishable under S. 409 I. P. C. and within the cognizance of the Court of the District Magistrate".

The prosecution examined fifteen witnesses and let in a large volume of documentary evidence in support of the charge. The defence examined two witnesses and filed a large number of exhibits. On a consideration of the entire evidence, both oral and documentary, the District Magistrate came to the conclusion that the offence with which the petitioner had been charged was proved and he convicted and sentenced him to rigorous imprisonment for one year and a fine of Rs. 1000 & in default to rigorous imprisonment for 6 months as stated above. The petitioner thereupon filed an appeal against the said conviction and sentence. The learned Sessions Judge, who heard the appeal, agreed with the learned District Magistrate and confirmed the conviction as well as the sentence. This revision case is filed against the order of the learned Sessions Judge of Tirunelveli division.

(9) Mr. K. S. Jayarama Aiyar, appearing for the petitioner, has in the first instance, contended that the amount of Rs. 78,300 and Rs. 5,300 involved in the case and said to have been misappropriated by the petitioner did not belong to the Devasthanam, that the said amount covered by the promissory notes in question had not been dedicated as a public trust in favour of the Navaneetha Krishnaswami temple at Veerakeralampudur, that there has been no declaration of the Trust in favour of the temple, that therefore the amount cannot be said to be trust property and that, on the other hand, the property belonged to the Zamindar and, therefore, in the absence of proof that there has been any valid dedication in favour of the temple of the property in question the petitioner cannot be said to have committed any criminal breach of trust or misappropriation of the property belonging to the temple. Mr. Jayarama Aiyar's argument is that the original dedication of the seven villages to the Navaneethakrishnaswami temple by the limited owner of the zamin, Rani Meenakshisundara Nachiar, could enure only till the lifetime of the said Rani and, on her death in 1921, the seven villages should be deemed to have ceased to be the property of the temple, under the operation of S. 4 of the Impartible Estates Act. Therefore, both the villages as well as the accumulations became the properties of the estate on the death of the zamindarini and the handling of such properties by the petitioner could not amount to any criminal breach of trust or misappropriation.

There can be no question that any dedication in favour of any temple of any property by any limited owner would enure only till the lifetime of that limited owner and thereafter the properties dedicated by the limited owner will revert to the original estate. That appears to be the policy underlying the provisions of the Impartible Estates Act. That was the position taken up by the grandfather of the petitioner in the proceedings before the District Judge in the suits filed against him appears from Ex. D. 87 which is the written statement of Subbiah Thevar. Therefore, in our opinion, there appears, to be much force in the contention of the learned counsel for the petitioner that there was no dedication of the seven villages beyond the lifetime of the said Rani Meenakshisundara Nachiar. But the position taken up by the prosecution and which is accepted by the Courts below is that as evidenced by Ex. P. 1 and Ex. P. 2 wherein Subbiah Thevar the grandfather of the present petitioner, has signed as a hereditary trustee acknowledging the properties in question; and the subsequent conduct of the said Subbiah Thevar as disclosed in Ex. P. 89 followed by the conduct of the father of the present petitioner in Ex. P. 90 (a) and also that of the present petitioner in Ex. P. 91 and Ex. P. 13 shows that the property in question must be considered to be the property dedicated for the benefit of the Navaneethakrishnaswami temple and any misappropriation thereof must be held to be a criminal breach of trust by the trustee.

Mr. Jayaram Iyer for the petitioner urges that the admissions of Subbiah Thevar in Ex. P. 89 cannot be considered to amount to a dedication of public trust. He also urges that any admissions by the grandfather, Subbiah Thevar, will not bind the present petitioner, who is not a representative-in-interest of the previous holder. At the most, any admission by the present petitioner, according to him, could only be a piece of evidence and will not amount to a dedication of trust. He invited our attention in support of his contention to the decisions in — 'Kasi Ramarao v. Venkataratnam', AIR 1947 P C 88 (A) and — 'Vasudevarao v. Rangai Gounder', AIR 1952 Mad 650 (B), which deal with the requirements of dedication of a property to a charitable trust.

(10) Mr. Jayaram Aiyar next argued that by the mere allocation of moneys by the District Court, it cannot be inferred that there has been dedication of the amount allotted in favour of temple. In this case, the District Judge does not appear to have applied his mind in the matter on the office note that was placed before him when the petition was filed by Subbiah Thevar, the grandfather of the present petitioner, for taxing and ascertaining from the accounts and registers maintained by that Court, the amounts invested in Government securities belonging to the Devastanam pertaining to the Uthumalai estate. We see some force in this contention of the learned counsel for the petitioner. The mere fact that the property has been treated by the District Court as a trust property cannot

amount to dedication in favour of the trust. It has been held by our Courts that mere entries in the account books by themselves cannot also amount to dedication. Even so, the admissions made in Ex. P. 91 based on a mistake of fact or law and which are said to have also been made on information by the petitioner, will not be of any avail to make the property dedicated in favour of the temple. As already observed, any admission valid in law could be proved to be not binding, if it is based on a mistake of fact and law. In support of this contention he relied upon the decision in — 'Dolatsingji v. Khachar Mansur', AIR 1936 P C 150 (C) and — 'King v. Alston', (1849) 18 L. J. Q. B. (N S) 59 (D), which are to the effect that wrong admissions made in ignorance of legal rights have no force and that it is permissible to prove that the admissions by parties have been based upon mistake of fact.

(11) We have been taken through the entire contents of Exs. P. 89 and also 91 and Exs. P. 1 to P. 4 and P. 13. On a consideration of all these exhibits, as also the oral evidence which has been relied upon by the prosecution, we do not think that it has been proved in any satisfactory manner that there has been a dedication of the property in question in favour of the temple. However, we do not think it is necessary for us, for the purpose of this revision petition to determine the question as to whether there has been or has not been a dedication of the amount which is said to be the subject matter of the alleged criminal breach of trust. In our opinion, that will be a matter which will have to be properly determined in appropriate civil proceedings and we do not want to prejudice the rights of either party by any opinion of ours in this judgment on that point.

(12) Mr. K. S. Jayaram Aiyar has, in the next instance, contended that the promissory notes which are said to have been pledged with the Punjab National Bank, Mathurai branch, by the petitioner became the personal property of the petitioner as evidenced by the correspondence between the petitioner and the Union Government prior to the issue of the said promissory notes in the name of the present petitioner. The history of the issue of these promissory notes in the name of the petitioner has already been traced and it is not necessary to refer to it once again. The admission on the part of the petitioner or his predecessors that the promissory notes belonged to the Devastanam, if really they did not belong to it, will not alter the position. If they are not trust properties validly dedicated to the temple they could not, by virtue of the mere admission, become the trust properties. What is not a valid trust could not become one such by these mere admissions. S. 13, of the Negotiable Instruments Act, makes these Government promissory notes issued in the name of the present petitioner negotiable instruments and there can be no doubt about this. The Negotiable Instruments Act applies to Government promissory notes except in regard to certain incidents relating to them. They are not transferable as chose in action but transfers have to conform to certain requirements prescribed by the rules governing such transfers. Such transfers are subject to the Indian Securities Act, (Act, 10 of 1920) and similar other special provisions made in regard to the transfer of such Government Promissory notes. When once these promotes have been issued in favour of the present petitioner in lieu of the old pronotes which were held by his grandfather, they are instruments which are capable of being encashed, and the law gives the holder of these negotiable instruments the right to encash them. In law, therefore, the petitioner became entitled to endorse these negotiable instruments through any bank. It is, therefore, the contention of the learned counsel for the petitioner that what the petitioner has done in the present case is simply to negotiate the promissory notes which stood in his name and which he was entitled, in law, to do, so long as the instruments stood in his name. Mr. Jayarama Aiyar relies on S. 79, I. P. C., which says that nothing is an offence that is justified by law, and when the law allows the petitioner to negotiate as a holder of the said Government promissory notes, he cannot be deemed to have committed an offence when he has negotiated them. S. 8, Negotiable Instruments Act, defines who an holder is and S. 15 defines the term endorser. The sec. 15 is to some extent modified by S. 5, Securities Act which says that the endorsements must be only on the back of the note itself. S. 15, Negotiable Instruments Act, allows the scope for even creating a trust by means of endorsements.

(13) Apart from these contentions, Mr. Jayarama Aiyar has invited our attention to Ss. 18 and 19, Public Debts Act, which came into force on 1st May 1946. The learned counsel lays great stress on the latter part of S. 19 of the said Public Debts Act (Act 18 of 1944). That section is to the following effect:

> "No recognition by the Bank of a person as the holder of a Government security, and no order made by the Bank under this Act, shall be called in question by any Court so far as such recognition or order affects the relations of the Union Government or the Bank with the person recognised by the Bank as the holder of a Government security or with any person claiming an interest in such security and any such recognition by the Bank of any person or any order by the bank vesting a Government security in any person shall operate to confer on that person a title to the security subject only to a personal liability to the rightful owner of the security for money had and received on his accounts."

In this case, the Reserve Bank of India has recognised and vested the Government securities in the petitioner and according to S. 19, such vesting and recognition shall operate to confer on that person a title to the security and, when such title is conferred on the person who holds the said security, it is made subject only to a personal liability to the rightful owner of the security for money had and received on his account. The rightful owner in the present case would be, even if it were according to the prosecution the temple trust, under S. 19, entitled only to enforce the claim against the holder of the security for money had and received on its account. Therefore, what the section aims at appears to be that when once a bank has recognised, or has conferred, or has vested a Government security, in any person, the rightful owner of the security shall have only a civil claim which is enforceable against the holder of the security as for money had and received on account of the rightful owner by the holder of the security. This section, Mr. Jayarama Aiyar claims, rules out all possibilities of there being any criminal liability on the part of the holder of the security, if he begins to negotiate or otherwise deal with the security. Therefore, in so far as the present petitioner, as holder of the Government promissory notes in question has dealt with the said promissory notes, by way of raising a loan on their security, the rightful owner, if it is a temple trust, will have to proceed against the petitioner, only in a court of law to enforce its claim

for money had and received on account of the temple, and not proceed in a criminal court to prosecute the petitioner, for any offence of alleged criminal breach of trust or misappropriation.

(14) We think that the interpretation that the learned counsel for the petitioner has urged upon us of this latter part of S. 19 seems to be tenable and we are inclined to agree with him. When the Government promissory notes in question could not be transferred as a chose in action but could be transferred only under the rules and provisions of law governing Government securities and when the Public Debts Act has made the holder of such securities liable only in a civil Court as if for moneys had & received the section (S. 19) it must be construed, is seeking to limit the scope of the right of the rightful owner to enforce his claim in respect of the said securities. Mr. Jayarama Aiyar has invited our attention to the Full Bench decision in — 'Municipal Council, Dindigul v. Bombay Co., Ld', AIR 1929 Mad 409 (FB) (E), as to the scope of the principle of personal liability for moneys had and received, and also to certain passages in — 'Sinclair v. Brougham', (1914) A. C. 398 at p. 414, (F), for the enforcement of such personal liability, which arises in respect of moneys had and received. Even so, the relevant article of the Limitation Act will be 62 and this has been elaborately considered in the decision in — 'AIR 1929 Mad 409 (FB) (E).

(15) In this case, it has been further brought to our notice by the learned counsel for the petitioner that, after receiving the pronote from the petitioner in respect of his liability to pay the temple the sum of Rs. 88,000 and odd, the Hindu Religious Endowments Board proceeded against him to enforce the said claim under the promissory note and obtained a decree & has since attached the amount payable to the petitioner, under the Zamin Abolition Act, by way of compensation. If such be the case, the learned counsel for the petitioner argues, that the H. R. E. Board must be taken to have brought into operation the latter part of S. 19 of the Public Debts Act and that, when once they have proceeded in the matter to enforce the claim against the petitioner as if for money had and received, as contemplated by S. 19 of the said Public Debts Act, the basis, for the criminal prosecution must be deemed to have been knocked out and the prosecution cannot therefore stand. Though we are not inclined to agree with the learned counsel for the petitioner to the full length to which he wants us to agree with him, still we are of the opinion that, in the circumstances that have transpired, in regard to the admission of the petitioner of his liability to repay the said sum of Rs. 88000 and odd, his execution of the pronote and its acceptance by the H. R. E. Board, the enforcement of the pronote by way of a suit, and further attachment of the amount payable to the petitioner by way of compensation by the Government under the Zamin Abolition Act, the H. R. E. Board was not well advised in having launched this prosecution against the petitioner. If the H. R. E. Board had been properly advised in the matter, we think that the enormous public time and money that were involved in the launching of the prosecution and its final conclusion could have been saved. Even otherwise, the Hindu Religious Endowments Board should have realised that there was reasonable scope for the petitioner to contend that he had acted under a bona fide claim of right in respect of the promissory notes when he negotiated them, according to him, for the purpose of meeting the demands like the payment of peishkush and other expenses necessary for the administration of the trust.

(16) While on this point, it is worthwhile to mention the further contention of the learned Counsel for the petitioner that the charge in the case has not been properly framed. As it is, the charge merely states that the petitioner pledged the Government Bonds with the Punjab National Bank Ltd, Mathurai branch, and thereby committed breach of trust punishable under S. 409, I. P. C. According to the learned counsel for the petitioner, the charge does not mention that there has been any criminal breach of trust, much less does it state that there has been any dishonest intention on the part of the petitioner with a view to cause wrongful loss to the Trust and wrongful gain to himself. No doubt, the charge, as it is, does not mention that the petitioner committed any criminal breach of trust and from the mere pledge of the securities which stand in the name of the petitioner, and in respect of which the Trust could have taken steps to enforce the personal liability as if for moneys had and received, it cannot be stated that the petitioner has committed any breach of trust. Notwithstanding the fact that the beneficial ownership in respect of the pronotes vested in the Trust, it cannot be said that by the action of the petitioner in having pledged the Government securities and taken a loan which was in due course credited to his current account, upon which the petitioner is said to have operated, the beneficial ownership of the Trust is in any way affected. The trust will always be entitled to trace the money which belongs to it if it were able to establish such a right wherever it might have gone and whatever shape it might have taken. Mr. Jayarama Aiyar has invited our attention to the decision in — 'Ramaswami Reddi v. Emperor', AIR 1931 Mad 235 (G), where Pandalai J. has held that, where the accused by virtue of an arrangement, took a promissory note in his own name subject to the obligation to pay off that amount to another person before or after realisation, he could not be held to be guilty of breach of trust when he repudiates his obligation or commits other breach of contract in respect of them. We do not think that it is necessary for us to go into any further discussion of the point raised by the learned Counsel for the petitioner, for, in the view we have taken, we think that S. 19 of the Public Debts Act of 1944 saves the petitioner from any criminal action in respect of the pronotes which have been issued in his name and which he has negotiated with the Punjab National Bank, Mathurai.

(17) Mr. Jayarama Aiyar has also relied upon the observations of Lord Shaw and Lord Dunedin occurring at page 225 and page 228 in — 'Lanier v. King', (1914) A. C. 221, (H), with regard to the distinctions between civil responsibility and constructive criminal responsibility in cases where there has been a mixture of public and private funds. For criminal responsibility, there should be a guilty mind which should be proved by evidence. In this case, no guilty mind has been proved. If the petitioner did not have in his mind, at the time he was negotiating with the promissory notes, that they belonged to the trust but was acting as if they were his own properties, then it cannot be said that the prosecution has shown that he had acted with a guilty mind, or with any dishonest intention.

We are, therefore, of the opinion that in so far as the petitioner could be deemed to be the holder of the notes subject only to the personal liability that is envisaged under the latter part of S. 19 of the Public Debts Act, the prosecution cannot

stand and the petitioner could not be convicted and sentenced for any such offence for which he has been indicted. We, therefore, set aside the conviction and sentence by the learned Sessions Judge of Tirunelveli division and direct that the petitioner be set at large. The fine if already paid will be refunded.

A/R.G.D. Revision allowed.

A. I. R. 1953 MADRAS 792 (Vol. 40, C. N. 302)

PANCHAPAKESA AYYAR, J.

Dr. Dwaraka Bai, Petitioner v. Professor Nainan Mathews, Respondent.

O. M. S. No. 6 of 1951, D/- 28-1-1953.

(a) Divorce Act (1869), S. 10 — Adultery — Proof of.

It is unreasonable to expect direct evidence regarding such an act like adultery. It will be almost always committed behind closed doors and without witnesses. So, circumstantial evidence is all that can be normally got regarding adultery. The circumstantial evidence thus produced must be however convincing to the Court, which should be left in no reasonable doubt regarding the fact of adultery. (Para 19)

When a witness confesses that she cannot give any date, and that the visits of the respondent to the woman were casual and far between, it is obvious that the charge of adultery, which is a quasi-criminal charge, must founder for lack of definiteness. Any person accused of adultery is entitled to know with precision the specific date of the alleged adultery, or the period covered by the adultery. The period does not mean vaguely between the years or the months named when the visits are admittedly casual and far between but means a period of continued living between the adulterous pair. (Para 21)

Whenever a person sets up one thing and fails to prove it, and sets up another thing like adultery for getting the same relief, Courts will naturally examine the evidence with a lynx eye and will not be satisfied except with convincing and unimpeachable evidence proving adultery.

Held that the burden of proving adultery was on the petitioner who had alleged it and that she had failed to prove it. (Para 22)

Anno: Div. Act, S. 10, N. 2.

(b) Divorce Act (1869), S. 10 — Res judicata — (Civil P. C., (1908), S. 11.).

Former petition for divorce on ground of sodomy — Subsequent petition setting up adultery, desertion and cruelty — Latter petition is barred by res judicata regarding sodomy or attempt at sodomy but not regarding adultery and cruelty. (Para 24)

Anno: Div. Act, S. 10, N. 1; Civil P. C., S. 11, N. 2, 6.

(c) Divorce Act (1869), S. 10 — Cruelty — Statements of jealousy.

Cruelty under S. 10 must be such cruelty as, without adultery would entitle a wife to a divorce a 'mensa et toro.' The Divorce Law in India is based on the English law, which has always held that mere mental cruelty, without causing bodily injury, is not sufficient though mental cruelty affecting bodily health will be sufficient.

Making statements of Othello-like jealousy against a wife will not amount to cruelty under S. 10 though deliberate attribution of immorality to a wife with named persons will certainly entitle the wife to resist a petition for restitution of conjugal rights filed by the husband. (Para 25)

Anno: Div. Act, S. 10, N. 7.

(d) Divorce Act (1869), S. 10 — Cruelty — Mere incompatibility of temperament.

Though on mere commonsense and reason, most sane human beings will agree that it is cruel to ask a woman who loathes her husband or a man who loathes his wife, to remain as husband and wife and have conjugal relations, the law in our country, in its anxiety to protect the sacred institution of marriage, will not allow mere incompatibility of temparament to be a ground for divorce. Till the law is amended Courts must enforce the law and cannot make judge-made law by stretching law beyond its legitimate limits. (Para 26)

Anno: Div. Act, S. 10, N. 7.

(e) Divorce Act (1869), S. 10 — Duty of Court.

A Judge is not the person to decide the interests of society. When the law says a thing clearly, it must be carried out. Thus a Court cannot take into consideration that if divorce is not granted a healthy and sturdy woman will go without a male and that it would be in the interest of society to grant her divorce and allow her to marry a man she likes. (Para 29)

Anno: Div. Act, S. 10, N. 1.

† (f) Divorce Act (1869), S. 10 — Validity — (Constitution of India, Arts 13, 14 and 15) (Obiter).

Obiter: S. 10 as it stands is not prima facie repugnant to Articles 13 to 15 of the Indian Constitution. It appears to be based on a sensible classification, and after taking into consideration the abilities of man and woman, and the results of their acts, and not merely based on sex, when alone it will be repugnant to the Constitution. (Para 30)

Anno: Div. Act, S. 10, N. 1.

Pais, Lobo and Alvares, for Petitioner; Respondent in person.

CASES CITED:

(A) (1929) 98 LJ P 113: 1929 Probate 131
(B) (1860) 9 LT 265: 3 SW & Tr 234
(C) (1942) 111 LJ P 90: 1942 Probate 1

JUDGMENT: This is a long-drawn-out petition, having a tangled history which must be set out briefly for the purpose of understanding the facts and issues involved.

(2) The petition is by Dr. Dwaraka Bai, M.B.B.S., an Indian Christian doctor of Guntur, now aged 43, for divorce against her husband Professor Nainan Mathews M.A., B.L., a retired Indian Christian Professor, now aged 60, and till recently a regular student of the United Theological College, Bangalore. The petitioner took her M.B.B.S. degree in Madras in 1935 and began practising at Guntur where her father also is a doctor. When she became nearly 36 years old, i.e., in the beginning of 1946, she felt an urgent desire to get married. She, therefore, wanted to find out a suitable man to marry. One Mrs. Joseph, a

Syrian Christian doctor of Bapatla, in Guntur district, told her about the respondent, Nainan Mathews, and told her also that he was by age, education, culture, family and character eminently fitted to be her husband. So, a long paper correspondence began between Mrs. Joseph and the respondent and then between the petitioner and the respondent. The petitioner told the respondent in Ex. P. 27 dated 23-2-46 that she had acquired house, lands, and cash worth some Rs. 80,000 and had been an Honorary Magistrate. She finally became violent in her passion for the respondent (see Exs. P. 33, P. 34 etc.) in her letters and was willing to overlook the disparity in age. The respondent was far more cool and calculating. He told her bluntly in his letters that he had undertaken various responsibilities towards his step-brothers which were not legally or morally binding on him but had been taken up by him on Good Samaritan principles. So, he wanted her at first to give him a dowry, (really bride-groom's price) of Rs. 15,000/- and finally demanded an irreducible minimum of Rs. 6000/-. The petitioner who had made good money by her practice and was getting more than a thousand rupees a month by 1946, and had also acquired house and lands and car and had much cash lent out for interest, was quite willing to give a good sum as bride-groom's price. The respondent told her in his letters that both by culture, character and wealth she appeared to him to be a desirable mate but that there was one difficulty he had to overcome, namely, his family which was an ancient Syrian Christian family and claimed to be the descendants of Nambudri Brahmins converted by St. Thomas in the first century A. D. Naturally the family wanted him to marry only a Syrian Christian, and there was also one Syrian Christian Inspectress of Schools in sight besides an M.B.B.S. lady of doubtful character but of undoubted wealth. The respondent, in his letter to the petitioner, said that he did not want to marry the lady of doubtful character and of undoubted wealth. The petitioner wrote to the respondent (see Ex. P. 34) that if he married the Syrian Christian Inspectress lady, the first marriage present he would receive would be her corpse, meaning that she would commit suicide like a Juliet of the 20th Century. The respondent assured her that there was no need to take any such desperate step as he had resolved to marry her and he was not the man to go back on his resolve.

(3) Eventually negotiations progressed to the usual climax, and the respondent arrived with his four brothers at Bapatla on 20-4-1946. The petitioner ran up from Guntur to Bapatla in her car in her eagerness to see her would-be husband and pour out her love to him. But, when she met him in the night (the time is given by her as 9.30 p.m. and by the respondent as 12-30 a.m. on the night of the 20th), in her own words, she was shocked to find that he looked much older than the figure in the photo that was sent to her by him. In their anxiety for the marriage, the petitioner and the respondent had sent to each other photos taken several years before. That is perhaps an illustration of the maxim that in love and war truth is the first casualty. Anyway, the petitioner was thoroughly disappointed at the physical appearance of the respondent whom she considered to be an ugly old man, very much dilapidated and not coming up to his own specification. But she had already made all preparations for the marriage and had told one and all, and the bride-groom too had arrived and she had to go on with the marriage, as remarked by the learned Judges in O. S. A. No. 73 of 1947. The marriage was celebrated at a cost of Rs. 4000 and with great pomp, at Guntur, on 22-4-1946, advancing it three days earlier than the original date fixed. But, as usually happens, the pomp did not contain the substance. The voice of laughter hid a heart of sadness so far as Dwarakabai was concerned.

(4) That night, after she went to the nuptial chamber upstairs, with the respondent, according to her, she could not have sexual intercourse with the respondent owing to her being in menses. But, she did not admittedly, tell him about the menses till both entered the nuptial chamber at night. According to her, when the respondent wanted to have sexual intercourse with her, she told him that she was in menses and could not have it that day. But he insisted on having intercourse with her, and suddenly removed her clothes and committed sodomy on her. She got upset in body, mind and soul by this unnatural act and could not attend to her work for several days and had to engage a substitute (the substitute was not examined or even named). On subsequent days also she could not have sexual intercourse with the respondent owing to her nervous state. But, some days after the marriage, one night the respondent pretended that he was having a stomachache, at 4 a.m. and, when she was administering to him some medicine to relieve his supposed stomachache, he suddenly began fondling her parts, and she thought that he was wanting to have sexual intercourse and angrily jerked him off. On 7-5-1946, the respondent left her house in a rickshaw intending to go to Chirala with one Verghese, a Syrian Christian Professor of the Andhra Christian College, Guntur and his wife Mrs. Verghese. But the petitioner who was already aggrieved at Mrs. Verghese going and taking away her wedding ring on the ground that it was hers, lent to the respondent went and told the Vergheses that they should not take the respondent to Chirala with them, and so, they did not take him; and the respondent remained in the Vergheses' house and sent a registered letter, dated 9th May 1946 with false allegations to her and she denied all those allegations.

(5) Thereafter according to the petitioner, all attempts at reconciliation failed, and she filed O. M. S. No. 34 of 1946 on the file of this Court for a divorce on the ground of cruelty by sodomy and desertion, sought to be covered up by clever letters inviting her to return to him but with no real intention to take her or live with her. That petition was heard by Clark J. and dismissed on 31-7-1947. Clark J. disbelieved the case of cruelty by sodomy, or even by attempt to commit sodomy, alleged by the petitioner. He relied on the observations of Lord Hanworth M. R. in — 'Statham v. Statham', (1929) Probate 131 (A), to the following effect:

> "It is quite clear from the authorities cited that cogent evidence is required to overcome the presumption of innocence where such a charge is made. As Sir Crosswell said in — 'N. v. N. (1860) 3 Sw. & Tr. 234 at p. 238 (B)', 'The crime here imputed is so heinous and so contrary to experience, that it would be most unreasonable to find a verdict of guilty where there is simply oath against oath, without any further evidence, direct or circumstantial, to support the charge'. The same principles apply in my judgment in divorce proceedings as in a criminal Court, for it is the very nature of the charge, easy to make and difficult to repel, which demands such proof as is adequate to establish the guilt of the person charged in the minds of reasonable men'."

(6) The petitioner took the matter in appeal. Rajamannar C. J. and Viswanatha Sastry J. heard the appeal O. S. A. No. 73 of 1947 and by their Judgment dated 13-9-1950, dismissed the appeal

with costs. They disbelieved the petitioner's story of attempted sodomy and observed further that they were not also impressed with the evidence adduced on her behalf about her mental prostration, nervous breakdown etc. after the wedding night. They went on to observe:

"The impression left on us is that as soon as she saw him she was intensely disappointed, shocked as she says and was practically compelled by circumstances to go through the marriage. She, however, felt afterwards that it was impossible to be the wife of the respondent except in name, and the respondent was obviously insisting on his rights as a husband. There was no other go for the appellant to be free from the shackles of this unfortunate marriage except to file a petition for divorce. As the law stood, it was necessary to allege one or other of the grounds mentioned in Section 10 of the Divorce Act to obtain a dissolution of the marriage. That was why resort was sought to the story of an attempt on the part of the respondent to commit an unnatural offence. We have no hesitation in holding that the appellant has failed to establish her case even of an attempt at sodomy. She will therefore be entitled to no relief either for divorce or for judicial separation."

(7) The petitioner has filed the present petition thereafter on 15-10-51, changing her case and asking for dissolution of her marriage with the respondent, this time on the ground of his alleged adultery with one Mrs. H. living in No. 72, Wallajah Road, Madras, sexual perversity, cruelty and desertion. The respondent contested the case vigorously and claimed that the petition should be dismissed with compensatory costs under S. 35-A, Civil P. C.

(8) The following issues were framed:

1. Has the respondent deserted the petitioner for upwards of two years prior to the date of the petition?

2. Has the respondent been guilty of cruelty to the petitioner?

3. Has the respondent committed adultery as alleged in paragraph 15 of the petition?

4. Is the petition barred by 'res judicata?

5. To what reliefs, if any, are the parties entitled?

(9) But, before the trial, the respondent suddenly withdrew his defence unconditionally. His counsel Mr. P. S. Ramachandra Ayyar, however continued to be on record but was merely watching the proceedings on the final day of hearing, 8th April 1952, without the least attempt to contest the case or disprove the facts alleged by the petitioner. The reasons for the sudden 'volte face' by the respondent were not clear to me even that day. I considered that either he was unable to face the allegations in the plaint because, they were true, or had been bought off by the petitioner, or had become — because of religious preoccupation — uninterested what happened to this woman and the proceedings instituted by her. Her counsel, Mr. Ramachandra Iyer, emphatically assured me that the respondent had not been bought off by the petitioner and that there was no collusion. The petitioner swore to the facts stated in the petition. One Mrs. Pritchard, an Anglo-Indian woman, aged 60, stated that she had herself witnessed Mrs. Hill said to be a widow aged 50, with three children, all at school, spend some nights alone with the respondent in her bed-room in her house in 72, Wallajah Road, Madras she (Mrs. Pritchard) being a tenant downstairs, in a room and having ample opportunities of watching all people going upstairs. As the case was undefended and the evidence of these two as P. Ws. 1 and 2 stood uncontradicted, and as I held that 'res judicata' would operate only regarding the allegation of sodomy, or attempt at sodomy, and not regarding the subsequent allegation of adultery and cruelty or desertion, I granted a decree 'nisi' to the petitioner on 8-4-1952, but specifically stated, in the course of my order:

"In the circumstances, I have no other option but to grant a decree nisi to the petitioner, on the evidence on record though it is a curious and somewhat suspicious case."

The petitioner did not want any order for alimony or maintenance or costs. The petition stood posted for further orders on 8-10-1952 for passing a decree absolute in the usual course .

(10) The petitioner put in Application No. 4219 of 1952, on 29-9-1952 for recording a compromise she had entered into with the respondent in this matrimonial suit instead of proceeding with the hearing of the petition further for making the decree nisi absolute. I perused all the records and heard Mr. Thyagarajan, for the petitioner and Mr. P. S. Ramachandran Ayyar for the respondent, and on 29-9-1952 passed an order refusing to record the compromise. My order contained the following observations:

"I am of opinion that no Court in the Indian Union, should under the law as it stands, use its discretion in allowing a compromise of this sort which gives the petitioner liberty to rake up the old adultery, 'even after the compromise' and resumption of the status of husband and wife, as the basis of a fresh petition for dissolution of her marriage. The policy of law, is, of course, to see that marriages are, as far as possible, kept intact, and divorces only granted wherever unavoidable. The law of divorce in the Indian Union is not so easy or wide as in some of the States in the United States of America, the Courts in the Indian Union will not contemplate divorces freely, much less frivolously. If there is a bona fide agreement between a husband and a wife, and the wife really condones her husband's past adultery, and wants the marriage to continue that will be a generous and even praiseworthy act which the Courts will be only too ready to appreciate and support. But, when an alleged old adultery is held like a Damocles-sword over the husband for a fresh petition for divorce, as here, no Court will allow a compromise to be recorded and the decree nisi to be set aside 'on that ground' and grant the wife freedom for filing a fresh petition for divorce on the ground of the alleged old adultery and subsequent desertion. Adultery itself is a nauseous thing, and needless to say, old adulteries will be even more stinking, and cannot be allowed to be raked up like this off and on as selfish interests dictate. In that view, I am not for granting permission for this compromise under such circumstances."

(11) Mr. Thyagarajan, for the petitioner, and Mr. P. S. Ramachandra Ayyar for the respondent, both prayed that the decree-nisi passed ex parte by me on 8-4-1952 should be set aside and that O. M. S. No. 6 of 1951 should be restored to file and disposed of afresh after hearing the evidence to be adduced on behalf of the petitioner and the respondent. I agreed to that as in the peculiar circumstances of this case, and in view of the past history, it was desirable to set aside the decree nisi passed by me on 8-4-1952 and hear the evidence adduced on both sides afresh, and give a fresh decision after contest, especially as the respondent had ceased to abscond and had made himself available, as pointed out by his learned

counsel and was likely to contest the action and adduce evidence on his behalf. The prayer to record the compromise was accordingly refused, but the prayer to set aside the decree nisi passed by me on 8-4-1952 was granted for the reasons stated above, and O. M. S. No. 6 of 1951 was restored to file and posted on 5-11-1952 for hearing. In the peculiar circumstances, all the parties to this petition were directed to bear their own costs.

(12) After O. M. S. No. 6 of 1951 was restored to file thus, the petitioner wanted to raise another ground, namely, that it was repugnant to the Constitution of India, and especially to Arts. 13, 14 and 15 thereof, to allow as still valid law S. 10 of the Indian Divorce Act requiring a woman wanting to divorce her husband to prove not merely adultery as the husband wanting to divorce his wife was entitled to do, but also cruelty or desertion in addition to the adultery, as that would amount to an "illegal discrimination" based only on sex not countenanced by the Constitution of India. The respondent vigorously contested this prayer and said that it was a perfectly just, reasonable and valid classification and not based on discrimination against women that while the poor husband had only one ground for divorce, namely, adultery of his wife, the wife had seven grounds for divorce, and that it was monstrous to say that there was illegal discrimination against the woman on the ground only of her sex. Anyway, I allowed the point also to be raised in case it became necessary 'after the proof of adultery' which, of course, is the hub of the whole petition, as agreed to by Mr. V. Thyagarajan. If adultery failed, cruelty not amounting to cruelty 'a mensa et toro' would be of no avail as also desertion 'by itself'.

(13) When the petition came on finally for hearing, the petitioner examined P. W. 1, an Anglo-Indian woman of 60 called Mrs. Pritchard, to prove the adultery between the respondent and one Mrs. Hill, a European or Anglo Indian widow with three children, living in No. 72, Walajah Road on seven or eight occasions. P. W. 2 was one Pachipulusu Subramanyam, a standing client of the petitioner. He spoke to the respondent's agreeing to resign his job in Ceylon and coming to India and living in Guntur with his wife, the petitioner, after the marriage, and went on to say that that was one of the conditions on which the petitioner married the respondent. He also stated that he tried to offer some more money to the respondent to induce him to allow the petitioner's divorce petition to remain unopposed. He probably thought that the respondent who took Rs. 6000/- to marry the woman, would take another Rs. 6000 to release the woman; but he was wrong in his conclusion as the respondent would not agree to take some more money and quit. P. W. 2 was a habitual client of the petitioner, even according to himself, and a person deeply interested in her. P. W. 3 was the petitioner herself. The petitioner marked on her behalf Exs. P. 1 to P. (46) ranging from the marriage certificate and letters intimating her weight, height, and colour and burning love letters, to letters containing sharp rebukes, accusations recriminations and insinuations. The respondent examined his friend Dr. Jacob as D. W. 1, his brother George as D. W. 2, and himself as D. W. 3. He filed Exs. D. 1 to D. (26) ranging from his photo to his Imperial Bank accounts and including his demands for bride-groom price and love letters and letters with sharp insinuations.

(14) In the course of the final hearing of the case, on 20-1-1953, the respondent felt that his advocate, Mr. P. S. Ramachandra Ayyar, was not asking the petitioner, P. W. 3 as many clinching questions as he would desire, and so, gave up that advocate, with his entire consent, and requested the Court for permission to conduct the case himself. Permission was granted and thereafter, the respondent most enthusiastically contested his own case. I may remark here that the respondent passed the examinations necessary to practice the law but did not take to the profession both because he had a low opinion of it and because he was diffident of making a success at it. It is needless to add that the petitioner, as P. W. 2 attributed the failure of the marriage to the attempt by the respondent to commit an unnatural offence, on her, though she now, as P. W. 3, watered down the sodomy and the attempt to commit sodomy to emission by the respondent on her buttocks on the wedding night without even an attempt to have intercourse 'per anus'. She alleged that the respondent was vamping on her and had married her more for monetary gain than for anything else, and was vilifying her to all and sundry at Guntur and elsewhere and attributing to her adulterous acts with one Jeevarathnam, a vakil and one Imazuddin, a Muslim doctor, besides attributing licentious and libidinous behaviour with one Vittal Rao, said to be another doctor of the place.

(15) According to the respondent, the petitioner just before their entering the nuptial chamber, asked him why he did not marry the Syrian Christian Inspectress of Schools, and he took it as a joke and replied that he could not do so as he had married her (the petitioner). He added that when they entered the nuptial chamber and he invited her to have sexual intercourse with him, she said that she wanted a fat and hefty man for sexual intercourse (the respondent is thin, while she is fat). She also told him that though at Medical College she had kept free from carnal intercourse with boys she had contracted associations with Jeevarathnam and another and asked him whether he would mind them. He being a professor, said that he saw nothing wrong in healthy associations, but that he would certainly object to 'unhealthy associations' and asked her to which category the associations mentioned by her belonged. She said that the associations mentioned by her were "unhealthy associations" & he then refused to allow them to continue. According to him, she offered to have sexual intercourse with him, as also with fat young and hefty persons, and he refused this offer also. Further, he says that she offered to give him one or more of her nurses as "bed-companions" to satisfy his lust and eagerness for intercourse and he refused this third offer also. According to him, she then insulted him by referring to one of his letters, where he had hoped that she would rejuvenate him, giving a loving wife to him, by telling him that what he required was not rejuvenation but castration making him impotent. Naturally, the wedding night was anything but happy. There was admittedly, no sexual intercourse between the husband and wife that night, though the causes given are different.

(16) Admittedly there has been no sexual intercourse between this husband and wife at any time thereafter, though the causes given are again different. The respondent would have it that he had a real stomachache one night some days after the marriage and that at about 4 a.m. he went to the petitioner, who was sleeping separately from him downstairs after the wedding night, and told her about the stomachache, and she gave him some medicine and rubbed some ointment on his belly and then asked him angrily "Do you want me to have sexual intercourse with you now?" and he replied, "Good Heavens! I am dying. This is not the moment for sexual intercourse". According to him also, the relations became further embittered by the tales carried by third parties. One Jacob

told him even before the marriage, that he could not live with a woman like the petitioner for a week as he knew what kind of woman she was. A week after the marriage Verghese also told the respondent that he had heard several rumours about the petitioner. Several others joined in telling stories to the respondent. The respondent says that he firmly desisted from believing any of these stories, but that he could not avoid hearing whatever was related to him. He also added that the petitioner told him bluntly that he was a freak and that any child born to her by him would also be a freak and that she has therefore resolved to have a child only by Advocate Jevarathnam. When the respondent said that he would not allow it she told him in Malayalam "Then, I shall kill you". Jeevarathnam has a wife and four children. The respondent says that he saw Jeevarathnam rush into the bed-room when he and the petitioner were alone and pat the petitioner and stroke her hair, in his very presence, and that he also saw the Muslim doctor Imazuddin behave in that very nuptial room, in a compromising manner with the petitioner. He added that he asked Imazuddin to leave the room and house within twenty four hours on pain of fearful consequences, and that the doctor left without more ado.

(17) The respondent, admittedly, sent a complaint Ex. P. 43 to the Deputy Superintendent of Police, Guntur stating that Jeevarathnam was trying to wreck his marriage and had interviewed him for more than two hours and told him about his long-standing love for the petitioner, ever since she was eleven years old, and assured him that the marriage of the petitioner with him was only nominal and that he had himself been a party to the marriage which was only to serve as a cloak for his own sexual depredations on her. According to the respondent, the Dy. Supdt. of Police sent for and warned Jeevarathnam, and that man, ever since then, avoided the respondent and even ran away from him when he came in his sight. The respondent was insistent that he never agreed to go and live with the petitioner at Guntur permanently after the marriage as alleged, and that he wanted to enter politics in Ceylon with the prospect of becoming a Minister or some other high dignitary as everybody now-a-days enters politics with some such high object in view. He also stated that he had offered to take the petitioner to Colombo or Panadurai, a suburb of Colombo to live with him there as he was getting a pension amounting to nearly Rs. 240 a month, and would get something extra by tution, and she could make easily Rs. 5000 a month by practising in Ceylon, a place noted for its generous payment to doctors. He offered even now to take the petitioner, directly from Court to live with him, and said that he would forget the entire past as his religious conviction told him that marriages were made in Heaven & should not be broken, and that any fault of a wife or husband should be forgiven on signs of repentence and reform. The petitioner said that she was not willing to go back to the respondent or have sexual intercourse with him and would rather prefer to die.

(18) Now I shall give my findings on the issues, on the oral and documentary evidence on record.

'Issue No. 3.' This is the most important issue in this case, as the alleged adultery is the hub of the whole petition, the alleged cruelty and desertion being only branches. Section 10, Indian Divorce Act, runs as follows:

"Any husband may present a petition to the District Court or to the High Court, praying that his marriage may be dissolved on the ground that his wife has, since the solemnization thereof, been guilty of adultery.

"Any wife may present a petition to the District Court or to the High Court, praying that her marriage may be dissolved on the ground that since the solemnisation thereof, her husband has exchanged his profession of Christianity for the profession of some other religion, & gone through a form of marriage with another woman:

or has been guilty of incestuous adultery,

or of bigamy with adultery,

or of marriage with another woman with adultery,

or of rape, sodomy or bestiality,

or of adultery coupled with such cruelty as without adultery would have entitled her to a divorce 'a mensa et toro',

or of adultery coupled with desertion, without reasonable excuse, for two years or upwards.

Every such petition shall state, as distinctly as the nature of the case permits, the facts on which the claim to have such marriage dissolved is founded."

This petition was not filed on the ground of incestuous adultery by the respondent, or bigamy combined with adultery, or marriage with another woman with adultery, or rape, sodomy and bestiality, but only on the ground of adultery coupled with some cruelty, as, without adultery, would have entitled her to a divorce 'a mensa et toro' or of adultery coupled with desertion, without reasonable excuse, for two years or upwards. So, adultery is the main thing to be proved. Whether it alone need to be proved will be considered later.

(19) The case of the petitioner is that the respondent committed adultery with one Mrs. Hill, a European or Anglo-Indian widow with three children at No. 72, Wallajah Road, Madras. when the three children were away at school. The only witness examined to prove the alleged adultery with Mrs. Hill is P. W. 1. Mrs. Pritchard, an Anglo-Indian woman aged 60 and none too affluent. Reliance is also placed on a chit Ex. P. 45 given by the respondent on 4-4-1930 to a private detective called 'Mahavrat ('Great Penance') who called himself Charles Jones and made friends with the respondent and got the chit from him to Mrs. Hill. Of course there is no direct witness regarding the commission of the adultery by the respondent with Mrs. Hill. As Mr. Thyagarajan rightly urged, it will be unreasonable to expect direct evidence regarding such an act like adultery. It will be almost always committed behind closed doors and without witnesses. Except 'Aghorapanthins' in ancient India, who believed in having sexual intercourse in public, on the principle that no man should be ashamed to do in public what he does in secret, no others are found to do the sexual act in public, and so, direct witnesses to the act cannot usually be had. But, on the other hand, insinuations of adultery against women can be lightly made and are lightly made, especially in oriental countries. That is why Mohammed the prophet prescribed punishment for a man who accused a woman of adultery "unless he produced four direct witnesses to prove it". So, circumstantial evidence is all that can be normally got regarding adultery. The circumstantial evidence thus produced must be however convincing to the Court, which should be left in no reasonable doubt regarding the fact of adultery. Mr. Thyagarajan relied on the observations of Latey in page 69 of his "Law and Practice in Divorce and Matrimonial Causes". These observations are to the following effect:

"It is not necessary to prove adultery by direct evidence, as it is usually secret. Association coupled with opportunity and evidence of illicit affection or familiarities creates an inference upon which the Court can find adultery. If the alleged adulterers occupy the same bed or bed-

room the inference of adultery is drawn, except in cases where it is a pretence for the purpose of cloaking the real facts and securing a collusive divorce.

"It is rarely that the petitioner is a witness to adultery, but, if so, the Court though entitled to grant a decree on such evidence usually requires corroboration, where possible either in the shape of suspicious circumstances, such as compromising letters, or the evidence of an independent witness.

"Evidence by paid witnesses, formerly called 'testes lupanres', private detective or inquiry agents, and women of evil repute, is subjected to special scrutiny.

A confession of adultery by a respondent must, if possible be supported by corroborative evidence, but the Court may, in appropriate circumstances, grant a decree on an uncorroborated confession...."

(20) I may state here that there was no evidence of illicit familiarities between the respondent and Mrs. Hill in this case or of their occupying the same bed or bed-room. Mrs. Pritchard admitted that she had not gone upstairs or seen the respondent and Mrs. Hill occupying the same bed-room. Mr. Thyagarajan also relied on the observations of Manchanda at page 56 of his book "The Law and Practice of Divorce" to the following effect:

"Going to a brothel and remaining alone for a considerable time in a room with a common prostitute is sufficient evidence to infer adultery. If a married man goes to a brothel knowing it to be such, a strong presumption of adultery arises, which needs to be rebutted by the very best evidence...."

In this case, there is no evidence that No. 72 Wallajah Road, Madras is a brothel, or that Mrs. Hill was running a brothel in her flat upstairs in that house. I am of the opinion that the adultery alleged in this case between the respondent and Mrs. Hill is not proved. My reasons are these: Mrs. Pritchard's evidence, even if believed in full, will not lead to a conclusive inference of such adultery. That woman admittedly did not go upstairs to see what the respondent did to, or with, Mrs. Hill. Mrs. Hill, according to her, occupied the entire upstairs and Mrs. Pritchard had no occasion to go upstairs, and never did so. Mrs. Hill had in the upstairs not only a bed-room but also admittedly a court yard, a bath room and a kitchen. It is one thing to say that a man and a woman of an age fit for sexual intercourse and not within prohibited degrees shut up alone in a single bed-room for the night, may be presumed to be there only for committing sexual intercourse, and it is another thing to say that any man going to a woman's house or flat goes there only to commit adultery with her, even if he visits her at night. Mrs. Pritchard stated that she never found the respondent and Mrs. Hill together in the same bed-room. No doubt she added, that the respondent spent some nights on the seven or eight occasions she noticed him visiting Mrs. Hill's flat upstairs. But she did not say that she kept awake all night and made sure that the respondent spent the night actually in Mrs. Hill's flat. There was no reason for her to do so. What is more, the petitioner, as P. W. 3 said that Mrs. Hill was the first person she interviewed on, receiving the report from her private detective, Mahavrat, about this adultery, that Mrs. Hill told her that she committed several acts of adultery with the respondent in the months of February, March and April 1950 and that if she wanted any witness she could go to Mrs. Pritchard, P. W. 1 whose address she gave, as by that time, that woman had shifted to another lodging place. But P. W. 1, Mrs. Pritchard gave the months of the adultery as March to September 1950, and not February to April 1950 as given by Mrs. Hill, the person who is actually alleged to have committed the act of adultery with the respondent. Mrs. Hill was not examined by the petitioner, though she is alive and available, and though P. W. 3 stated that she was friendly with her and told her freely about her acts of adultery with the respondent. Mahavrat also was not examined to prove his investigations into this adultery, or even the chit Ex. P. 45, given to him by the respondent to Mrs. Hill.

(21) What is more, Mrs. Pritchard does not strike me as a very reliable witness. She improved her case from time to time. She swore in this very Court on 8-4-1952 that Mrs. Hill was over 50, but not quite 60 as she herself was. That was when the respondent had given up his defence. But when he renewed his defence and contended that he could not have had intercourse with Mrs. Hill, as she was past the age of intercourse, P. W. 1 swore that Mrs. Hill was only 42. The age of Mrs. Hill was, in my opinion, advanced eighteen years to make the probabilities of adultery greater. Not only that, Mrs. Pritchard had, on 8-4-52 described Mrs. Hill as a European widow with three children and had merely attributed adultery to her. But now, she swears that Mrs. Hill is a prostitute entertaining several lovers and that she can identify 40 or 50 of Mrs. Hill's paramours. It will almost seem as if Mrs. Pritchard spent her whole time counting the paramours of Mrs. Hill. The evidence of a witness like this cannot be safely acted on in a grave charge like this, amounting almost to a criminal offence even though it is set up on a civil matter like this. I may add here that Mrs. Pritchard's evidence cannot be accepted for another reason. She admitted that she cannot give any single date for the visits of the respondent to Mrs. Hill. A criminal charge of adultery will founder at once without a definite date, or a series of dates covering a period. When Mrs. Pritchard confessed that she could not give any date, & that the visits were casual and far between, it is obvious that the charge of adultery, which is a quasi-criminal charge, must founder for lack of definiteness. Any person accused of adultery is entitled to know with precision the specific date of the alleged adultery, or the period covered by the adultery. The period does not mean vaguely between the years or the months named when the visits are admittedly casual and far between but means a period of continued living between the adulterous pair. Mrs. Pritchard made her evidence somewhat picturesque, though more incredible, by saying that the respondent always went with the tennis racket to meet Mrs. Hill for committing adultery. Why a tennis racket was carried by him when he went for such purposes is not clear. Indeed, she identified the respondent from a photo as the adulterer and as 'the man with a tennis racket' like "the Woman in White". It is only in Court that she identified the respondent in person as the 'adulterer'. There were according to P. W. 1 half a dozen more Anglo Indians living in the downstairs of that very house, like her. None of them was examined.

(22) The chit Ex. P. 45, does not carry any more conviction on the question of adultery. It runs as follows:

"Dear Mrs. Hill,

I am writing this to introduce my friend Mr. Charles Jones whom you met in the Canteen along with me. I am held up owing to some important Court work and so unable to come. I

hope you will extend to him the courtesy of homely treatment.

Yours sincerely,
(Sd) P. N. Mathews,
4-4-1950.

To
Mrs. Hill,
72 Wallajah Road."

According to the petitioner, this chit was given by the respondent, the adulterous paramour to Mrs. Hill, a prostitute, introducing Charles Jones, or Mahavrat, to that prostitute for sexual intercourse with her. I cannot agree with Mr. Thyagarajan when he says that an immoral man will introduce another immoral man to his keep for sexual intercourse as pigs are said to do. Psychologists are agreed that even immoral people want to monopolise their immoral keeps for themselves and do not offer them to all and sundry, as even immorality attracts a man only in the guise of morality. Whatever it be, Mahavrat, the man to whom Ex. P. 45 was given, is the proper person to state that the chit was given to him by the respondent to be handed over to Mrs. Hill as a recommendation for sexual intercourse. Mahavrat has not been examined. The fact that the respondent recommended "homely treatment" by Mrs. Hill to Mahavrat, will not mean unambiguously that Mrs. Hill was asked to have sexual intercourse with Mahavrat. It will be a sad day when the beautiful phrase "homely treatment" in the English language comes to mean 'sexual intercourse for immoral purposes' as Mr. Thyagarajan wants it to be interpreted. Nor is Mrs. Hill proved to be a prostitute. The allegation that she is a prostitute is made for the first time by that unreliable woman Mrs. Pritchard, when examined now. She did not refer to Mrs. Hill's being a prostitute before, nor was any independent witness examined to prove Mrs. Hill was or is a prostitute. While Ex. P. 45 may undoubtedly lead to an inference that the respondent had visited Mrs. Hill at No. 72 Wallajah Road, and not merely seen her dancing away in the Marine Canteen as stated by him, it will not show that he had committed adultery with her, in the absence of proof that Mrs. Hill was a prostitute or was running a brothel in No. 72 Wallajah Road. The varying periods given by Mrs. Hill for the acts of adultery & by Mrs. Pritchard for the very same acts of adultery, will also create doubts regarding the alleged adultery. Mr. Thyagarajan's argument that there was nothing physically preventing the respondent from going to No. 72 Wallajah Road and having sexual intercourse with Mrs. Hill does not appeal to me. Practically no healthy person of the sexual age is physically prevented from having sexual intercourse with any woman of sexual age anywhere in the vicinity. But that will not show that he did actually go and have sexual intercourse with that woman. The burden of proving adultery is under the law, on the person alleging it, and the petitioner has failed to prove adultery. There is also the suspicious fact that the petitioner had filed the former petition for divorce on the ground of sodomy and had watered it down to an attempt to commit sodomy and had failed to prove either sodomy or attempt at sodomy, and had then filed this petition setting up adultery, desertion and cruelty. Whenever a person sets up one thing and fails to prove it, and sets up another thing for getting the same relief, Courts will naturally examine the evidence with a lynx eye and will not be satisfied except with convincing and unimpeachable evidence proving adultery. As I am satisfied that there is no such evidence in this case, I hold on issue 3 that the allegation of adultery against the respondent has not been proved and find it accordingly in the negative.

(23) Once it is held that adultery has not been proved, there is perhaps no real need to discuss the allegations of desertion and cruelty, as they cannot, by themselves, admittedly, entitle the petitioner to divorce as fairly conceded by Mr. Thyagarajan. Still, I shall discuss them for the sake of completeness.

(24) 'Issue 4'. This petition is barred by res judicata regarding sodomy and attempt at sodomy, but not regarding the allegation of adultery and cruelty otherwise than by sodomy or desertion. To hold otherwise will be to prevent a person from getting a relief for subsequent acts of misconduct and to encourage the husband, acquitted of sodomy to go on committing adultery only not combined with cruelty and desertion, and snap his fingers at the Law.

(25) 'Issue 2'. The cruelty alleged, apart from the sodomy or attempt at sodomy, is attributing to the petitioner statements admitting her passion for intercourse with hefty men for immoral purposes and desire to get children by advocate Jeevarathnam, and her alleged improper behaviour with Dr. Imazuddin. I must say that I am not convinced about the truth of the allegations made by the respondent regarding these matters, though I am not prepared to say that they are entirely imaginary. I only hold that they are as unproved as the adultery alleged against him, though they have some kind of suspicion not amounting to proof, behind them. I cannot agree with Mr. Thyagarajan that making such statements of Othello-like jealousy against a wife will amount to cruelty under S. 10, Indian Divorce Act, though deliberate attribution of immorality to a wife with named persons will certainly, under many rulings of this Court and other Courts entitle the wife to resist a petition for restitution of conjugal rights filed by the respondent. Cruelty under S. 10, Indian Divorce Act, must be such cruelty as, without adultery would entitle her to a divorce 'a mensa et toro'. Our Divorce Law is based on the English Law, which has always held that mere mental cruelty, without causing bodily injury, is not sufficient though mental cruelty affecting bodily health will be sufficient. Mr. Thyagarajan urged the advance of modern psychology and modern manners and morals. He said that in revolutionary times like ours, a revolutionary view is indicated, and that even though adultery is not proved, and physical harm to the body by means of cruelty is not proved, still divorce should be granted. He stated that the law of maintenance had advanced much in recent times, and that husbands are freely taking a walk on the Marina with their wives which they were not doing in former times, and that I must stretch a point and hold that cruelty which is sufficient to resist a petition for restitution of conjugal rights—would be enough to grant a divorce. He also relied on the dictum of Sir F. Jeune at page 153 of Latey's book, to the following effect:

> "It is a terrible thing that people should be going about the world, neither married nor unmarried, possibly liable to contract fresh and illegal matrimony, and certainly exposed to temptation to commit adultery."

and urged that Dr. Dwaraka Bai should be granted a divorce to save her from such temptation.

(26) But he could not show any case where this terrible thing was sought to be cured by a more terrible thing, viz., granting a divorce, where the law would not permit it, by stretching the law. He frankly admitted that that has never been done. So, the pious observation, quoted above, will not help him, and only the legislature must be approached to liberalise the law as desired by him. Indeed on mere commonsense and reason, most sane human beings will agree that it is cruel to

ask a woman who loathes her husband or a man who loathes his wife, to remain as husband and wife and have conjugal relations. But the law in our country, in its anxiety to protect the sacred institution of marriage, will not allow mere incompatibility of temperament to be a ground for divorce. Till the law is amended, Courts must enforce the law and cannot make judge-made law by stretching law beyond its legitimate limits. The respondent assured me that he has not the least intention of filing a petition for restitution of conjugal rights, and that he only wants as a good Christian, that the marriage is not dissolved by divorce or even judicial separation by Court. I see no reason to grant a divorce or judicial separation in this case. Nor need I discuss how far the cruelty proved in this case, namely, of attributing immorality deliberately to the wife, would be a complete answer to a petition for restitution of conjugal rights, if and when filed. I hold that the cruelty required under S. 10, Indian Divorce Act, has not been proved, and accordingly find issue 2 in the negative.

(27) 'Issue 1'. I have no doubt, on the evidence on record, that the petitioner has failed to prove that the respondent deserted her for upwards of two years prior to the day of the petition. It was urged by Mr. Thyagarajan that the respondent had agreed to reside with the petitioner at Guntur permanently after the marriage and that when he broke this agreement, and left the house, he would be guilty of desertion, following the ruling in — 'King v. King', (1942) Probate 1 (C). I need not discuss the question as to whether there is a breach of public policy in India by making the husband stick to such an undertaking, if made at the marriage on pain of divorce being granted against him on the ground of desertion, because, in this case, the evidence has not proved that there is any such undertaking. Mr. Thyagarajan could not lay his finger on any sentence, in the innumerable letters that have passed between the petitioner and the respondent, where the respondent agreed to any such undertaking. The letters show that the respondent intended to discuss with the petitioner, after the marriage, where they should settle down. The respondent had three alternatives: one, for him to settle down in Guntur with his wife; another for him to settle down at Colombo with his wife and make her practice there, earning the fabulous sum of Rs. 5000 per month and supplement this princely income with his own meagre pension and tuition earnings, the third for him to settle down in Tuticorin or Travancore, or any other suitable place, where there was scope for his ambition and enterprise and where people would want him and her. Nothing was settled before the marriage.

(28) Mr. Thyagarajan relied on Exs. P. 5 and P. 25 and the oral evidence. Exs. P. 4 and P. 25 themselves contain these three alternatives which are also found in many other letters. People, when they marry embark on a new life, and think of various plans which settle down only after some time. Time and opportunity govern the final decision. Very few people, in India, at any rate, stipulate regarding the residence of the husband in the bride's house as a condition to the marriage, as in the case relied on. P. W. 3 spoke to such a condition, and P. W. 2 her standing client, interested in her, tried to corroborate her. I am not impressed with their evidence. I do not think that, at the first midnight visit of the petitioner to the respondent on the night of 20-4-1946, she discussed this question and got an undertaking from him, especially when she confessed that the very sight of him gave her a shock, as he was far older and more dilapidated than she had ever imagined. A person in shock does not think out things coolly or take undertakings from another. So, tne ruling relied on by Mr. Thyagarajan will, far from helping him, be in favour of the respondent and will disprove desertion. Nor will the alleged fact that the respondent wrote letters asking the petitioner to come to him without any intention to take her in reality and maintain her be enough to prove desertion. The respondent in this case has, no doubt not spent one pie on the petitioner, or on the marriage and has only wanted her to give him Rs. 6000 as dowry, to take him to Bangalore for a honey-moon, and do such other acts out of her own earnings and income. But many a husband in India today vamps on rich wives and their resources, and the very fact of the vamping may not be proof of desertion. I am satisfied that the respondent has not deserted the petitioner and that he was always asking her to join him and that he is still willing to take the petitioner with him, and that it is the petitioner who says that she will rather die than go back to him.

(29) Of course, I am satisfied that if the petitioner goes back to the respondent, he will make her life miserable and that this couple can never live again together in peace and amity on earth. But, unfortunately that conclusion will not do for granting a divorce or judicial separation, when the law will not allow it. It will only do to resist a petition for restitution of conjugal rights if and when brought. Mr. Thyagarajan urged that it will be against reason and commonsense to allow this healthy and sturdy woman of 43, the petitioner, to go without a mate and thus frustrate her and that it will be in the interests of society if she is granted a divorce and allowed to marry a man she likes. But a Judge is not the person to decide the interests of society, under our Law. When the law says a thing clearly, it must be carried out. That is why many a Judge, with his own private view against capital punishment, has to inflict it under the law, or resign and preach for a reform of the Penal Code. So, I find this issue also in the negative and hold that desertion is not proved.

(30) Lastly, I wish to say a few words about Mr. Thyagarajan's contention that, under Arts. 13 to 15 of the Constitution of India. Section 10, Indian Divorce Act, in so far as it requires a woman to prove not only adultery by her husband, but also desertion and cruelty, is null and void, as repugnant to the Law, as it amounts to an illegal discrimination against woman on the ground only of sex, and that I should hold that mere proof of adultery by the husband is enough for a woman to obtain a divorce, just as mere proof of adultery by the wife would be enough for a husband to get divorce from the wife. I cannot agree, though I do not want to give a final decision on the point, as it is unnecessary in this case, where I hold that neither adultery nor desertion nor cruelty has been proved, and that the petition for divorce, as well as judicial separation must be therefore dismissed. I may add, however, that I consider that S. 10 as it stands, is not prima facie repugnant to Articles 13 to 15 of the Indian Constitution. It appears to be based on a sensible classification, and after taking into consideration the abilities of man and woman, and the results of their acts, and not merely based on sex, when alone it will be repugnant to the Constitution. Nothing in Articles 13 to 15 of the Constitution can be urged for proving that women also ought to be conscripted as soldiers along with men, or that girls also ought to be allowed, under the law, to be taken in adoption like boys. It is obvious that, under the second example, the discrimination is against women, because they would lose by not being adopted by persons having vast properties, and yet even Mr. Thyagarajan was not prepared to urge that the

Hindu Law of adoption as it stands is invalid, and that girls ought to be allowed to be adopted like boys. I may add also that an adultery by a wife is different from an adultery by a husband. A husband commits an adultery somewhere, but he does not bear a child as a result of such adultery, and make it a legitimate child of his wife's to be maintained by the wife. He cannot bear a child, nor is the wife bound to maintain the child. But if the wife commits adultery, she may bear a child as a result of such adultery, and the husband will have to treat it as his legitimate child and will be liable to maintain that child under S. 488, Criminal P. C., read with S. 112 of the Indian Evidence Act, which has been made applicable to civil, criminal and revenue Courts alike. It is obvious that this very difference in the result of the adultery, may form some ground for requiring a wife, in a petition for divorce not only to prove adultery by the husband but also desertion and cruelty, whereas the husband need prove only adultery by the wife.

(31) Anyway, I need not discuss the matter further, as I am not deciding the question finally. I am only indicating a few considerations, in view of Mr. Thyagarajan's argument on the point.

(32) In the end, therefore, this petition deserves to be and is hereby dismissed with costs. The respondent will not get compensatory costs, as he prayed for, but only ordinary taxed costs, as his conduct at one stage, in not contesting the petition, and the other facts, do not entitle him to compensatory costs, but only to ordinary taxed costs.

A/D.R.R. Petition dismissed.

A. I. R. 1953 MADRAS 800 (Vol. 40, C. N. 303)

PANCHAPAKESA AYYAR J.

G. Dwarakabai, Petitioner v. P. Nainan Mathews, Respondent.

O. M. S. No. 6 of 1951 and Appln. No. 4219 of 1952, D/- 29-9-1952.

Divorce Act (1869), S. 16 — Compromise petition for vacating 'decree nisi' — Wife reserving right to file petition on ground of old adultery — Maintainability.

No Court in the Indian Union should, under the law as it stands, use its discretion in allowing a compromise which gives the petitioner wife liberty to rake up the old adultery even after the compromise and resumption of the status of husband and wife, as the basis of a fresh petition for dissolution of her marriage. If there is a bona fide agreement between a husband and a wife, and the wife really condones her husband's past adultery, and wants the marriage to continue, that will be a generous, and even praiseworthy act which the Courts will be only too ready to appreciate and support. But when an alleged old adultery is held like a Damocles sword over the husband for a fresh petition for divorce, no Court will allow a compromise to be recorded and the decree nisi to be set aside on that ground, and grant the wife freedom for filing a fresh petition for divorce on the ground of the alleged old adultery and subsequent desertion. (Para 3)

Anno: Div. Act, S. 16 N. 1.

Pais, Lobo and Alvares, for Petitioner; Respondent in person.

ORDER: This is a petition by one Dr. Dwarakabai, M. B., B. S., aged 40, the Petitioner in O. M. S. No. 6 of 1951, a petition for dissolution of her marriage with the respondent, P. Nainan Mathews, a Master of Arts and Bachelor of Laws, aged 58, on the ground of his adultery and desertion. Her previous petition, O. M. S. No. 34 of 1946 for divorce on the ground of his attempted sodomy on her and subsequent desertion had been dismissed by Clark J. and the dismissal confirmed by Rajamannar C. J. and Viswanatha Sastri J. in appeal in O. S. A. No. 73 of 1947. In O. M. S. No. 6 of 1951, a decree nisi was passed by me 'ex parte', on 8-4-1952, on the evidence adduced by the petitioner, Dr. Dwarakabai, and her witnesses. Normally, O. M. S. No. 6 of 1951 would have come up before me on 8-12-1952 for making the decree nisi absolute. But, meanwhile, the respondent, Nainan Mathews, is said, by this petitioner, to be contemplating filing a petition against making the decree nisi absolute on the ground that he had not committed adultery or deserted the petitioner but that he had been given a large sum of money by the petitioner as bridegroom price and that it was fear regarding her demanding payment back of this money labelling it as a loan to him, that had made him remain 'ex parte' on 8-4-1952.

(2) Today, a petition has been filed by both the parties for recording a compromise entered into on 16-9-1952 between them and for vacating the decree nisi passed by me on 8-4-1952, and allowing the petitioner, Dr. Dwarakabai, to file a fresh petition for dissolution of her marriage on the very ground of adultery and desertion relied on by her for getting the decree nisi passed by me on 8-4-1952. It was prayed further that this compromise should be in no way used as a condonation by Dr. Dwarakabai of the old adultery and desertion alleged before.

(3) I have perused the records and heard Mr. V. Thyagarajan, for the petitioner, & Mr. P. S. Ramachandra Ayyar, for the respondent. I am of opinion that no Court in the Indian Union should, under the law as it stands, use its discretion in allowing a compromise of this sort which gives the petitioner liberty to rake up the old adultery even after the compromise and resumption of the status of husband and wife, as the basis of a fresh petition for dissolution of her marriage. The policy of the law is, of course to see that marriages are, as far as possible, kept intact, and divorces only granted wherever unavoidable. The law of divorce in the Indian Union is not so easy or wide as in some of the States in the United States of America, and Courts in the Indian Union will not contemplate divorces freely, much less frivolously. If there is a bona fide agreement between a husband and a wife, and the wife really condones her husband's past adultery, and wants the marriage to continue, that will be a generous, and even praiseworthy act which the Courts will be only too ready to appreciate and support. But when an alleged old adultery is held like a Damocles sword over the husband for a fresh petition for divorce, as here, no Court will allow a compromise to be recorded and the decree nisi to be set aside on that ground, and grant the wife freedom for filing a fresh petition for divorce on the ground of the alleged old adultery and subsequent desertion. Adultery itself is a nauseous thing, and, needless to say, old adulteries will be even more stinking, and cannot be allowed to be raked up

like this off and on as selfish interests dictate. In that view, I am not for granting permission for this compromise under such circumstances.

(4) But Mr. Tyagarajan, for the petitioner, and Mr. P. S. Ramachandra Ayyar, for the respondent, both prayed that the decree nisi, passed 'ex parte' by me on 8-4-1952 should be set aside, and that O. M. S. No. 6 of 1951 should be restored to file and disposed of afresh after hearing the evidence to be adduced by the petitioner and the respondent. I agree to that as in the peculiar circumstances of this case, and in view of the past history, it is desirable to set aside the order of decree nisi passed by me on 8-4-1952 and hear the evidence adduced on both sides afresh, and give a fresh decision after contest, especially as the respondent has ceased to abscond and has made himself available, as pointed out by his learned counsel, and is likely to contest the action and adduce evidence on his behalf. The prayer to record the compromise is accordingly refused, but the prayer to set aside the decree nisi passed by me on 8-4-1952 is granted for the reasons stated above, and O. M. S. No. 6 of 1951 is restored to file and posted to 5-11-1952 for hearing. In the peculiar circumstances. all the parties to this petition will bear their own costs.

B/D.R.R. Order accordingly.

*** A.I.R. 1953 MADRAS 801 (Vol. 40, C. N. 304)**

(FULL BENCH)

RAJAGOPALAN, BALAKRISHNA AYYAR AND CHANDRA REDDY JJ.

In re Nalla Baligadu and others, Petitioners.

Criminal Revn. No. 977 and Criminal Revn. Petn. No. 960 of 1951, D/- 9-2-1953.

*** (a) Criminal P. C. (1898), Ss. 437 and 209 (1) — Power of revision on order of discharge under S. 209 (1) — AIR 1952 All 231 (FB), Dissented from.**

Where under S. 209 (1) a Magistrate finds that there are not sufficient grounds for committing the accused for trial and directs such person to be tried before himself or some other Magistrate, the revisional powers under S. 437 can be exercised before the conclusion of the trial before such Magistrate. (Para 33)

When a Magistrate discharges an accused in respect of an offence exclusively triable by a Court of Session and proceeds to try him himself for an offence within his jurisdiction, on the language of S. 437 it will be open to the District Magistrate to direct the committal of the accused for trial "upon the matter of which he has been, in the opinion of the District Magistrate, improperly discharged." 24 Mad 136; AIR 1945 Mad 459; AIR 1949 Mad 66; AIR 1949 Mad 430; AIR 1953 Mad 26, Rel. on; AIR 1920 Mad 94; 20 Cal 633, Expl.; AIR 1952 All 231 (FB), Dissented from. (Para 5)

Anno: Cr. P. C., S. 209 N. 6; S. 437 N. 8.

(b) Criminal P. C. (1898), S. 437 — "Upon the matter."

The word "matter" is elastic enough to comprehend a single charge or a plurality of charges, a single offence or a plurality of offences, a part of a case or the whole of a case. The word is also appropriate enough to cover cases where the same act is punishable under two or more sections of the Code. (Para 3)

Anno: Cr. P. C., S. 437 N. 8.

(c) Criminal P. C. (1898), S. 209 (1) — "Discharge".

The word "discharge" is not defined in the Code. The word is used in the Code in relation to different sets of circumstances or situations. A discharge of the accused in one set of circumstances produces consequences which are not identical with a discharge in another set of circumstances. To say that the word "discharge" is used in the same sense throughout the Code, and that as it produces certain results in certain situations it must produce the same results in all situations—is to refuse to recognise the existence of the large variety of situations for which the Code makes provision. (Paras 6, 22)

Anno: Cr. P. C., S. 209 N. 6.

(d) Criminal P. C. (1898), S. 209 (1) — "Unless it appears ... ".

The clause "unless it appears..." in the context only means "and then proceed to try him for other offences." (Paras 7, 29)

Anno: Cr. P. C., S. 209 N. 11.

O. Chinnappa Reddy and P. Ramakrishna, for Petitioners; Public Prosecutor, for the State.

CASES CITED:

(A) ('01) 2 Weir 544: 24 Mad 136
(B) ('20) AIR 1920 Mad 94: 43 Mad 330: 38 Mad LJ 194: 21 Cri LJ 91
(C) ('45) AIR 1945 Mad 459: 1945-2 Mad LJ 139: 1945 Mad WN 85 Cr
(D) ('49) AIR 1949 Mad 66: 49 Cri LJ 597
(E) ('38) AIR 1938 Mad 396: 1938 Mad WN 38: 39 Cri LJ 335
(F) ('49) AIR 1949 Mad 430: 1949-1 Mad LJ 145: 1949 Mad WN 4 Cr: 50 Cri LJ 558
(G) ('53) AIR 1953 Mad 26: 1952-1 Mad LJ 507: 1952 Mad WN 749 Cr: 1953 Cri LJ 121
(H) ('93) 20 Cal 633
(I) ('52) AIR 1952 All 231: 1952 Cri LJ 440 (FB)
(J) ('28) AIR 1928 PC 254: 50 All 722: 29 Cri LJ 828
(K) ('19) AIR 1919 All 66: 20 Cri LJ 778
(L) ('48) AIR 1948 All 405: 49 Cri LJ 692
(M) (1900) 2 Weir 543: 23 Mad 225
(N) ('36) AIR 1936 Nag 87: 37 Cri LJ 715

Pursuant to an Order of Reference dated 14-11-52, by Chandra Reddy J. to a Bench and by a subsequent order of reference dated 15-1-53 by Govinda Menon and Basheer Ahmed Sayeed JJ. to a Full Bench, this petition coming on for hearing, the Court delivered the following judgment:

BALAKRISHNA AYYAR J.: The Station House Officer, Pulivendla, filed a charge sheet against seven persons for offences under Ss. 147, 148, 324 and 302 I. P. C. and S. 4(1), Madras Prohibition Act. The Stationary Sub-Magistrate, Pulivendla before whom the charge-sheet was laid, held an enquiry under Chapter 18, Criminal P. C., and, in exercise of the powers conferred on him by S. 209 of that Code, discharged accused 1 to 3 in respect of the offence under S. 302, I. P. C. This is what he said,

".....taking any view of the matter it is impossible for any Judge to find that A-1 to A-3 had a common intention to kill the deceased. So under those circumstances I feel compelled to discharge the accused for the offence of murder or culpable homicide

not amounting to murder with which they stand charge-sheeted. They shall however be charged for various other offences the evidence disclosed and shall be tried before me. Proceedings shall therefore be converted into one under Chapter 21 of the Criminal Procedure Code."

The Assistant Public Prosecutor, Grade II, Cuddappah, moved the District Magistrate in revision and he after hearing the Assistant Public Prosecutor and the advocate for the accused passed the following order:

"In the result the order discharging accused 1 to 3 is reversed and the Sub-Magistrate is directed to commit the accused 1 to 7 to take their trial before the Sessions Court, Cuddappah."

The accused thereupon moved this Court to revise the order of the District Magistrate. In view of the conflict of decisions that exist on the question, Chandra Reddy J. before whom the criminal revision petition came on for hearing, referred the matter to a Division Bench. The Division Bench consisting of Govinda Menon and Basheer Ahmed Sayeed JJ. in their turn have referred the matter to a Full Bench.

(2) The question which we have to answer may be thus formulated:

Where under S. 209(1) Crl. P. C., a Sub-Magistrate finds that there are not sufficient grounds for committing the accused for trial and directs such persons to be tried before himself or some other Magistrate, can the revisional powers under S. 437 be exercised before the conclusion of the trial before such Magistrate?

(3) Before attempting an answer to this question it is as well to examine the familiar sections once more. S. 437, Crl. P. C., so far as is here material, runs as follows:

"When, on examining the record of any case under S. 435 or otherwise, the .....District Magistrate considers that such case is triable exclusively by the Court of Session and that an accused person has been improperly discharged by the inferior Court the ..... District Magistrate may.....instead of directing a fresh enquiry order him to be committed for trial 'upon, the matter' of which he has been, in the opinion of the ..... District Magistrate, improperly discharged."

Then follow two provisos, the first of which requires the Magistrate to give an opportunity to the accused to show cause why commitment should not be ordered. The second one runs as follows:

"If such.....Magistrate thinks that the evidence shows that some other offence has been committed by the accused, such ..... Magistrate may direct the inferior court to inquire into such offence."

I would draw attention to the words "upon the matter" which occur in the body of the section. The word "matter" it appears to me is elastic enough to comprehend a single charge or a plurality of charges, a single offence or a plurality of the offences, a part of a case or the whole of a case. The word is also appropriate enough to cover cases where the same act is punishable under two or more sections of the Code. Let us suppose that 'X' is charged with having caused the death of 'Y' by stabbing him with a knife. The offence proved may be punishable under S. 324, 326 or 302, I. P. C. though the offences under Ss. 324 and 326 would stand merged in the offence under S. 302, I. P. C. Again if 'X' is charged with having committed robbery on 'Y' and having caused grievous hurt to him with a knife while committing the robbery the offence would be punishable under Ss. 379, 326 and 397 I. P. C. The word "matter" it seems to me is sufficient to comprehend every one of these aspects of the crime. It will be noticed that under the second proviso to S. 437, Cr. P. C., the word used is "offence", a term with a more definite connotation.

(4) The next section we have to pay attention to is 209 (1) which provides,

"When the evidence referred to in S. 208 sub-secs. (1) and (3) has been taken and has if necessary examined the accused for the purpose of enabling him to explain any circumstances appearing in the evidence against him, such magistrate shall, if he finds that there are not sufficient grounds for committing the accused person for trial, record his reasons & discharge him unless it appears to the Magistrate that such person be tried before himself or some other Magistrate, in which case he shall proceed accordingly.";

When a Magistrate has recorded all the evidence for the prosecution and all the evidence for the defence and has also completed the examination of the accused, he will be in possession substantially of all the material facts. At that stage S. 209, Cr. P. C., empowers him to do one of four things. (1) He can commit the accused to the Court of Session where he will be regularly tried. (2) He can say that no offence triable exclusively by a Court of Session has been made out, but that an offence triable by a First Class Magistrate appears to have been committed and may send up the case to the appropriate First Class Magistrate under S. 346, Cr. P. C. For example if a charge sheet is laid against an accused under S. 302, I. P. C., before a Second Class Magistrate, he may say that only an offence under S. 326 or S. 304-A, I. P. C., has been made out. In that case there will be no justification for committing the case to the court of session. The Magistrate will have no jurisdiction to try these offences himself since he is only a Magistrate of the Second Class. So he will send the case to a First Class Magistrate. (3) He may take the view that no offence triable exclusively either by the Court of Session or by a First Class Magistrate has been made out, but that only an offence which he himself is competent to try has been committed. Thus even though the prosecution may be for an offence under S. 302, I. P. C., still if he considers that the evidence discloses only an offence under S. 324, I. P. C., he will try it himself. (4) Finally he may take the view that no offence of any kind has been made out, in which case, the accused will be wholly discharged.

(5) It will be appreciated that when the Magistrate adopts the fourth course and discharges the accused what he really does is to exonerate him from the whole case and release him from further attendance in court in respect of that case. When he adopts course No. 3 what he does is to exonerate the accused in respect of the charge triable both by the Court of Session and by a First Class Magistrate; the accused would have been "discharged" in respect of those matters. But

only in respect of those matters. When he adopts course No. 2 what he does is to exonerate the accused in respect of the offences triable by the Court of Session; there would be a "discharge" of the accused in respect of that matter but that matter only. That is substantially the position and no amount of argument can alter that. Therefore when a Magistrate discharges an accused in respect of an offence exclusively triable by a Court of Sessions and proceeds to try him himself for an offence within his jurisdiction, on the language of S. 437, Cr. P. C., it will be open to the District Magistrate to direct the committal of the accused for trial "upon the matter of which he has been, in the opinion of the District Magistrate, improperly discharged." It would therefore appear that the order of the District Magistrate which the petitioners now ask this court to set aside was within its competence.

(6) Mr. Chinnappa Reddy for the petitioners, however drew attention to the word "unless" occurring in S. 209 (1), Cr. P. C. and argued that when a Magistrate decides to try an accused person himself or send him up for trial before another Magistrate, there cannot be a discharge of the accused within the meaning of the former part of that section; according to him the use of the word "unless" negatives the idea of a discharge. As the next step in this argument he contended that if there is no discharge within the meaning of S. 209 there can be no improper discharge either and therefore it would not be competent to the District Magistrate to set aside the non-existent order of discharge. Mr. Chinnappa Reddy next pointed out that the word "discharge" is used in Ss. 209 (1), 209 (2), 213, 253, 259, 333 and 494, Criminal P. C. and said that it is used in the same sense in all these sections and that the word "discharge" means discharge from the whole case. I think a fallacy is involved in this reasoning. The first thing is to bear in mind is that the word "discharge" is not defined in the Code. The next thing to bear in mind is that the word "discharge" is used in the Code in relation to different sets of circumstances or situations. A discharge of the accused in one set of circumstances produces consequences which are not identical with a discharge in another set of circumstances. To say that the word "discharge" is used in the same sense throughout the Code, and that as it produces certain results in certain situations it must produce the same results in all situations — to say that, is to refuse to recognise the existence of the large variety of situations for which the Code makes provision.

(7) All this apart, I fail to see why it should be said that there has been no discharge unless a person is discharged from the whole case. If a person can be acquitted on one charge and convicted on another charge at the same trial equally logically he can be discharged in respect of one offence and be tried in respect of another offence. The word "unless" does not create any difficulty. All that S. 209 (1), Criminal P. C. tells the Magistrate is this: If you find that there are not sufficient grounds to commit the accused for trial you will exonerate him and send him away from Court, but you are not bound to do that if you decide that he should be tried before you or before another magistrate. I do not think that S. 209 (1) says anything more than that.

(8) The view taken in this Court has been generally against the contentions of Mr. Chinnappa Reddy. The earliest of the cases is reported in — 'Krishnareddi v. Subbamma', 24 Mad 136 (A) the headnote of which runs as follows:

"Certain persons were charged before a Magistrate of the first class under S. 379, I. P. C. with the theft of a promissory note. The prosecution applied for a further charge to be framed under S. 477, I. P. C. but this the Magistrate declined to do, as, in his opinion, there was no direct evidence that the accused had destroyed or secreted the note. After hearing the evidence for the defence, the Magistrate acquitted the accused under S. 258 Criminal P. C. Application was then made to the Sessions Court to call for the records and direct the committal of the accused for trial for an offence under S. 477, I. P. C. The Sessions Court ordered that a further enquiry be made and that the accused be committed for trial. On its being contended, on revision, that the order of the Sessions Court was illegal on the ground that the accused had been acquitted and not discharged: Held: that the order of the Magistrate was in substance an order discharging the accused in respect of an alleged offence under S. 477, I. P. C. and that the Sessions Judge had jurisdiction to make the order sought to be revised."

At page 138 Benson J. stated:

"The complaint against the accused was that he committed an offence punishable under S. 477, I. P. C. Such offence is triable exclusively by the Court of Sessions. The Magistrate could neither acquit nor convict him of such offence. He was bound either to commit him to the Sessions Court or to discharge him. He did not commit him. The only alternative was to discharge him, and that, I take it is what the Magistrate really did do.....The mere omission of the Magistrate to say 'I discharge the accused so far as the offence under S. 477, I. P. C. is concerned' cannot alter the essential character of the Magistrate's proceedings."

Moore J. took a different view of the matter and so the case was placed before a Bench of three Judges and the order of the Court appears on pages 145 and 146. At page 146 the following passage occurs:

"From the terms of the Magistrate's order it is clear that he adjudicated upon the question whether there was any evidence against the accused in respect of the major offence. The Magistrate came to the conclusion that there was not, and he declined to charge him with the major offence. It seems to us that this is a "discharge" within the meaning of S. 209."

(9) 'Gandi Appa Razu v. Emperor', A. I. R. 1920 Mad 94 (B), is the next case in this Court. The facts there appear to have been as follows. The police laid a charge sheet under Ss. 147 and 302, I. P. C. The Magistrate commenced an enquiry under Chapter 18, Criminal P. C. but he declined to frame a charge either under S. 302 or 304, I. P. C. Instead he framed a charge under S. 147, I. P. C. and proceeded to try it himself. At that stage P. W. 1, on whose information the police had

laid a charge sheet, moved the District Magistrate under S. 435, Criminal P. C. to direct the committal of the case to Sessions. The District Magistrate sent the petition to the District Superintendent of Police and on receipt of a report from him dismissed the application. Subsequently, the Sub-Magistrate acquitted the accused under S. 258, Criminal P. C. in respect of the offence under S. 147, I. P. C. At this stage, the Sessions Judge was moved and he directed the committal of the accused to the Court of Session for offences under Ss. 147 and 304, I. P. C. The accused then came to this Court. A Bench of this Court set aside the order of the Sessions Judge so far as S. 147, I. P .C. was concerned on the ground that there had been an acquittal of the accused of the offence under that section and that S. 403, Criminal P. C. precluded the Sessions Judge from setting aside that acquittal. But, the order of the Sessions Judge was confirmed so far as it related to the charge under S. 304, I. P. C.

Now, in respect of the application that had been made to the District Magistrate, Krishnan J. who delivered the order of the court remarked,

"Now, it will be noticed that at the time the application was made, there was no express order of discharge as to S. 304, I. P. C. nor could an order of discharge be implied under the authority of — '24 Mad 136 (A), above referred to, as the trial had not come to a close as in that case, and it was still open to the Sub-Magistrate to frame further charges and commit under S. 347, Criminal P. C. if he thought fit to do so. There was thus no order of discharge to revise, and the application cannot be looked upon as one for that purpose."

This passage was cited as lending support to the proposition that so long as proceedings are pending before a Magistrate it cannot be said in law that there has been a discharge of the accused even though the Magistrate has framed charges only for a minor offence and refused to frame charges in respect of the offences exclusively triable by a Court of Session. On this passage, however, certain observations may be made. The first is that it appears to be inconsistent with the view expressed a little earlier in the course of the same order. This is the passage I have in mind:

"Though the complaint alleged facts against this accused constituting an offence under S. 302, I. P. C. the Sub-Magistrate disbelieved the evidence on the point, and did not frame any charge under S. 302 or 304, I. P. C. His action amounted in law to an order of discharge on those counts, even though no express order of discharge was recorded by him. See — '24 Mad 136 (A)'. That being so, it was open to the Sessions Judge under S. 436, Criminal P. C. to act suo motu and set aside the implied discharge....."

The next remark I would make is that in the end this Court confirmed the order of the Sessions Judge so far as it related to the offence under S. 304, I. P. C. thereby necessarily implying that there had been a discharge in that respect of the accused by the Magistrate under S. 209 (1), Criminal P. C.

In the third place, the learned Judge observed that the District Magistrate considered that the application which P. W. 1 made to him was not competent because, as he thought, the police were the proper parties who should have moved him and not P. W. 1.

The learned Judge accepted the principle of implied discharge laid down in — '24 Mad 136 (A)'. The learned Judge upheld the right of the Sessions Judge to revise such an implied order, if it was improper, in the exercise of his powers under S. 436, Criminal P. C. The learned Judge further held in that case that the prior attempt to move the District Magistrate to interfere in revision was no bar to the exercise of revisional powers by the co-ordinate authority, the Sessions Judge. The learned Judge pointed out that the District Magistrate himself did not treat it as a proceeding under S. 436, Criminal P. C. "the District Magistrate also seems to have treated it as an incompetent application as he declined jurisdiction under S. 435, Criminal P. C. and refused to call for the records....." That the revisional powers of the Sessions Judge were left untouched by the infructuous proceedings before the District Magistrate was also based by Krishnan J. on the ground

".....that at the time the application was made there was no express order of discharge under S. 304, I. P. C. nor could an order of discharge be implied under the authority of — '24 Madras 136 (A)', above referred to. as the trial had not come to a close as in that case and it was still open to the Sub-Magistrate to frame further charges and commit under S. 347, Criminal P. C....."

In my opinion, these observations should be construed with reference to the context in which they were made, and they must be confined to the facts of that case. The learned Judge does not appear to have intended to lay down as an inflexible rule of law that an order of discharge of a major offence cannot be implied at all when a charge for a lesser offence is framed, and the further proceedings under that charge before that Magistrate do not terminate. That would have been directly opposed to the principle laid down in — '24 Mad 136 (A)', the authority of which Krishnan J. never intended to challenge; "In fact a Magistrate cannot proceed under the latter part of sub-s. (1) of S. 209 until he has discharged the accused under the former part of the sub-section" (at page 136 — 'Krishnareddi v. Subbamma', 24 Mad 136 (A)). It is the refusal to frame a charge for the major offence and not the subsequent conviction or acquittal of the minor offence, for which a charge was framed, that furnishes the basis for implying an order of discharge of the major offence. Besides, in the case before us there was an express order of discharge before the Magistrate framed charges for the lesser offences.

(10) 'In re Lakshmayya', AIR 1945 Mad 459 (C), was a case in which a charge sheet was filed by the police for an offence under S. 307, I. P. C. The Sub-Magistrate who held the enquiry under Chapter 18, Criminal P. C. decided that no case had been made out under S. 307, I. P. C. He however framed charges under Ss. 147, 323 and 325, I. P. C. and converted the case into a calendar case. In revision the Additional District Magistrate directed that the accused be committed to the Court of Session. The accused person then came up in revision to this court and Happell J. who heard the petition dismissed it on the

ground that so far as the charge under S. 307, I. P. C. was concerned the accused had been discharged and that therefore the Additional District Magistrate was competent to set aside the order of discharge.

(11) The next case of this Court that requires to be examined appears in — 'In re Jayaraman AIR 1949 Mad 66 (D)'. There, some twelve persons were charged before a First Class Magistrate for offences under Ss. 147, 148, 149, 332, 225 and 379, I. P. C. The Magistrate discharged accused 5 to 12 and framed charges against the remaining four accused under various sections of the Code. At that stage the prosecution filed an application before the District Magistrate under Ss. 435 and 436, Cr. P. C., praying that the order of discharge be set aside. The learned Additional District Magistrate did so and directed the First Class Magistrate to enquire into the matter afresh. The accused persons then came to this Court. Govinda Menon J. in allowing the petition observed as follows:

"In my opinion, the proper time at which the propriety of a discharge like the one in question here, can be agitated in revision is only after the court of enquiry or trial has finally disposed of the matter. It would not be proper for a Magistrate discharging some accused and framing charges against others to express any definite opinion regarding the credibility or otherwise of the witnesses examined for the prosecution. It may be that a Magistrate may be inclined to believe the evidence as against some of the accused and not believe the same as regards the others. It is very embarrassing for a Magistrate to give reasons at such a stage and therefore the Court of first instance in this case was perfectly justified in not giving any reason for discharging the accused at that stage. Of course he is bound to give his reasons when he finally either acquits or convicts the other accused persons against whom charges have been framed. In a similar case in — 'Govindaraj v. Emperor', AIR 1938 Mad 396 (E), Venkataramana Rao J. has laid down that it would be competent to a magistrate to discharge some accused and frame charges against others without giving any reasons. Till the charge against the remaining accused is disposed of by a final order the trial court should be deemed to be in seisin of the whole and so long as it is in charge thereof the reasons in regard to the order of discharge can be given at the final stage. There is nothing in the language of S. 253, Cr. P. C., which precludes the court from doing so."

The learned Judge went on to observe:

"Of course the language of the section would plainly indicate that a Magistrate should give his reasons at the time he pronounces the order of disc' a ge nd if it 's the final order in the case he is bound to give his reasons. The moment he pronounces the final order, he becomes 'functus officio' and he is no longer in charge of the case. But in a case of this nature (where the charges have been framed in the case of some) I am inclined to think that he has not become 'functus officio' and it would be open to him to defer his reasons."

I am in entire agreement with the observations made by the learned Judge. I would therefore hold that the Additional District Magistrate was not justified in setting aside the order of discharge in the present case. As a matter of practice and convenience, it would always be better if the applications by the prosecution for setting aside orders of discharge in cases where charges have been framed against some of the accused along, or against all the accused under some sections alone, were made only after the court finally disposes of the matter."

It will be noticed that Govinda Menon J. did not say that where the Magistrate framed charges under some sections and declined to frame charges under other sections there has been no discharge as regards matters in respect of which the Magistrate had refused to frame charges. Nor do I think that the learned Judge intended to lay down any firm and inflexible rule when he made the observations which I have just quoted. At what stage the revisional authority should be moved and at what stage it should interfere would in a very material degree depend upon the facts peculiar to each case. It may be added that in the instant case the Sub-Magistrate has given full reasons for the view he took. That Govinda Menon J. did not intend to lay down any rule of the kind which Mr. Chinnappa Reddy would read into that decision appears from what he himself said in — 'Parameswarayya In re,', AIR 1949 Mad 430 (F). He then observed:

"When the Sub-Magistrate framed a charge under S. 337, I. P. C., and did not frame one under S. 307, I. P. C., his action amounted to a discharge of the accused of an offence under the latter section. In that case, it is open to the District Magistrate under Ss. 436 and 437 Cr. P. C., either to order a further enquiry or to order commitment to the court of sessions. The fact that the court of first instance has convicted the accused of an offence under S. 337, I. P. C. will not in any way interfere with the order of discharge under S. 307, I. P. C."

(12) The last decision of this court is reported in — 'G. Mathayya in re', AIR 1953 Mad 26 (G). That proceeds on the view that where the committing Magistrate holds that no case has been made out against the accused for an offence exclusively triable by the Court of Sessions and framed charges only in respect of offences triable by him there has been a discharge on the graver offence, and, in such circumstances, the District Magistrate is competent to interfere in revision, set aside the order of discharge and direct the committal of the accused to sessions.

(13) It will thus be seen that the decisions of this court have been generally against the contentions of Mr. Chinnappa Reddy. He, however, pressed for our acceptance the view which he said had been taken in — 'Baijanath Pandey v. Gauri Kanta Mantal', 20 Cal 633 (H). In that case certain persons were prosecuted for dacoity. The Magistrate found that no sessions offence was prima facie established and so framed charges against the accused only for offences under Ss. 380 and 448 I. P. C. Finally, he acquitted the accused on these charges also. Thereafter he gave sanction to prosecute the complainant under S. 211, I. P. C. The complainant moved the sessions Judge in revision.

The Sessions Judge then proceeded to consider the whole case. He considered that a proper enquiry had not been made, that all the evidence available had not been taken and that if that had been done, a sessions case might be established. Therefore, he directed the Magistrate to make further enquiry and proceed in accordance with the result of that enquiry. The accused then went to the Calcutta High Court in revision. The learned Judges observed:

"We have no doubt that the Sessions Judge in this matter has exercised a jurisdiction which was not vested in him by law. If he proceeded to exercise the powers of revision as he seems to have done, he was competent to send for the record for any of the purposes mentioned in S. 435. But he was not competent under S. 436 to direct a fresh enquiry to be made, inasmuch as the accused had not been improperly discharged of an offence triable exclusively by a court of session but had been acquitted of an offence within the Magistrate's jurisdiction in proceedings as already pointed out under Ss. 209, 234 and 258. The Sessions Judge, as a matter of fact has exercised a jurisdiction vested in him as an appellate court under S. 423, as if an appeal had been presented to him from the order of acquittal passed by the magistrate."

When we examine this passage carefully it will be seen that it is not an unqualified authority for the proposition that so long as there has not been a discharge from the whole of the case a Sessions Judge or a District Magistrate cannot interfere in revision even though a committing Magistrate improperly discharges an accused of offences triable exclusively by a Court of Session. It will be noticed that the learned Judges took the view that the accused had not been improperly discharged. If the accused had not been improperly discharged, obviously neither the Sessions Judge, nor the District Magistrate could interfere in revision. In so far as it can be treated as an authority for the view which Mr. Chinnappa Reddy tried to persuade us to accept, it was dissented from in — '24 Mad 136 (A)', and, speaking for myself, I prefer the view that has been taken by this Court.

(13) The last of the decisions which Mr. Chinnappa Reddi cited and which needs examination is reported in — 'Nahar Singh v. The State', AIR 1952 All 231 (I). The facts there were these: The police laid a charge sheet against the accused under S. 304, I. P. C. The Magistrate commenced proceedings under Chapter 18, Cr. P. C. He recorded the evidence for the prosecution and the defence and framed a charge under S. 304-A, I. P. C. He did not however pass an order explaining why he thought that the offence did not fall under S. 304 but only under S. 304-A, I. P. C. A son of the deceased moved the Sessions Judge in revision, who took the view that the omission of the Magistrate to farme a charge under S. 304, I. P. C. amounted to a discharge of the accused in respect of that offence. He therefore directed the committal of the accused. The accused then went to the High Court, which set aside the order of the Sessions Judge on the ground that there had been no discharge by the Magistrate of the accused in respect of the offence under S. 304, I. P. C.

(14) I have read with great care the judgments of all the three learned Judges, but I must say that I am not persuaded by their reasoning. One is tempted to ask: if there was no discharge of the accused in respect of the offence under S. 304, I. P. C., what happened to that charge or accusation? One answer suggested by Desai J. is that an acquittal would be implied. But surely this is hardly a satisfactory answer since the Magistrate enquiring into an offence exclusively triable by a court of session has no power either to convict or to acquit. How can there be an acquittal by a Court which is not competent to pass such an order? How again can an acquittal be implied where a discharge cannot be implied, since acquittal and discharge both imply an exoneration of the accused, one main difference between the two forms of exoneration being that in the case of an acquittal the accused is entitled to the protection conferred by S. 403, Cr. P. C.? This is not by any means the end of the difficulties which the view taken in the Allahabad High Court would raise. If a committing Magistrate improperly refuses to frame a charge in respect of an offence exclusively triable by a court of Session and tries the accused for a minor offence, and finally disposes of those offences how can his mistake be put right? Desai J. suggested that the complainant can file another complaint, but ordinarily that complaint would have to be presented to the same Magistrate, and it can hardly be expected that he would take a different view merely because a new copy of the old complaint is handed over to him. Desai J. also suggested that a commitment can be ordered by the High Court; but consistently with the view taken in that decision how this can be done? As I explained before, if a discharge cannot be implied an acquittal cannot be implied either, and, if there has been neither a discharge nor an acquittal, what order can the High Court set aside?

Desai J. finally suggested that the Government can file an appeal against the acquittal, but, as already pointed out, the assumption that there has been an acquittal cannot be justified at all.

Desai J. who delivered the leading judgment in the case, remarked:

"If he (the Magistrate) retains the power of commitment, it would be difficult to say that the accused has been discharged."

With all respect, I regret my inability to follow this. S. 347, Cr. P. C., merely gives the Magistrate a further opportunity to reconsider his decision. It does not imply that a decision has not already been arrived at or given. Besides the circumstances that the Code gives the Committing Magistrate an opportunity to re-examine his earlier view, does not in any way take away the revisional powers either of the District Magistrate or of the Sessions Judge.

With the views expressed by Desai J.:

"that so long as some charge has been framed to cover the allegation there is no discharge" (page 236, col. 2); that "the discharge contemplated under the Code is discharge from the case without regard to the offence" (page 238, Col. 1) and that, "Even if the Magistrate writes out a detailed order giving reasons for framing a charge for minor offence and for not framing a charge for the major offence and even if he says that he dis-

charges the accused of the major offence, there is no discharge."

I regret, with all respect, my inability to agree.

(15) I prefer the view that has been well established in this Court and would answer the question raised in the affirmative.

(16) RAJAGOPALAN J: I agree with Balakrishna Aiyar J.

(17) CHANDRA REDDY J.: I agree with the order proposed by my learned brother Balakrishna Ayyar J. I shall however give my reasons in support of the conclusion.

(18) The question for consideration before the Full Bench is:

"Where under S. 209(1) Cr. P. C., a magistrate finds that there are not sufficient grounds for committing the accused person for trial and directs that such person should be tried before himself or some other magistrate can the revisional powers under S. 437, Cr. P. C., be exercised before the conclusion of the trial before such magistrate?"

(19) The circumstances that led up to this question are the following: The petitioners were charge-sheeted before the Stationary Sub-Magistrate of Pulivendla for offences under Ss. 147, 148, 324 and 302 read with S. 34, I. P. C. After hearing the prosecution case, the Stationary Sub-Magistrate came to the conclusion that no prima facie case was made out against the petitioners under S. 302 read with S. 34, I. P. C., and that the evidence disclosed only lesser offences against them which were not exclusively triable by the Sessions Judge. So he framed charges against the petitioners under Ss. 147, 148 and 324 and proceeded with the trial of the case. Treating this as an order of discharge as regards the graver offence under S. 302 read with S. 34, I. P. C. the prosecution moved the District Magistrate to revise the order of the Stationary Sub-Magistrate. The District Magistrate set aside this order of the Sub-Magistrate and directed that the petitioners should be committed to take their trial before the Sessions court. Against that order the present revision case has been filed.

(20) In support of this petition, it was contended by Mr. Chinnappa Reddy that S. 437, Cr. P. C., does not confer jurisdiction on the District Magistrate to interfere with an order like the present one as there was no discharge in law within the meaning of that section and that in any event so long as the proceedings before the Sub-Magistrate are not terminated, it could not be said that there has been a discharge of the accused of the graver offence as it is always open to him under S. 347, Cr. P. C., to commit the accused to sessions at a later stage. At the outset it must be mentioned that it is under S. 209, Cr. P. C. that the order that has given rise to this petition was passed by the Stationary Sub-Magistrate and it is the provisions of this section that form the subject-matter of this enquiry.

(21) The learned counsel urges that three views may possibly be taken of S. 209, Cr. P. C. (1) The order amounts to a discharge and so it is competent for the District Magistrate or the Sessions Judge to interfere under S. 437, Cr. P. C. (2) If the Magistrate decides to proceed with the trial of the case before himself there can be no discharge which can be revised under S. 437, Cr. P. C. (3) The discharge of graver offences springs into existence when the case ends finally either in a conviction or an acquittal in respect of lesser offences before the Magistrate and it is only on the termination of these proceedings that the revisional jurisdiction under S. 437, Cr. P. C. could be invoked.

According to the learned counsel the first view is opposed to the plain meaning of the words of S. 209 and to the signification of the word "discharge" which occurs in other parts of the Code as well as in some of the decided cases. He invited our attention to Ss. 213, 253, 259 and 333 where the word "discharge" is used and argues that since in those sections that expression is meant a total dropping of all the proceedings, the same meaning must be attributed to the word "discharge" in S. 209, Cr. P. C. also.

(22) Before I meet this argument, I will refer to the terms of S. 209. S. 209, Cr. P. C. runs thus:

"209(1): When the evidence referred to in S. 208, sub-secs. (1), (3) has been taken and he has (if necessary) examined the accused for the purpose of enabling him to explain any circumstances appearing in the evidence against him, such Magistrate shall, if he finds that there are not sufficient grounds for committing the accused person for trial, record his reasons and discharge him, unless it appears to the Magistrate that such person should be tried before himself or some other Magistrate, in which case he shall proceed accordingly.

(2) Nothing in this section shall be deemed to prevent a Magistrate from discharging the accused at any previous stage of the case, if, for reasons to be recorded by such Magistrate, he considers the charge to be groundless."

Can it be predicated that the word "discharge" is used as synonymous with the total dropping of all proceedings in all the sections referred to above? On an examination of all the material sections, it appears to my mind that the expression is not used in the same sense in all the sections wherever that expression occurs. For instance S. 494 of the Code says:

"Any Public Prosecutor may, with the consent of the court, in cases tried by jury before the return of the verdict, and in other cases before the judgment is pronounced, withdraw from the prosecution of any person either generally or in respect of any one or more of the offences for which he is tried; and upon such withdrawal, (a) if it is made before a charge has been framed the accused shall be discharged in respect of such offence or offences; (b) if it is made after a charge has been framed, and when under this Code no charge is required, he shall be acquitted in respect of such offence or offences."

It is manifest from this section that it does not contemplate the total dropping of all the proceedings. It is open to a Public Prosecutor with the leave of the Court to withdraw a charge in respect of one offence and proceed with another offence against the same individual. Therefore, I am unable to accede to the argument based on a comparison of the relevant provisions of the Code.

(23) Mr. Chinnappa Reddy laid particular emphasis on the expression "unless it appears to the Magistrate" in S. 209, Cr. P. C. and urges that the Legislature in so expressing itself in-

tended to exclude the possibility of a discharge when the Magistrate frames charges for a lesser offence and proceeds himself with the trial of the case. It was also maintained by him that the decision of the Magistrate to frame charges for a lesser offence and proceed with the trial of the case himself would not amount to a discharge of the graver offence, in view of the provisions of S. 347, Criminal P. C. Section 347, Criminal P. C. provides :

"(1) If in any inquiry before a Magistrate or in any trial before a Magistrate before signing judgment, it appears to him at any stage of the proceedings that the case is one which ought to be tried by the Court of Session or High Court, and if he is empowered to commit for trial, he shall commit the accused under the provisions hereinbefore contained."

The learned counsel poses the question as to how a Magistrate could revise his own order and commit the accused.

(24) For these arguments reliance was placed on the Full Bench ruling of the Allahabad High Court in — 'AIR 1952 All 231 (I)'. There the learned Judges laid down that when a person is accused of a major offence before a Magistrate and the latter chooses to frame a charge for a minor offence and proceeds to try the offender himself it does not amount to a discharge because the case is proceeding against him on the same facts and consequently it is not competent for the District Magistrate or the Sessions Judge to exercise revisional jurisdiction under S. 437, Criminal P. C. The 'ratio-decidendi' of this decision is: (a) When an accused is convicted, or acquitted of an offence he must be deemed to have been acquitted of all the other offences which could have been made out from the evidence on record; and as a person cannot be said to be both discharged and acquitted it follows that there was no discharge at all in such a case. (b) If the District Magistrate or the Sessions Judge could order an enquiry into the charge for the graver offence, there would be two trials and the Legislature could not have intended that the accused should be subjected to two trials. (c) If the Magistrate retains the power for commitment it would be difficult to say that the accused has been discharged and besides it is open to the Magistrate to commit the accused at a later stage under S. 347, Cr. P. C. (d) A comparison of the various sections in which the word "discharge" is used indicates that it was only a complete dropping of all the proceedings that was contemplated by that expression whenever it is used. The learned counsel for the petitioners largely based his arguments on the reasoning of the Full Bench.

In support of the view that the decision not to commit the accused to the sessions for trial for graver offence does not result in discharge of that offence but amounts to an acquittal, reliance was also placed by the learned Judges in that last mentioned case on a ruling of the Privy Council in — 'Kishan Singh v. Emperor', AIR 1928 PC 254 (J). With great respect to the learned Judges, I must observe that this ruling has no bearing at all on the point. All that was laid down by their Lordships of the Judicial Committee was that the High Court should not interfere in revision with an order of acquittal when there was appeal competent against such an order. I fail to see how there can be said to be an acquittal of an offence in respect of which there has been no charge, no trial and above all when the Magistrate before whom the accusation is made has no jurisdiction either to acquit or convict. In this connection, I may refer to the opinion expressed in the leading judgment in —'AIR 1952 All 231 (I)', that the prosecution is not precluded from filing a charge sheet against the accused for the graver offence on the same set of facts as S. 403, Cr. P. C., is not a bar to such a course. It appears to me that these two opinions are irreconcilable. The learned Judges say that there could not be both discharge or acquittal in respect of an offence. It means that there can be either an acquittal or a discharge. Hence if there is no acquittal there must be a discharge even if it is not so expressed. If the basic assumption that there is an acquittal in such a situation goes, it follows there is a discharge.

As regards the difficulty of the two trials envisaged in the judgment it looks to me that it is not a substantial one. It is not necessary to proceed with two trials simultaneously. The revising authority can stay the proceedings before the Magistrate and if as a result of the revision petition there is a direction for the committal of the accused person to take his trial before the Sessions court for graver offences, the Magistrate can commit the accused to the sessions for that offence also.

With reference to the argument based on S. 347, Cr. P. C., that section confers a general power on the Magistrate to commit an accused person at a later stage not only in the case of an accusation of an offence exclusively triable by the Sessions Court but in a case where the charge sheet laid is for an offence triable by a Magistrate as well. Merely because an enabling provision is enacted in S. 347, Cr. P. C. that does not take away the power of a superior Magistrate or a Sessions Judge to correct any error committed by the Magistrate. It is also my opinion that the power conferred upon a Magistrate under S. 347, Cr. P. C. is not in any way inconsistent with the view that the decision to frame a charge for lesser offence is tantamount to an implied discharge of a graver offence.

(25) I may remark that the view taken in — 'AIR 1952 All 231 (F. B.) (I), is opposed to the uniform course of decisions of our court on this subject the leading authority being — '24 Mad 136 (A)'. The reasons given by the learned Judges for dissenting from — '24 Mad 136 (A)', do not commend themselves to me. Further, a view contrary to that expressed in — 'AIR 1952 All 231 (F. B.) (I)', was taken at least in two cases in that court in — 'Sheo Narain v. Radhamohan', AIR 1919 All 66 (K)', which following —. '24 Mad 136 (A)', to which reference will be made immediately held that the order of the Magistrate framing a charge for a lesser offence amounts to a discharge of the accused for more serious offence. To the same effect is the decision of Sapru J. in — 'Amir Hasan v. Rex', AIR 1948 All 405 (L). In this case also reference is made to — '24 Mad 136 (A)'.

(26) '24 Mad 136 (A)' came up before a special Bench composed of White C. J., Subramaniam and Davies JJ. on a difference of opinion between Benson and Moore JJ., on the interpretation of S. 209, Cr. P. C. There three persons

were charged before a Magistrate for theft of a promissory note executed by the predecessor-in-interest of one of them in favour of the predecessor-in-interest of the complainant. The prosecution wanted that a charge should be framed under S. 477, I. P. C. But the Magistrate declined to do so on the ground that there was no evidence to justify such a charge. Ultimately he acquitted them. Thereupon the Sessions Judge was moved to direct the Magistrate to commit the accused for an offence of secreting and destroying the promissory note. The Sessions Judge allowed the revision petition and directed the commitment under S. 477, I. P. C. The question that was raised before the Bench was that the Sessions Judge had no jurisdiction to order the committal for trial in that there was no discharge as contemplated in S. 209, Cr. P. C. Benson J. negatived this contention and dismissed the petition on the ground that the Sessions Judge had jurisdiction to make the order, while Moore J. thought that there was no discharge by the Magistrate within the meaning of S. 209, Cr. P. C. and it was therefore not competent to the Sessions Judge to exercise powers under S. 437, Cr. P. C. The Special Bench agreed with the view taken by Benson J. The position was summed up by the learned Judge thus:

"If, in the opinion of the Magistrate, there is no evidence to warrant a charge for an offence exclusively triable by a Court of Session, he may 'discharge' the accused in respect of the alleged offences & having done so, may proceed as regards the minor offence or offences under Chapter 21 or other appropriate chapter. In fact, a Magistrate cannot proceed to act under the latter part of sub-sec. 1 of S. 209 until he has 'discharged' the accused under the former part of the sub-section."

In my opinion this embodies the correct exposition of law enacted in S. 209. In this case the Bench decision in — 'Queen-Empress v. Hanumantha Reddi', 23 Mad 225 (M), which merely followed — '20 Cal 633 (H)', was dissented from. With respect to the learned Judges who decided last mentioned two cases, I must observe they are based on misconception of the effect of the omission to frame a charge for a graver offence under S. 209, Cr. P. C. as they thought that a decision of the Magistrate not to commit the accused person to trial and to frame charges for minor offences triable by him amounted to an acquittal of the major offence.

(27) The ruling in — '24 Mad 136 (A)', was followed in — 'AIR 1920 Mad 94 (B)'. Krishnan J. who delivered the judgment on behalf of the Bench remarked that when a Magistrate disbelieved the evidence of the prosecution and did not frame a charge for the major offence that amounted in law to an order of discharge on those counts despite the omission of the Magistrate to make express order of discharge. I may have to refer to another portion of the judgment in this case which has given rise to the contention that the revisional jurisdiction could be invoked only after the termination of the proceedings before a Magistrate, at another place.

(28) In — 'Ganga Datta v. Emperor', AIR 1936 Nag 87 (N). Gruer J. of Nagpur High Court following the ruling in — '24 Mad 136 (A)', laid down that framing of charges on a minor section is equivalent to the discharge of the accused on major counts. A Bench of the Lahore High Court also accepted the principle laid down in — '24 Mad 136 (A)'.

'24 Mad 136 (A)' was followed by Happell J. in — 'AIR 1945 Mad 459 (C)', by Govinda Menon J. in — 'AIR 1949 Mad 430 (F)', and by Ramaswami J. in — 'AIR 1953 Mad 26 (G)'. There are some other decisions bearing on this topic to which I need not refer. Suffice it to say that the weight of authority is in favour of the view we have taken in this case.

(29) Mr. Chinnappa Reddi contends that the ruling in — '24 Mad 136 (A)', requires reconsideration as the learned Judges failed to consider the meaning of the expression "discharge" which occurs in various sections of the Code and also the meaning of the word "unless" in S. 209. As regards the first part of it, I have already stated that this term has not got the same connotation as used in different sections of the Code. With reference to the other argument, it looks to me that the clause "unless it appears ....." in the context only means "& then proceed to try him for other offences."

(30) In this context, the last part of S. 437 (1) "to be committed for trial upon the matter of which he had been, in the opinion of the .....improperly discharged" may be considered. In my opinion the expression "matter" is wide enough to include any offence and is not used in the specific sense to mean the allegations constituting the accusation. For these reasons I hold that the refusal of the Magistrate to frame charges for the more serious offence is tantamount to an implied discharge and the failure of the Magistrate to pass an express order of discharge and to record reasons therefor does not in any way affect the matter.

(31) The next point is whether the jurisdiction of the Magistrate cannot be invoked till the proceedings before the Magistrate come to an end. As already pointed out, the basis of this argument is mainly the opinion expressed by the Bench in — 'AIR 1920 Mad 94 (B)'. The relevant passage in that decision is at page 95:

"Now it will be notified that at the time the application was made there was no express order of discharge as to S. 304 I. P. C. nor could an order of discharge be implied under the authority of — '24 Mad 136 (A)', above referred to as the trial had not come to a close, as in that case, & it was still open to the Sub-Magistrate to frame further charges and commit under S. 347, Cr. P. C., if he thought fit to do so."

(32) In my opinion the fact that the Magistrate is empowered to order commitment under S. 347, Cr. P. C. at a later stage has really no material bearing on this question, and I have already adverted to this aspect of the matter. I fail to see any rational basis for this view. If really there is an implied order of discharge it does not stand to reason that the prosecution has to wait till the termination of the proceedings before the Magistrate. The view taken by the learned Judges implies that the order of discharge springs into existence only after the proceedings before the Magistrate end either in an acquittal or on a conviction. It looks to me that the very basis of the judgment in that case that there is an implied discharge in the circumstances stated there is opposed to the notion that the order of

discharge comes into effect only at the end of the proceedings before the Magistrate. This theory can be supported only on the assumption that it is only the conviction or acquittal of the minor offence by a Magistrate that would give rise to an order of discharge. If that basis is not accepted, there can be no impediment in the way of the exercise of revisional powers under S. 437, Cr. P. C. Mr. Chinnappa Reddy next called in aid some observations of Govinda Menon J. in — 'AIR 1949 Madras 66 at p. 67 (D)'.

"As a matter of practice and convenience it would always be better if the applications by the prosecution for setting aside orders of discharge in cases where charges have been framed against some of the accused alone or against all the accused under some sections alone, were made only after the court finally disposes of the matter."

But I do not think the learned Judge intended to lay down any invariable rule. These remarks should be understood with reference to the circumstances of the case.

(33) It follows that it is competent for the District Magistrate or the Sessions Judge to revise the order of discharge without waiting for the termination of the proceedings before the Magistrate. That, in my opinion, is the only logical result of the view that the decision to proceed under the latter part of S. 209(1) Cr. P. C. amounts to an order of discharge. Thus the question is answered in the affirmative.

A/V.S.B. Answered accordingly.

A. I. R. 1953 MADRAS 810 (Vol. 40, C. N. 305)

RAJAMANNAR C. J. AND VENKATARAMA AYYAR J.

M. P. S. Al. Alagappa Chettiar, Appellant v. Nachiappa Chettiar, Respondent.

A. A. O. No. 99 of 1951, D/- 30-11-1951.

Debt Laws — Madras Agriculturists' Relief Act (4 of 1938), Ss. 19, 20 — Retrospective effect — (Madras Merged States (Laws) Act (35 of 1949), S. 6) — (Madras General Clauses Act (1 of 1891), S. 8) — (General Clauses Act (1897), S. 6) — (Civil P. C. (1908), Pre.).

Decree in 1945 — Plea that defendants were entitled to relief under provisions of Pudukottai Agriculturists' Relief Regulations (15 of 1938) rejected and defendants held not to be agriculturists — Application under S. 20 of Madras Agriculturists' Relief Act for stay of execution proceedings to enable defendant to file application under S. 19 of the Act — Held that the Madras Agriculturists' Relief Act 4 of 1938 which came into force in the territory of Pudukottai on 1-1-1950 was applicable to this case, and the application made by the appellant under S. 20 of that Act must have been granted. AIR 1937 Mad 232 (FB) and AIR 1949 FC 135, Foll.

(Paras 5, 6, 7, 12, 14, 16, 19)

Anno: G. C. Act, S. 6 N. 2; C. P. C., Pre., N. 3.

K. S. Ramabhadra Iyer, A. Sundaram Iyer and V. Sundara Vyas, for Appellant; K. V. Ramachandra Iyer, for Respondent.

CASES CITED:

(A) ('37) AIR 1937 Mad 232: 1937-1 Mad LJ 105 (FB)

(B) (1899) 1 QB 406: 68 LJ QB 257

(C) ('49) AIR 1949 FC 135: 1949 FCR 292 (FC)

JUDGMENT: This case has given me some difficulty mainly because of an omnibus application of a set of laws in force in a particular State to another State which had its own set of corresponding laws differing in material particulars, without any attempt to make necessary amendments and alterations.

(2) There is no dispute as to the facts. The appellant is one of the judgment-debtors and the respondent is the decree-holder in O. S. No. 341 of 1944 on the file of the Chief Court of Pudukottai which was a suit to recover the amount due in respect of three deposits. The decree was passed on 31-3-1945. On behalf of the defendants, a plea was raised that they would be entitled to relief under the provisions of the Pudukottai Agriculturists' Relief Regulations 15 of 1938. The Court held that the defendants could not be considered to be agriculturists and rejected the plea. There was an appeal by the defendants which was dismissed. The particular plea under the above Regulation was not pressed before the appellate court. In 1947, the State of Pudukottai was merged in British India and thereafter began to be administered as part of the Province of Madras. Nevertheless, the laws in force in that State continued in force until eventually the Madras Merged States (Laws) Act 35 of 1949 was passed by which certain Acts both of the Central Legislature and of Madras were made applicable to the territory which was once Pudukottai State from 1-1-1950 and the corresponding laws of the Pudukottai State were repealed. It is necessary to refer to the following sections of this Act:

"3. So much of the enactments specified in the First Schedule as extends to the Province of Madras and relates to matters with respect to which the Provincial Legislature has power to make laws for the Province, is hereby extended to, and shall be in force, in, the merged State of States specified in the corresponding entry in the first column thereof.

... ...

5. If, immediately before the commencement of this Act, there is in force in any merged State, an Act, Ordinance, Regulation or other law corresponding to an enactment specified in the First Schedule, whether such Act, ordinance, regulation or other law is in force by virtue of an Order under the Extra Provincial Jurisdiction Act, 1947, or by virtue of any other legislative power, such corresponding law shall, upon the commencement of this Act, stand repealed to the extent to which the law relates to matters with respect to which the Provincial Legislature has power to make laws for the Province."

One of the enactments mentioned in the schedule is Madras Act 4 of 1938, the Madras Agriculturists' Relief Act.

(3) The decree in O. S. No. 341 of 1944 was being executed by means of successive petitions, the last of which was E. P. No. 274 of 1950. The appellant before us, who was impleaded as the seventh defendant on the death of his father, the first defendant filed an application, E. A. No. 1152 of 1950 in the court of the Subordinate Judge of Pudukottai under S. 20 of the Madras Agriculturists' Relief Act for

stay of execution proceedings in E. P. No. 274 of 1950 to enable him to file an application under S. 19 of that Act. The respondent-decree-holder opposed the application 'inter alia' on the ground that the application was incompetent and misconceived. The learned Subordinate Judge held that the Madras Agriculturists' Relief Act was not applicable to the case and dismissed the application with costs, without going into the merits. His decision was based mainly on the saving provisions contained in clause (a) of S. 6(1) of the Merged States Act, which runs thus :

"The repeal by S. 5 of this Act of any corresponding law in force in any merged State immediately before the commencement of this Act shall not affect

(a) the previous operation of any such law."

He held inasmuch as the debt in question had already been dealt with in the suit under the Pudukottai Regulation, it was a case in which the previous law had operated and determined the rights of parties and the new Act was not intended to affect transactions already dealt with under the previous corresponding law. The appeal is against this decision of the Subordinate Judge.

(4) It was contended on behalf of the appellant that under S. 3 of the Merged States Act the Madras Agriculturists Relief Act came into force in Pudukottai on 1st January 1950 and simultaneously the corresponding Pudukottai Regulation stood repealed under S. 5 of the Act, and therefore on and after 1st January 1950 the appellant could claim relief under Madras Act 4 of 1938. Section 6(1)(a) of the Merged States Act, he further contended, had no application to this case, because there had been no previous operation of the Pudukottai Regulation. What was held in the suit was that the Regulation did not apply to the case and therefore it could not be said that the previous law operated on the case.

(5) Undoubtedly, on and from 1st January 1950 the Madras Agriculturists Relief Act must be deemed to be in force in the territory which was formerly the State of Pudukottai. Section 19(1) of the Act, which was a part of the original Madras Act 4 of 1938 before it was amended by Act 23 of 1948 confers a right on a judgment debtor against whom a decree had been passed before the commencement of the Act for the repayment of a debt to apply for amendment of the decree in accordance with the provisions of the Act. The words "before the commencement of this Act" must obviously be construed in this case as "before 1-1-1950." If, on the other hand, the words are taken literally and to mean the commencement of the Madras Act in 1938, then there would be the anomaly that S. 13 would be applicable without the petitioner ever having had the opportunity of invoking the benefit of that section. This conclusion is also supported by the provision made in S. 7 of the Merged States Act which enacts that for the purpose of facilitating the application in any merged State of any of the Acts made applicable by the Act, any court or other authority may construe such enactment with such alterations not affecting the substance as may be necessary or proper to adopt it to the matter before the court or other authority. As the decree in this case was certainly passed before 1-1-1950, the application made by the appellant was 'prima facie' maintainable. But the learned Judge considered that the saving provision in S. 6(1)(a) of the Merged States Act prevented the application of the Madras Agriculturists Relief Act to this case, because the matter had been dealt with already under the Pudukottai Regulation. He called into aid the well-established rule of statutory construction that no Act should be presumed to have a retrospective operation and held that the new Act could not be construed as depriving any party of rights which had vested in him by reason of proceedings taken under the repealed law.

(6) No rule of construction is more firmly established than this that a retrospective operation is not to be given to a statute so as to impair an existing right. That is the general rule. But no one can deny the competency of the Legislature to pass clearly, or by necessary and distinct intendment, to have retrospective operation; there is nothing inherently illegal on that account.

"A statute is to be deemed to be retrospective which takes away or impairs any vested right acquired under existing laws or creates a new obligation or imposes a new duty or attaches a new disability in respect to transactions or considerations already passed." (Vide Craies on Statute Law, 4th Edn. at page 329).

It is not accurate to call a statute retrospective merely because a part of the material facts dates from a time antecedent to the passing of the Act.

(7) It cannot be disputed that a statute could expressly or by necessary intendment be retrospective in the sense that the Act applies to transactions and facts prior to the date of the coming into force of the enactment. One must look to the general scope and purview of the statute and the remedy sought to be applied. I fail to see how the rule which makes a presumption in favour of a new statute not being retrospective applies to a case like the Madras Agriculturists Relief Act. One of the express purposes of that Act is to provide for the relief of indebted agriculturists by scaling down debts due by them even when the debts have merged into decrees. S. 19 expressly makes the provisions of the Act applicable to decrees passed before the Act in unequivocal terms, for it refers to decrees passed "before the commencement of the Act". The Act, therefore, is designed to operate on decrees which have otherwise become final. In a case like this there is no scope for the application of the general presumption against retrospective application of a statute.

(8) It was then urged by the respondent that when an Act is repealed and a new Act is enacted, the provisions of the new Act should not be so construed as to take away rights which had become vested in parties under the provisions of the older enactment.

(9) The effect of repeal of a statute is comprehensively set out in S. 8, Madras General Clauses Act. The Merged States Act, by way of abundant caution, also makes provision for the same result by S. 6 of that Act. Two questions therefore arise, namely, (1) Whether it can be held that there has been a previous operation of the Pudukottai Regulation in this case, and (2) Whether, even assuming that it had operated, there is anything inconsistent in applying the provisions of the new enactment with such prior operation of the old law.

(10) Now, what is the right acquired by the respondent, the right which became vested in him, because of the rejection of the plea of the

defendant based upon the Pudukottai Regulation? All that was adjudicated upon in the prior litigation was whether the defendants were entitled to obtain relief under that Regulation as "agriculturists." It was held by the Court that they were not "agriculturists" within the meaning of the Regulation then in force. Does the adjudication mean that the judgment-debtors were precluded from ever obtaining any relief in future, even under new enactments? Can it be said that a decision that the judgment-debtor is not entitled to a particular relief under a particular statute confers any absolute indefeasible right on the decree-holder? Of course, the rule of res judicata bars any attempt to re-adjudicate on the same question, confining the question to that which directly and substantially was decided on the prior occasion. Otherwise, I think that the doctrine of vested rights cannot be extended to such cases. Take, for instance, a case where a person is held to fall outside the purview of an enactment, having regard to a particular definition in force at the time. If there is subsequently a change in the definition which would draw the person within the purview of the statute, can the person maintain the plea that he should be excluded from the operation of the new definition because it had been held that he did not fall within the definition? I think not. A decision of a Full Bench of our Court appears to support my view.

(11) In—'the Board of Commrs. for the H. R. E. B. Madras v. Ratnasami', AIR 1937 Mad 232 (FB) (A), the question arose in the following circumstances. The Hindu Religious Endowments Act of 1927 originally defined an "excepted temple" in certain terms in Cl. 5 of S. 9. Sometime in 1927 a temple was held by the Board to be an "excepted temple" within the meaning of the definition as it then stood. By an Amending Act of 1930 a new definition of an "excepted temple" was substituted. After the Amending Act, the Board held that the temple was not an "excepted temple" according to the new definition. Against this decision of the Board the trustees of the temple filed an application to set it aside on the ground that the former decision of the Board had become final and the Amending Act could not take away the right acquired by the trustees under that decision. The District Judge who heard the application set aside the order, agreeing with the contentions of the trustees, but in revision the Full Bench reversed the decision of the District Judge. Dealing with the first argument that the former decision had become final, Varadachariar J., who delivered the opinion of the Full Bench said:

"In the nature of things, the Board could have given a decision in 1927 only with reference to the definition as it then stood and the finality attached by S. 84 to such a decision can also have relation only to that definition. Properly understood, the decision merely means that the institution was an excepted temple within the meaning of Act 2 of 1927. It cannot be suggested that it is not open to the legislature to vary that definition. On such variation, the question for determination will be whether the institution is an excepted temple within the meaning of the new definition. A decision that an institution satisfied a particular definition cannot certainly mean a decision that it must satisfy the new definition."

The learned Judges also negatived the contention that the Amending Act could not take away the vested rights of the trustees. It was held that there was really no question of any interference with a vested right or impairing obligations which had come into existence under a previous state of law. After pointing out that there was nothing like a recognised legal right or category of right known to general jurisprudence connoted by the expression "excepted temple" and that it was merely a convenient method of referring to a certain class of temples with a view to lay down certain rules in relation thereto, the learned Judge observed:

"But it does not seem to us reasonable to suggest that there was a kind of guarantee that, once the Legislature has thought fit to say that a particular temple will be dealt with in a particular manner, it should never afterwards be dealt with in a different manner."

(12) The principle that freedom coming within the mischief of a particular enactment is not a right acquired which is saved from the operation of a new enactment was applied in — 'Starey v. Graham', (1899)-1 QB 406 (B). A right acquired, Channell J. explains, does not mean "right" in the sense in which it is often popularly used. He says:

"In one sense, no doubt, every one has a right to do that which the law does not forbid. Every one has a right to wear spectacles, for instance, but he does not acquire a right to wear them by the fact that he does wear them. He is only doing something which the law does not forbid; and if a law were passed forbidding people to wear spectacles, everybody would stand in precisely the same position whether they had in fact been wearing them before the Act or not. If a person has been wearing them he has done so, not because he had acquired a right to wear them, but merely because the law had not forbidden him to do so."

Applying the analogy, it may be said that the decree-holder before the extension of Madras Act 4 of 1938 to Pudukottai had the right to execute the decree for the full amount for which it was passed. What was decided in the prior decision was that he was not prevented from doing so by reason of the Regulation of 1938. By that decision he did not acquire a new right. The right which he had under the decree was held to be not liable to be diminished. If, subsequently, a new enactment expressly curtails that right, it cannot be said that it is interfering with a right acquired by him.

(13) In my opinion, the application of Madras Act 4 of 1938 to this case does not, in any way, conflict with or circumvent the prior decision given under the old Regulation. All that was decided was that the Pudukottai Regulation did not apply to the case. That does not mean that no subsequent enactment on the subject can ever apply to the case. To give an extreme illustration, suppose a new enactment is passed under which all unsatisfied decrees are wiped out, would not such a law apply to this case merely because it was decided previously that the Pudukottai Regulation of 1938 which gave a limited relief to the debtor would not apply to the case? The basis of the prior decision was that the judgment-debtors were not agriculturists within the meaning of the definition of an "agriculturist" in the Regulation. If, subsequently, a different definition of

an "agriculturist" is substituted and the judgment-debtors came within the scope of that decision, it cannot be said that they are not entitled to seek relief afresh.

(14) Madras Act 4 of 1938 is expressly retrospective in the sense that it affects decrees and transactions before the commencement of that Act. That Act must be deemed to have come into force in the territory of Pudukottai from 1st January 1950. The statute is a piece of beneficial legislation and the Federal Court has laid down that

"The words of a remedial statute must be construed so far as they reasonably admit so as to secure that the relief contemplated by the statute shall not be denied to the persons intended to be relieved"—'Ram Taran v. Mrs. D. J. Hill', AIR 1949 FC 135 at p. 139 (C).

(15) Logically, if the contention of the respondent is accepted, there should not be any difference between a case in which there was a decision under the prior Pudukottai Regulation and a case in which there was not. If a person was not an agriculturist within the meaning of that Regulation, it would not really matter whether there was an adjudication to that effect or not. In all cases in which we can now hold that the debtors were not agriculturists within the meaning of that Regulation, Madras Act 4 of 1938 which came into force on 1-1-1950 could not be taken advantage of by the debtors, because it could be said that in all these cases the respective decree-holders had acquired rights to execute their decrees in full. That would mean making a distinction between cases in which decrees had been passed before 1-1-1950 and cases in which decrees have been passed after that date. We see nothing in the provisions of the Madras Merged States Act or in the general law relating to interpretation of statutes which would justify such a distinction. In effect such a construction would make S. 19 of the Act a dead letter.

(16) It may be asked, in what cases the saving provision embodied in S. 6 (1) (a) of the Merged States Act would apply. That would apply in cases in which relief was granted under the Pudukottai Regulation. Nothing in Madras Act 4 of 1938 could deprive the debtor of that relief. That provision only means that the repeal of the Pudukottai Regulation would not have the effect of nullifying the scaling down made under the prior Regulation.

(17) The learned Subordinate Judge, while recognising that it is open to give any statute retrospective operation, considered that there was no such provision in the Madras Merged States Act. That is certainly so. But the provision of Madras Act 4 of 1938 which came into force by reason of S. 3 of the Madras Merged States Act does have retrospective operation in the sense that it does refer to decrees passed and liabilities incurred before the commencement of the Act.

(18) Several decisions were cited to us by counsel on both sides, but we have not been able to derive any assistance from such of those as have not been mentioned already in this judgment.

(19) I am therefore of opinion that the Madras Agriculturists Relief Act 4 of 1938 which came into force in the territory of Podukottai on 1-1-1950 is applicable to this case. The application made by the appellant under S. 20 of that Act must have been granted. We allow the appeal, set aside the order of the learned Subordinate Judge and allow the petition filed by the respondent. There will be no order as to costs. This decision of ours does not imply that the petitioner is an agriculturist. That question may have to be decided later if and when an application is filed under S. 19 of the Act.

B/D.H.Z. Appeal allowed.

A. I. R. 1953 MADRAS 813 (Vol. 40, C. N. 306)

RAJAMANNAR C. J. AND VENKATARAMA AIYAR J.

Nallathambi alias Venkatachalam Chetty and others, Appellants v. Perumal Chetty and others, Respondents.

Appeal No. 116 of 1948, D/- 18-12-1952.

Tenancy Laws — Madras Estates Land Act (1 of 1908), S. 3(2)(d) — Estate — Scattered bits of land in Ryotwari village.

Where the identity of the village originally granted in inam had completely disappeared when in the days of Tippu there was a resumption of a moiety and thereafter there was a grant by the British Government of scattered bits of land in lieu of the unresumed moiety of the original grant, there being no confirmation or recognition by the British Government of a grant of a whole village as such and all that the British Government did was to make a grant of portions of what was a ryotwari village, the total extent of such portions cannot be held to be an inam village within the meaning of cl. (d) of S. 3. (Para 4)

The fact that for revenue purposes the lands in possession of the agraharamdars were treated by the Revenue authorities as a separate entity, separate from the ayan or ryotwari portions of the villages, cannot alter the legal position. For revenue purposes, in the interests of administrative convenience, the lands held on inam tenure and covered by a joint inam patta may be dealt with separately as distinct from lands held on ryotwari tenure. But this separate dealing would not make the total extent of the lands held in inam tenure a whole inam village. AIR 1950 PC 105, Distinguished. (Para 5)

A. Srirangachari and E. A. Viswanathan, for Appellants; R. Desikan, for Respondents.

CASE CITED:
(A) ('50) AIR 1950 PC 105: 64 Mad LW 1 (PC)

RAJAMANNAR C. J.: This appeal arises out of a suit, O. S. No. 55 of 1945, filed in the Court of the Subordinate Judge of Salem by 22 persons who were occupying separate lands in the village of Kannurpatti Agraharam for a declaration that the lands in their possession are ryoti lands in an estate within the meaning of the definitions of those terms in the Madras Estates Land Act and therefore the plaintiffs have occupancy rights therein. The learned Subordinate Judge dismissed the suit. Plaintiffs 1, 3, 6, 8 to 15 and 17 to 19 are the appellants. During the pendency of the suit itself, some of the plaintiffs compromised with the defendant-landholders, and they withdrew from the suit. During the pendency of the appeal some of the appellants have also entered into compromise with the respondent-landholders, and it is common ground before us

that the only appellants who press this appeal are appellants 1, 3, 4 and 5.

(2) The only question which arises in this appeal is whether the lands in suit are situated within an estate within the definition of that term in S. 3(2)(d), Madras Estates Land Act. That definition, in so far as it is material to this appeal, runs thus:

> "Any inam village of which the grant has been made, confirmed or recognised by the British Government, notwithstanding that subsequent to the grant, the village has been partitioned among the grantees or the successors in title of the grantee or grantees.....
>
> Explanation 3: Where a portion of an inam village is resumed by the Government, such portion shall cease to be part of the estate, but the rest of the village shall be deemed to be an inam village for the purposes of this sub-clause. If the portion so resumed or any part thereof is subsequently re-granted by the Government as an inam, such portion or part, shall, from the date of such regrant, be regarded as forming part of the inam village for the purposes of this sub-clause."

The only evidence we have which has a bearing on the question in issue is furnished by the extract from the Register of Inams prepared at the time of the Inam Settlement during 1863 to 1866. From this extract, we obtain the following information about the origin and history of the inam grant of the lands now in occupation of the appellants. Originally, about 300 years before the time of the Inam Settlement, there was a grant made by the then Palayagar, one Ramachandra Naick. It does not appear very clearly, but it may be assumed, that the original grant was of an entire village in inam. In the days of Tippu, one half of this village was resumed. After the British conquest, one Capt. Macleod appears to have granted to the descendants of the original grantees (agraharamdars) lands scattered here and there in the ryotwari village of Kannurpatti which yielded a moiety of the income of three inam villages. This was evidently in lieu of the moiety of the original village which had remained in the possession of the agraharamdars after the resumption in the days of Tippu. At the time of the inam settlement, the village was being enjoyed in 30 shares or vrittis. The vrittis varied in extent and his assessment in respect of each vritti also varied. The recommendation of the Inam Commissioner was that the total extent of the lands in possession of the several agraharamdars may be confirmed in one joint title deed, though specifying the quit rent which each vrittidar had to pay to the Government. This course was obviously adopted as a convenient method of determining the liability of the agraharamdars to the Government by way of quit rent. It is not disputed that the lands covered by the title deed did not form one whole block within defined boundaries, and down to this day, these scattered bits of land are found clubbed along with admitted ryotwari lands as part and parcel of the ryotwari village of Kannurpatti.

(3) On these facts which are really the only facts which are material for a decision of the question in issue, there can only be one conclusion, namely, that the lands in suit are not situated within an estate within the definition of that term in S. 3(d) of the Act.

(4) Mr. Srirangachariar, the learned counsel for the appellants relied upon the fact that originally the grant was of an entire village. He also relied on explanation 3 to cl. (d) and contended that here was a case of a portion only of an inam being resumed and therefore the rest of the grant shall be deemed to comprise an inam village within the meaning of that Explanation. That would be so if out of a whole village originally granted in inam a portion had been resumed and the remainder allowed to continue to be with the grantees. Then such remaining portion would by virtue of the terms of Explanation 3 be deemed to be an inam village for the purpose of cl. (d). But what happened in this case is quite different. The identity of the village originally granted in inam, assuming it was so, completely disappeared when firstly there was a resumption of a moiety and thereafter there was a grant by the British Government of scattered bits of land in lieu of the unresumed moiety of the original grant. There is therefore no confirmation or recognition by the British Government of a grant of a whole village as such. All that the British Government did was to make a grant of portions of what was a ryotwari village. The total extent of such portions cannot be held to be an inam village within the meaning of cl. (d).

(5) Reliance was placed by the learned counsel for the appellants on proceedings of Revenue authorities which indicated that for revenue purposes the lands in possession of the agraharamdars were treated as a separate entity, separate from the ayan or ryotwari portions of the villages. This, however, cannot alter the legal position, for revenue purposes, in the interests of administrative convenience, the lands held on inam tenure and covered by a joint inam patta may be dealt with separately as distinct from lands held on ryotwari tenure. This separate dealing would not make the total extent of the lands held in inam tenure a whole inam village.

(6) Learned counsel for the appellants relied on the ruling of the Privy Council in — 'Krishnaswami v. Perumal', AIR 1950 PC 105 (A). The facts of that case were totally different. In that case, there was originally a grant in pre-British times of a whole inam village. In 1795 a small part of that village was resumed by the Government and granted in ryotwari tenure but the rest of the village continued to be treated as an inam village. That continued for nearly 100 years, and in 1895, the Government granted on inam tenure the rest of the village which had been treated as a whole village for the past 100 years. Their Lordships held that the subject-matter of the grant of 1895 fell within the definition of estate in S. 3(2)(d), Madras Estates Land Act. The reasoning of their Lordships can be discovered in the following passage of the judgment:

> "In their Lordships' view it is irrelevant that the village so granted had once formed part of a larger village. The important fact is that the grant of 1895 comprises the whole of what was then regarded as an inam village."

We have nothing like this in the case before us. The grant made by Macleod did not comprise the whole of what was then regarded as an inam village. The grant was certainly of scattered portions of a ryotwari village.

(7) We agree with the learned trial Judge in his conclusion that the plaintiffs have not established their case that the suit lands are situated in an estate within the meaning of that term as defined in S. 3(2)(d), Madras Estates Land Act.

(8) The appeal is dismissed. The contesting appellants shall pay the costs of the appeal to the respondents.

B/D.R.R. Appeal dismissed.

A. I. R. 1953 MADRAS 815 (Vol. 40, C. N. 307)

SATYANARAYANA RAO AND BALA-KRISHNA AIYAR JJ.

Sreenivasan and others, Appellants v. Rangachari and others, Respondents.

Appeal No. 599 of 1949, D/- 12-1-1953.

(a) Hindu Law — Sons — Pious obligation.

No decree can be made against the sons when the plaintiff, who is an endorsee of the promissory note, is not the assignee of the debt in respect of which the pious obligation of the sons would attach. But the decree against the father, the maker, itself constitutes a debt which could be enforced in execution against the shares of the sons as well by reason of the pious obligation of the sons to discharge the antecedent debts of the father not tainted with illegality or immorality. AIR 1938 Mad 377 (FB), distinguished. (Para 2)

(b) Civil P. C. (1908), O. 21, R. 94 — What passes at a Court sale.

It is one thing to say that the Court has got a wider power of selling not only the Hindu father's share but also the shares of the sons & it is a totally different thing to decide whether, in fact, what was sold was the smaller interest or the entire property. Held that the property itself was sold and not the right, title and interest of the judgment-debtor. 14 Cal 572 (PC), Distinguished. (Para 3)

Anno: C. P. C., O. 21 R. 94 N. 6, 8.

N. R. Raghavachari, for Appellants; S. V. Rama Iyengar, P. S. Srinivasa Desikar, D. Ramaswami Iyengar, P. R. Varadarajan, K. Kalyanasundaram, T. K. Sundarachari and K. Satyanarayana, for Respondents.

CASES CITED:

(A) ('38) AIR 1938 Mad 377: ILR (1938) Mad 568 (FB)

(B) ('04) 14 Mad LJ 84: 27 Mad 243 (FB)

(C) ('87) 14 Ind App 77: 14 Cal 572 (PC)

SATYANARAYANA RAO J.: The plaintiffs are the appellants and are the sons of defendant 1 by his second wife. Defendants 2 and 3 are his sons by his first wife. There is another son Aravamudha Aiyangar, who is not made a party to the suit. In 1931, defendant 1 purchased an extent of 73 cents of property for a sum of Rs. 1,000. He paid cash in part and for the balance executed a promissory note in favour of the vendor for a sum of Rs. 570 on the date of the sale. The vendor, in his turn, endorsed over the promissory note to defendant 4, one Srinivasachari. The father failed to pay the debt with the result that Srinivasachari, defendant 4, instituted a suit on the promissory note O. S. No. 31 of 1934, District Munsif's Court, Arni and obtained a decree against the father. As he was only an endorsee of the promissory note and was not an assignee of the debt as well, he could not under law implead the sons also as parties to the action and obtain a decree on the debt against the sons. In due course, the decree was put into execution and items 15 to 56 of the plaint schedule properties were sold for a sum of Rs. 1501 and the decree-holder himself purchased the property. The sale was on 16-9-1935 and there was also delivery of possession of the property on 17-2-1938.

The purchaser, in his turn, made various alienations, the details of which are not material for the disposal of this appeal. The second wife's sons of defendant 1 instituted the present suit for partition of the family properties and in this suit included also the items, which were sold in execution of the decree in O. S. No. 31 of 1934 and claimed partition and separate possession of these items also on the ground that the sale did not affect their interest in the properties. There were also other contentions raised in the suit but we are not now concerned with them in this appeal. The lower Court held that the court sale conveyed not only the interest of the father, who was the judgment-debtor, but also the shares of the sons to the purchaser; in other words, it was held that what was sold was the property itself and not merely the right, title and interest of the judgment-debtor. In the result, he negatived the claim of the plaintiffs for a share in items 15 to 56 of the plaint schedule in the possession of defendants 4 to 24. The appeal by the plaintiffs is, therefore, confined to the question whether the decision of the trial Court excluding items 15 to 56 from partition was correct or not.

(2) The learned Advocate for the appellants raised two contentions. In the first place, he urged that as in a suit by an endorsee of a promissory note against a maker, the sons of the maker could not be impleaded as parties to the action and no decree could be passed against them on the debt, the shares of the sons could not be seized in execution of the decree so obtained against the father alone in enforcement of the pious obligation of the sons under Hindu law. For this contention, however, the learned counsel was not able to cite any authority. It is no doubt true, as held by the Full Bench in—'Marutha Muthu Naicker v. Kadir Badsha Rowther', AIR 1938 Mad 377 (A) that no decree in such a suit could be made against the sons as the plaintiff, who is an endorsee of the promissory note, was not the assignee of the debt in respect of which the pious obligation of the sons would attach, but the decree against the father, the maker, itself constitutes a debt which could be enforced in execution against the shares of the sons as well by reason of the pious obligation of the sons to discharge the antecedent debts of the father not tainted with illegality or immorality. If the sons are impleaded in the execution proceedings, it would be perfectly open to them to establish, if they can, that the debt was such as would not bind their shares. If they were not however impleaded, it is open to them in an independent suit to have the sale to the extent of their shares set aside on the ground that the debt was not one which would bind their interest in the property. In this case, no question of illegality or immorality of the debt arises as the debt was not attacked by the sons on that footing. The only question, therefore, is whether in execution of the decree against the father, the sons' shares also could be sold or not. As pointed out by Bhashyam Aiyangar J. in — 'Periasami Mudaliar v. Seetharama Chettiar', 27 Madras 243 (F.B.) (B), the decree itself is a debt and as it is not tainted with illegality or immorality, it could be enforced in execution against the shares of the sons as well.

(3) The second aspect of the case is that the court sale did not pass in fact the interest of

the sons to the purchaser. It is one thing no doubt to say that the Court has got a wider power of selling not only the father's share but also the shares of the sons and it is a totally different thing to decide whether, in fact, what was sold was the smaller interest or the entire property. That would depend upon, as pointed out repeatedly by the Privy Council, as to what was intended to be sold and what was in fact brought to sale. No such contention seems to have been raised in the plaint by the plaintiffs-appellants and it is perhaps for that reason that no material has been placed before the Court such as the sale proclamation etc. to consider whether what was sold was the property itself or only the right, title and interest of the judgment-debtor. There is the sale certificate, Ex. B-3 which however states that what was sold was the property described in the schedule. It does not state that what was sold was only the right, title and interest of the judgment-debtor. The decision of the Privy Council in — 'Simbunatha Pande v. Golap Singh', 14 Cal 572 (C) to which our attention was drawn by the learned counsel for the appellants was clearly a case in which from the beginning the interest of the judgment-debtor alone was intended to be sold by the Court. The specification of the property, as stated in the judgment, was the right and interest of the judgment-debtor in a four anna share out of 16 annas of mehal kindwar. It is an obvious case in which the property that was sold was only the right, title and interest of the judgment-debtor and no more. That is not the case in the present action. Even the meagre material that is available to us shows that the property itself was sold.

(4) For these reasons, we are in entire agreement with the view taken by the lower Court and affirm the decision and dismiss the appeal with costs.

B/D.H. Appeal dismissed.

A. I. R. 1953 MADRAS 816 (Vol. 40, C. N. 308)

RAJAMANNAR C. J. AND
VENKATARAMA AIYAR J.

R. N. Selvam Mudaliar and others, Appellants v. P. A. Raju Mudaliar and another, Respondents.

Original Side Appeal No. 80 of 1950, D/- 7-7-1952.

(a) Letters Patent (Madras), Cl. 15—Order adding party to suit — Judgment.

An order adding a party to a suit instituted on the Original Side of the High Court is not a judgment within the meaning of Cl. 15 of Letters Patent. No appeal lies against such an order. AIR 1930 Mad 987, Foll. (Para 2)

Anno: C. P. C., Letters Patent, Cl. 15 N. 3 Pt. 12.

(b) Civil P. C. (1908), S. 92 — Further sanction of Advocate General.

Where a sanction given by the Advocate General under S. 92 is one generally for the institution of the suit for the removal of persons purporting to act as the trustees of a public religious institution, an amendment sought for subsequently by way of addition of a party is merely formal and does not alter the nature of the suit. In such a case a further sanction of the Advocate General is not necessary. (Para 3)

Anno: C. P. C., S. 92 N. 25 Pt. 5.

V. Rajagopala Mudaliar, for Appellants; V. S. Rangachari, for Respondents.

CASES CITED:
(A) ('30) AIR 1930 Mad 987: 54 Mad 491
(B) ('12) 8 Ind Cas 340: 35 Mad 1 (FB)

RAJAMANNAR C. J.: The respondents instituted a suit on the Original Side of this Court, C. S. No. 10 of 1949 under S. 92, C. P. C. praying inter alia for the framing of a scheme for the management and working of the Church known as St. Peters Church at Royapuram after cancelling or modifying the scheme framed in an earlier suit on the file of this court and for the removal of certain defendants from the trusteeship of the Church. Defendants 1 to 5 were described as the persons who claimed to be the trustees of the Church. On the plaint there was an endorsement by the Advocate General as follows: "I consent to the institution of the suit under S. 92, C. P. C." It was discovered subsequently that another person, one S. A. Raja also claimed to be a trustee of the Church and the respondents applied to the court to add S. A. Raja as a party. Before they took out this application, they obtained the consent of the Advocate General to the addition of Raja as a party defendant. Objection was taken to the application on the ground that it was not competent to the Advocate General to add parties once a suit had been instituted after sanction had been obtained from him and once he had given his sanction, his powers were at an end. The learned Judge in Chambers allowed the application as in his opinion the nature of the suit had not been substantially changed in any manner by the addition of S. A. Raja as a party defendant and the amendment was therefore of a formal character. In his opinion even the sanction of the Advocate General was not necessary for the addition of S. A. Raja as a party defendant. Against this order, some of the defendants have filed the above appeal.

(2) At the outset, we must hold that the appeal is not maintainable. The order of the learned Judge cannot, in our opinion, be held to be a judgment within the meaning of Cl. 15, Letters Patent. In — 'Ramaswami Chettiar v. Kanniappa Mudaliar', AIR 1930 Mad 987 (A), it was held by Curgenven and Bhashyam Aiyangar JJ. that an order adding a party to a suit is not a judgment within the meaning of Cl. 15 and therefore no appeal lay against such an order. At page 987, after referring to the test adumbrated in the Full Bench decision in — 'Tuljaram Rao v. Alagappa Chetti', 35 Mad 1 (B), namely to see whether the order sought to be appealed puts an end to the suit or proceeding to any extent, Curgenven J. observed as follows:

> "Judged by this test, I feel no difficulty in deciding that an order adding a party to a suit is not a judgment. It does not put an end to the suit, but is clearly a step towards a final adjudication. It settles no rights other than the right to be heard in the cause."

Following this ruling, we must hold that the appeal is not maintainable.

(3) We further think that there is no substance on the merits. The Advocate General gave his sanction to the suit which was a suit for two main reliefs, viz., framing of a scheme

for the affairs of the Church and for the removal of persons who claimed to be the trustees of the Church. It may be that when sanction was obtained the plaintiffs were not aware that the seventh defendant was also a trustee. But it is clear that there was no distinction made between one trustee and another and it is not as if each individual trustee was sought to be removed on account of acts relating to each of them individually. In these circumstances the sanction must be deemed to be a sanction generally for the institution of the suit for the removal of persons purporting to act as the trustees of the Church. The amendment sought for by way of addition of a party was merely formal and did not alter the nature of the suit. We agree with the learned Judge in his view that further sanction of the Advocate General was not necessary in this case and it is therefore unnecessary to discuss the question whether in a case where the amendment was substantial in character the sanction accorded by the Advocate General subsequent to the original institution of the suit would be sufficient to save it from the bar of S. 92, C.P.C. The appeal must therefore be dismissed with costs.

C/V.S.B. Appeal dismissed.

A. I. R. 1953 MADRAS 817 (Vol. 40, C. N. 309)

RAJAMANNAR C. J. AND
VENKATARAMA AIYAR J.

A. R. Muthukrishna Reddiar and Sons, Appellants v. Messrs. Madhavji Devichand and Co., Ltd., Respondents.

O. S. Appeal No. 16 of 1949, D/- 30-11-1951.

(a) Sale of Goods Act (1930), Ss. 42 and 59 — Rights of buyer and seller.

In a C. I. F. contract the purchaser is entitled to reject the goods as not being in accordance with the terms of the contract notwithstanding that the property in the goods has passed to him by delivery of the bills of lading if he had no opportunity to inspect the goods before. It is only when buyer does any act which is inconsistent with the ownership of the seller that buyer loses his right of rejecting under S. 42, Sale of Goods Act. (Para 3)

When a purchaser rejects the goods after inspection the ownership would revest in the seller and the purchaser has no right to have the goods sold at the risk of the seller. If the purchaser sells the goods by public auction on ground that the seller had repudiated any liability, his right is only to damages for breach of warranty. (1923) 2 KB 490 and (1949) 1 All ER 215, Ref. (Para 3)

Anno: Sale of Goods Act, S. 42 N. 2; S. 59 N. 1.

(b) Sale of Goods Act (1930), S. 16 (2), Proviso — Goods not examined at time of sale — Proviso to S. 16 (2) does not apply — Buyer is entitled to benefit of warranty under S. 16 (2). (1919) 1 KB 486; AIR 1919 Mad 728; (1868) 3 QB 197, Ref. (Para 6)

Anno: Sale of Goods Act, S. 16 N. 4, 5.

(c) Sale of Goods Act (1930), S. 59—Measure of damages.

In determining the amount of damages to be awarded to the buyer under S. 59 for breach of warranty as to quality the question of inspection of goods has no relevance and the buyer would be entitled to damages notwithstanding that he did not avail himself of the opportunity of inspecting the goods on delivery. (Para 7)

In the case of a breach of warranty as to merchantable quality of the goods damages must be assessed on the basis of market rate at the place of delivery. Where the goods have been resold by the buyer without any unreasonable delay on his part at a place other than the place of delivery, the price realised at such auction may fairly be taken as the basis for determining the value of such goods, provided due allowance is made for circumstances affecting its value such as the absence of proper market at such place or the depreciatory conditions of sale. (1868) 3 QB 197; (1948) 2 All ER 724; (1948) 64 TLR 353 and (1857) 140 ER 687, Rel. on. (Paras 9, 10, 12, 14)

Anno: Sale of Goods Act, S. 59 N. 2.

V. Thyagarajan and N. Parthasarathy, for Appellants; V. C. Gopalaratnam and K. S. Ramaratnam, for Respondents.

CASES CITED:
(A) (1923) 92 LJKB 930: (1923) 2 KB 490
(B) (1949) 1 KB 254: (1949) 1 All ER 215
(C) (1923) 92 LJKB 675: (1923) 1 KB 685
(D) (1919) 88 LJKB 684: (1919) 1 KB 486
(E) ('19) AIR 1919 Mad 728: 35 Mad LJ 180
(F) (1868) 37 LJQB 89: 3 QB 197
(G) (1887) 56 LJQB 563: 12 AC 284
(H) ('32) AIR 1932 Lah 52: 135 Ind Cas 498
(I) (1948) 2 All ER 724
(J) (1948) 64 TLR 353
(K) (1857) 140 ER 687: 3 CB (N.S.) 128

VENKATARAMA AYYAR J.: This is an appeal against the judgment and decree of Bell J. dismissing C. S. No. 100 of 1946 on the original side of this Court. The plaintiffs are merchants carrying on business at Alandur near St. Thomas Mount and the suit was to recover damages for breach of warranty in respect of goods sold to them by the defendants under a contract entered into on 19-9-1945. During this period there was a great demand for chillies in Madras. The defendants had purchased 250 maunds of chillies from a firm of Calcutta merchants called Ganjee Sajun and Company and the same had been shipped per S. S. Dhruva on 16-9-1945. While the shipment was on its way the plaintiffs agreed to purchase this consignment of 250 maunds from the defendants at Rs. 37-12-0 per maund C.I.F. Cuddalore. The steamer arrived at Cuddalore on 2-10-1945. The bills of lading had been sent by the Calcutta merchants to the defendants along with their invoice dated 21-9-1945. The original arrangement was that the defendants should clear the goods at the port through Messrs. Parry & Co., and consign them by rail to the plaintiffs at St. Thomas Mount. On 4-10-1945 the plaintiffs wrote to the defendants that the bills of lading may be sent immediately the object of the plaintiffs being to make their own arrangements for promptly taking delivery of the goods. The defendants having agreed, the plaintiffs paid Rs. 9437-8-0 to them being the price of the goods as per invoice and took delivery of the bill of lading on 9-10-1945 and entrusted the same to one Kuppuswami Mudaliar who was doing business as clearing and forwarding agent at Cuddalore. The said Kuppuswami Mudaliar in turn engaged Messrs. Parry & Co. for clearing the goods and handed over to them the bills of lading on 11-10-1945. The goods were in due course cleared and sent to the plaintiffs at St. Thomas Mount in two consignments. The first consignment of 160 bundles made up of 479 bags

was despatched on 20-10-1945 at Cuddalore and they reached St. Thomas Mount on 26-10-1945. The second consignment consisting of 7 bundles made up of 21 bags was despatched at Cuddalore on 30-10-1945 and it reached St. Thomas Mount on 1-11-1945. The plaintiffs stocked all these 167 bundles in their godown at Alandur.

The case of the plaintiffs is that when they then inspected the goods they found them to be in a very damaged condition and that they complained about this to the defendants who sent one Kesavalal working in their office to inspect the goods, that the latter was satisfied that the goods were worthless and that it was agreed that the defendants would refund the amount and take back the goods. On 12-11-1945 the plaintiffs sent a lawyer's notice with the above allegations, Ex. P. 6. The defendants replied on 19-11-1945 repudiating their liability and stating that the bills of lading having been handed over to them on 19-10-1945 they were under no further liability to the plaintiffs and that the complaint could not be entertained. After some further correspondence the plaintiffs arranged with E. R. Prudhomme and Co., to have the goods surveyed. That was done on 27-12-1945 after notice to the defendants. The surveyor reported that the goods were bleached in colour with no appearance or vitality, that the stalks of a greater portion of the goods had come off, that the seeds were pouring out and that the supply must have been from old stock. Thereafter the plaintiffs had the goods sold in public auction through Messrs. Murray & Co., after giving notice to the defendants. At the sale held on 26-1-1946 the plaintiffs realised net Rs. 5934-14-0. The suit is laid for recovery of Rs. 5446-10-4 as damages as per particulars mentioned in the plaint.

(2) In Ex. P. 6 the plaintiffs took up the position that under the contract the goods must be "chillies of new best quality and red colour" and that as the goods actually sent were not in accordance with this description they had a right to reject them. In the plaint the claim was also made on the footing that there was a breach of the warranty as to the quality of the goods and that the plaintiffs were entitled to recover damages therefor. The defendants pleaded that they agreed to deliver only chillies and not best new red chillies, that the plaintiffs having taken delivery of the bills of lading on 9-10-1945 and treated the goods as their own, had lost the right to reject them and that the damage to the goods was due to exposure to rain and sun at Cuddalore and that the defendants were not liable therefor. The suit was tried by Bell J. He held that by taking delivery of the bills of lading and exercising other acts of ownership over the goods the plaintiffs had lost the right to reject them. Dealing next with the claim for damages for breach of warranty he held that the defendants did not agree to supply "best new red chillies", that the goods were not wholly unmerchantable and that they had suffered by exposure to rain at the sea port that the defendants were not liable for the damage and that in any event only a sum of Rs. 400 and odd could be claimed as damages. In the result he dismissed the suit with costs. The plaintiffs have preferred this appeal against this decision.

(3) On the question whether the plaintiffs are entitled to reject the goods there has not been much of an argument before us. There is authority for the position that in a C.I.F. contract the purchaser is entitled to reject the goods as not being in accordance with the terms of the contract notwithstanding that the property in the goods has passed to him by delivery of the bills of lading if he had no opportunity to inspect the goods before. It is only when he does any act which is inconsistent with the ownership of the seller that he loses his right of rejection under S. 42, Sale of Goods Act. In — 'Hardy & Co. v. Hillerns and Fowler', (1923) 2 KB 490 (A), the purchasers under a C. I. F. contract had sold the goods even before they took delivery of them from their sellers, and the goods having been found not to be in accordance with the contract, the question arose whether the purchasers had the right to reject them under S. 35, English Sale of Goods Act corresponding to S. 42 of the Indian Act. In discussing the scope of that section Bankers L. J. observed:

"I understand the section to refer to an act which is inconsistent with the seller being the owner at the material date; and the material date for the purposes of this case is not the date of the resale but the date of the notice of rejection, upon receipt of which the ownership revested in the sellers. It is with that revested ownership that in my opinion that the act of resale was inconsistent. And it was inconsistent with it for this reason: where under a contract of sale goods are delivered to the buyer which are not in accordance with the contract, so that the buyer has a right to reject them the seller upon receipt of notice of rejection is entitled to have the goods placed at his disposal so as to allow of his resuming possession forthwith and if the buyer has done any act which prevents him from so resuming possession that act is necessarily inconsistent with his right."

Vide also the decision in — 'Ruben (E. & S.) Ltd. v. Faire Bros. & Co. Ltd.', 1949-1 All ER 215 (B), where the decision in — '(1923) 2 KB 490 (A), was followed. On this reasoning it is possible to argue that the plaintiffs had not lost the right to reject the goods merely by transporting them from Cuddalore to St. Thomas Mount, because they were in a position to return the goods to the defendants. That appears to have been the attitude taken up by them in Ex. P. 6. But on that basis the title to the goods would have revested in the sellers and the plaintiffs should have had no right to sell the goods by public auction as they did on 26-1-1946 through Messrs. Murray and Co. In — 'L. J. Lyons & Co. Ltd. v. May & Baker Ltd.', (1923) 1 KB 685 (C), quoted by Mr. V. C. Gopalaratnam, the learned advocate for the respondents it was held that when a purchaser rejects the goods, he has no lien on them nor has he a title to retain possession of them until the price paid is returned. 'A fortiori' he has no right to have the goods sold at the risk of the seller. In our opinion whatever be the rights of the plaintiffs in respect of the goods prior to 26-1-1946 when the goods were auctioned, thereafter their right is only to damages for breach of warranty.

(4) The next question for consideration is whether there has been any breach of warranty on the part of the defendants. There has been some dispute as to whether the defendants warranted that the goods would be "best new red chillies". They denied having given any such warranty. The transaction was brought about through a broker Pyarilal Malhotra. He certainly assured the plaintiffs that the goods would be best new red chillies. Vide Ex. P. 1. The only question is whether he had authority of the defendants to give this assurance. He has stated

in his deposition that he had such authority. D.W. 2 the managing director of the defendant company has denied it. The invoice, Ex. P. 2 merely mentions chillies. The learned Judge was not prepared to find that any such authority was given. He was of opinion that the plaintiffs must have been misled by their own broker. That, however, does not conclude the matter because even if there was no express warranty, under S. 16 (2), Sale of Goods Act there would be an implied condition that the goods shall be of merchantable quality. D.W. 2 admits that though he did not give an express warranty he would have replied if he had been asked, that the chillies were red and new. That the goods were in a very damaged condition at the time when they were inspected at Alandur is amply established.

(After discussion of the evidence His Lordship proceeded:) In the result we hold that the goods which were supplied to the plaintiffs were damaged articles and that they are entitled to damages for breach of warranty.

(5) It is next contended by Mr. V. C. Gopalaratnam that the alleged defects in the quality of the goods could have easily been discovered by examining them, that the plaintiffs had the opportunity to inspect them at Cuddalore and having failed to do so they are not entitled to damages on account of patent as distinguished from latent defects of quality. This argument proceeds on a misapprehension of the true scope of S. 16 (2), Sale of Goods Act which runs as follows:

> "Where goods are bought by description from a seller who deals in goods of that description (whether he is the manufacturer or producer or not) there is an implied condition that the goods shall be of merchantable quality;
>
> Provided that, if the buyer has examined the goods, there shall be no implied condition as regards defects which such examination ought to have revealed."

(6) Under this section there is an implied condition that the goods bought by description shall be of merchantable quality. This is subject to the proviso, which enacts that if the buyer has examined the goods, then no such condition could be implied with reference to patent defects. Now this section is relevant only when a question arises as to the existence of a warranty in any given contract. It is not contended that the proviso to S. 16 (2) operates in this case so as to deprive the plaintiffs of the benefit of a warranty. It applies only to cases where the goods were actually examined by a buyer. Vide — 'Thorenett and Fehr v. Beers & Sons', (1919) 1 KB 486 (D) and — 'Peer Mohomed Rowther v. Dalooram Jaya Narayana', AIR 1919 Mad 728 (E). But where, as here, the goods were not examined at the time of the sale on 19-9-1945 and indeed could not be as the goods were in the course of carriage on the high seas, the proviso does not apply and the plaintiff would be entitled to the benefit of the warranty as per the terms of sub-s. (2). This was established by a decision of the Court of Appeal in the leading case of — 'Jones v. Just', (1868) 3 QB 197 (F). There the plaintiffs purchased Manilla hemp which was to arrive from Singapore by ship. On arrival the goods were delivered to the plaintiffs and the price was paid. On examining the goods the plaintiffs found that they were damaged and claimed damages for breach of warranty. It was held that they were entitled. The headnote is in these terms:

> "Under a contract to supply goods to a specified description, which the buyer has no opportunity of inspecting, the goods must not only, in fact, answer the specific description, but must be saleable or merchantable under that description. The maxim, 'caveat emptor', does not apply to a sale of goods where the buyer has no opportunity of inspection."

This decision was quoted with approval in — 'Drummond v. Van Ingen', (1887) 12 AC 284 (G), Lord Herschell observing,

> "It is equally well settled that upon a sale of goods of a specified description, which the purchaser has no opportunity of examining before the sale, the goods must not only answer that specific description but must be merchantable under that description. This doctrine was laid down in — '(1868) 3 QB 197 (F)', where all the previous authorities on the point were reviewed."

The noble Lord agreed with the law as laid down in that case. The provisions of S. 16, Sale of Goods Act and the corresponding provisions in S. 14, English Sale of Goods Act are in accordance with these authorities. It must, therefore, be held that the plaintiffs are entitled to the benefit of warranty as provided in S. 16 (2).

(7) When once that conclusion is reached and it is found that the warranty has been broken, then the rights of the parties are thereafter determined by S. 59, Sale of Goods Act. Under that section the only point for determination is what damages should be awarded for breach of warranty. The question of inspection has no relevance to the determination of that question. The learned advocate for the respondent relied on a decision in — 'Mithanlal v. Suraj Parshad', AIR 1932 Lah 52 (H), as supporting this position. There the purchaser claimed the right to reject the goods on the ground that they were not in accordance with the contract and it was held that as he had sold the goods to a third person he was not entitled to reject them. The case would be covered by S. 42, Sale of Goods Act. Then dealing with the claim for damages the Court proceeded to decide the same on the merits. It was not held that the plaintiffs were disentitled to damages by reason of their having had an opportunity of inspecting the goods and not availing themselves of the opportunity. We are, therefore, of opinion that the plaintiffs are entitled to damages notwithstanding that they did not inspect the goods on 9-10-1945.

(8) It now remains to determine what damages the plaintiffs are entitled to. There has been some discussion before us about the basis on which damages should be assessed. In — '(1868) 3 QB 197 (F)', already referred to the facts were very similar to those in the present case and with reference to the measure of damages it was held,

> "that the plaintiffs were entitled as damages to the difference between what the hemp was worth when it arrived and what the same hemp would have realised had it been shipped in a state in which it ought to have been shipped."

(9) Again in — 'Champanhac & Co. Ltd. v. Waller & Co. Ltd.', (1948) 2 All ER 724 (I), the plaintiffs having accepted unmerchantable goods were held entitled to damages for breach of warranty and it was observed:

> "The measure of damages is in the first place, the difference in value between the goods as they were and the value which they would

have had had they complied with the warranty."

In — 'Bunting v. Tory', (1948) 64 TLR 353 (J), it was held that in the case of breach of warranty of quality such loss is prima facie the difference between the value of the goods at the time of the delivery to the buyer and the value they would have had if they answered to the warranty. The principles applicable to the case are thus well settled and applying them to the present case, we have to ascertain what the value of good chillies was on 9-10-1945 which is the date of delivery; what the value of the damaged chillies was; and award the difference as damages to the plaintiffs. Simple as is the statement of the position in law, its practical application, however, presents difficult problems.

(10) It is contended for the respondent that as the contract was C.I.F. Cuddalore, the valuation of the goods must be on the basis of the market rate at Cuddalore and not at Madras. It was argued by Mr. V. Thyagarajan, the learned advocate for the appellants that the agreement between the parties was that the goods should be delivered at St. Thomas Mount and that, therefore, the market rate in Madras could properly be taken as the basis for valuation. For this he relies apart from oral evidence on the words "in transit, St. Thomas Mount" occurring in the invoice, Ex. P. 2. But the evidence discloses that during this period there were restrictions on the movement of goods from one district to another and that these words were introduced for purposes of facilitating prompt transport of goods from Cuddalore to St. Thomas Mount. We accept this evidence and hold that the place of delivery under the contract is Cuddalore and that the damages must be assessed on the basis of the market rate at that place.

(11) The more difficult question is to find out what the damaged chillies were worth on 9-10-1945. As they were not sold on that date, the ascertainment of their true value as on 9-10-1945 must to some extent be a matter of speculation. It was contended on behalf of the appellants that as there was no allegation or proof that the goods had deteriorated between November 1945 and January 1946 the price realised at the auction on 26-1-1946 might be taken as a basis for determining the value of the damaged goods. On this aspect of the case the decision in — 'Loder v. Kekule', (1857) 3 CB (NS) 128 (K), is of considerable assistance. There the contract was for the delivery of Russian tallow which was to be shipped from the Port of Danzig. The price was paid. The goods arrived on 12-1-1856 and were cleared by 25-1-1856. The plaintiff then inspected the goods and on 28-1-1856 he complained to the defendant that the quality was inferior. Then there was correspondence between the parties and ultimately the plaintiff had the goods resold on 12-3-1856. The action was to recover the difference between the price paid and the amount realised on the resale on 12-3-1856. After holding that the action was in substance one to recover damages for defect in quality and not to recover the return of the price paid, the Court observed as follows:

"Looking at the case in this aspect we think that the pre-payment cannot be taken into consideration in apportioning the damages; and that the true measure of damages would have been, if there had been nothing else in the case, the difference between the value of tallow of the quality contracted for, at the time of the delivery and the value of the tallow actually delivered. This, however, is on the assumption that the tallow delivered could be immediately resold in the market. But as in the present case it appears clearly from the correspondence that the defendant by his conduct delayed the resale, and, as the jury have found, we think, correctly that the resale on 12th March was in a reasonable time, we are of opinion that the proper measure of damages is the difference between the value in the market of tallow of the quality contracted for on 25th January, and the amount made by the resale of the tallow actually delivered."

(12) The facts of the above case bear a strong resemblance to those in the present. There as here there was delay caused by disputes and correspondence between the parties and ultimately a resale by the purchaser. It was held that the price realised at the resale might be taken as the true value of the damaged goods as there was no unreasonable delay on the part of the purchaser in selling the goods. In the present case, though there was constructive delivery of the goods to the plaintiff on 9-10-1945 when the bills of lading were handed over to them, the understanding of both the parties clearly was that the goods were to be consigned to St. Thomas Mount and it cannot be said that there has been any delay on the part of the plaintiffs in transporting the goods from Cuddalore to St. Thomas Mount. They inspected the goods immediately after their arrival at St. Thomas Mount in the beginning of November 1945 and reported to the defendants that the goods were in a damaged condition and had them inspected by Kesavalal the representative of the defendants. In Ex. P. 6 they exercised the right to reject the goods within a reasonable time and the further delay was due to the attitude taken up by the defendants in disclaiming all liability. We are unable to find that there was unreasonable delay on the part of the plaintiffs in bringing the goods to sale and we think that the price realised at the auction may fairly be taken as the basis for determining the value of the goods.

(13) But it is argued by Mr. V. C. Gopalaratnam that there was practically no market for the goods at Alandur where the auction was held and that further the notice of sale by Messrs. Murray and Co., Ex. P-18, marked the goods as sold at the risk of the defendants and that that was a depreciatory condition which must have brought down the price and that, therefore, the amount realised at the auction could not be taken as the proper value of the goods. This argument is not without force.

(14) The question of damages does not appear to have received adequate attention during the trial. No evidence was adduced about the market rate for chillies at Cuddalore on 9-10-1945. Nor was any attempt made to establish how far the price realised on 26-1-1946 could be taken as the true value of the damaged goods. The difference between the market rate for good chillies on 26-1-1946 and the amount realised at the auction on that date might be taken as furnishing a workable basis for assessing damages, due allowance being made for the absence of a proper market at Alandur and the depreciatory character of the sale conditions and the differences in the market rates ruling at Madras and Cuddalore. In the circumstances we think that the proper course is to remand the case for assessing the damages payable to the plaintiffs on the principles mentioned above. Both parties will be at liberty to adduce fresh evidence. We accordingly set aside the decree of the Court

below and remand the case for trial on the question of damages.

(15) The costs of this appeal will be provided for in the decree to be passed at the re-trial.

B/K.S. Case remanded.

A. I. R. 1953 MADRAS 821 (Vol. 40, C. N. 310)

RAJAMANNAR C. J. AND
VENKATARAMA AIYAR J.

Venkataperumal Naidu, Appellant v. M. Rathnasabhapathi Chettiar, Respondent.

Letters Patent Appeal No. 98 of 1949, D/- 19-2-1952 against decree of Rajagopalan J., in S. A. No. 800 of 1946, D/- 3-3-1949.

(a) Civil P. C. (1908), O. 34, R. 1 — Mortgagor, non-joinder of.

In a redemption suit by purchaser of equity of redemption, though the original mortgagor is a necessary party in the sense that it would be much more convenient to all the parties if he is on record, failure to add him does not prevent relief being granted to parties on record who were entitled in law to such relief as could be granted without affecting rights of parties not on record. (Para 2)

Anno: Civil P. C., O. 34, R. 1 N. 5, 6.

(b) T. P. Act (1882), S. 83 — Tender of full mortgage amount by purchaser of equity of redemption — Mortgagee cannot refuse to accept tender on ground of purchaser not paying mortgagor full price — Mortgagee is liable for mesne profits from date of tender. 30 Mad 524; 34 Mad 543; AIR 1920 Mad 164 and AIR 1944 Mad 124, Rel. on; 27 Mad 28, Not followed. (Para 3)

Anno: T. P. Act, S. 83 N. 20, 22.

K. S. Sankara Iyer for M. S. Vaidhyanatha Iyer, for Appellant; K. S. Ramamurthy, for Respondent.

CASES CITED:
(A) ('04) 27 Mad 28
(B) ('07) 17 Mad LJ 450: 30 Mad 524
(C) ('11) 8 Ind Cas 364: 34 Mad 543
(D) ('20) AIR 1920 Mad 164: 43 Mad 712
(E) ('44) AIR 1944 Mad 124: 212 Ind Cas 414

RAJAMANNAR C. J.: This is an appeal under the Letters Patent against the judgment of Rajagopalan J. dismissing a second appeal by the defendant in an action for redemption of a usufructuary mortgage for Rs. 650 effected under a deed dated 23-9-1940 by one Syed Ismail in favour of the defendant. The mortgage was redeemable at the end of three years. Before the expiry of this period, Syed Ismail conveyed the equity of redemption in the mortgage property to the plaintiff-respondent by a deed, Ex. P. 1, dated 4-8-1942. It is common ground that out of the sale consideration of Rs. 2900 a sum of Rs. 2029 was still due and payable even on the date of the suit. The sale deed which was executed on 4-8-1942 was registered only on 20-10-1942. Meanwhile, Syed Ismail had executed another usufructuary mortgage in favour of the defendant on 7-9-1942 to secure a further advance of Rs. 1000 alleged to have been paid on that date. On 14-10-1943, the plaintiff tendered the mortgage amount of Rs. 650/- but the defendant refused to accept it. The plaintiff followed by an application under S. 83, T. P. Act but that petition was dismissed because the defendant refused to accept the money tendered. Thereupon, the respondent instituted the suit out of which this appeal has arisen to redeem the usufructuary mortgage of 1940. The District Munsif of Madura decreed the suit and this decision was confirmed on appeal by the learned Subordinate Judge of Madurai. There was a second appeal which was dismissed by Rajagopalan J. It is against this decision that the present Letters Patent appeal has been filed.

(2) Mr. K. S. Sankara Aiyar learned counsel for the appellant pressed upon us only two points. The first was that the suit should have been dismissed because a necessary party viz., Syed Ismail, the original mortgagor had not been made a party to the suit. On this point Rajagopalan J. held that Syed Ismail was no doubt a necessary party in the sense that it would have been much more convenient to all the parties if he had been on record but the failure to add him did not prevent relief being granted to the parties on record who were entitled in law to such relief as could be granted without affecting the rights of parties not on record.

(3) The other point related to the plaintiff's claim for mesne profits from the date of the tender of the mortgage money. The arguments of learned counsel for the appellant was that inasmuch as the entire purchase money had not been paid to Syed Ismail, the vendor, he was entitled to continue to be in possession till he had been fully paid and as he held a mortgage from the vendor, he could rely upon his vendor's right to remain in possession and non-suit the plaintiff in his action for redemption. Before this contention can succeed the plaintiff's counsel realised that he would have to maintain that the vendor's lien for the unpaid purchase money would entitle the vendor to remain in possession till he had been paid the entire purchase money. In support of this contention, he cited to us an early decision of a Division Bench in — 'Subramania Ayyar v. Poovan', 27 Mad 28 (A); in which the learned Judges expressed the view that the vendor had a right to retain possession until the purchase money was paid and the vendor's lien extinguished by such payment. This view however did not find acceptance in later decisions of this Court: See — 'Velayuda v. Govindasamy', 30 Mad 524 (B);—'Velayutha v. Govindasami', 34 Mad 543 (C) and — 'Krishnamma v. Mali', AIR 1920 Mad 164 (D). In a recent case which came up before Somayya J. in — 'Poomalai v. Annamalai', AIR 1944 Mad 124 (E) the learned Judge followed the rulings in — '34 Mad 543' (C) and — 'AIR 1920 Mad 164' (D) as laying down the correct principle so far as this Court was concerned, though other Courts have taken a different view. With respect we accept the law as laid down in — '34 Mad 543' (C) and — 'AIR 1920 Mad 164' (D). It follows that the appellant was not entitled to refuse the tender lawfully made by the respondent because he was not entitled to remain in possession on the ground that the vendor had not been paid the entire purchase money by the respondent. The appellant would therefore be liable for mesne profits from the date of the tender as his possession must be deemed to be wrongful from and after that date.

(4) The Letters Patent appeal fails and is dismissed with costs.

B/R.G.D. Appeal dismissed.

A. I. R. 1953 MADRAS 822 (Vol. 40, C. N. 311)

RAJAMANNAR C. J. AND VENKATA-RAMA AYYAR J.

Kotta Govindarajulu Chettiar, Appellant v. Sivarama Krishnan minor by guardian Lakshmi Ammal and others, Respondents.

Appeal No. 498 of 1947, D/- 14-11-1951.

(a) **Civil P. C. (1908), O. 21, Rr. 72 and 73, O. 40, R. 1 and S. 47 — Purchase of property by decree-holder — Receiver without sanction of Court — Purchase is not nullity but voidable at instance of judgment-debtors in execution proceedings and not by suit — (Trusts Act (1882), S. 62): Case law Rel. on; A. S. No. 589 of 1947 (Mad.), Expl. (Paras 3, 4, 5)**

Where the judgment-debtors elect to affirm the sale or have lost their right to set aside the same for any reason, there is no further independent right available to them on the basis of anterior fiduciary relationship. They cannot, therefore, obtain a declaration on the basis of the principle embodied in S. 62, Trusts Act, 1882. (Para 9)

Anno: C. P. C., O. 21, R. 72 N. 9; R. 73 N. 2; O. 40, R. 1 N. 28; S. 47 N. 62.

(b) Hindu Law — Joint family — Manager — Proceedings even in execution against manager bind joint family including minor members — Acts and omissions of manager both are binding — (Civil P. C., O. 1 R. 8 and O. 7, Rule 5). (Paras 6, 7)

Anno: C. P. C., O. 1, R. 8 N. 21; O. 7 R. 5 N. 1.

N. Rajagopala Iyengar and K. R. Krishnaswami Iyer, for Appellant; T. V. Muthukrishna Iyer, K. G. Srinivasa Iyer and S. Ramachandra Iyer, for Respondents.

CASES CITED:

(A) (1907) 76 LJ Ch 614: (1907) 2 Ch 292
(B) ('22) AIR 1922 PC 336: 1 Pat 733 (PC)
(C) ('32) AIR 1932 Cal 672: 59 Cal 956
(D) ('35) AIR 1935 Mad 421: 68 Mad LJ 597
(E) ('49) AIR 1949 Mad 641: 1949-1 Mad LJ 542
(F) ('47) A S No 589 of 1947 (Mad)
(G) ('50) AIR 1950 Mad 801: 1950-2 Mad LJ 290
(H) ('46) AIR 1946 Mad 243: ILR (1946) Mad 670

VENKATARAMA AYYAR J.: Defendant 1 is the appellant before us. The facts leading to this litigation are these. Defendant 2 and his sons, defendants 3 and 4, executed two mortgages in favour of defendant 1 each for Rs. 7000, one on 13-8-1932 and the other on 14-8-1932, Exs. D-17 and D-18. Defendant 1 filed O. S. No. 14 of 1937 on the file of the Sub-Court, Trichinopoly, for recovering the amounts due under those two mortgages. He also applied for the appointment of a Receiver on the allegation that the security was insufficient. On 21-6-1937 he was appointed Receiver and he took possession of the properties some time in November or December 1937. Meantime, a preliminary decree was passed on 21-6-1937 and a final decree on 18-1-1938. In execution of this decree, the mortgaged properties were brought to sale. Defendant 1 applied in E. A. 378 of 1940 for permission to bid at the auction and set off the amount due to him and this was granted on 12-7-1940. The sale was actually held on 4-12-1940 and defendant 1 became the purchaser for a sum of Rs. 15,400.

The sale was duly confirmed and he was discharged from receivership. Then defendant 5 applied in E. A. 14 of 1941 for setting aside the sale under O. 21, R. 90 and S. 47, C. P. C. It may be mentioned that no objection was taken that the purchase by defendant 1 on 4-12-1940 was bad for want of permission of the Court. This petition was dismissed on the ground that no security was furnished. The present suit was filed on 29-4-1944. The plaintiff is the son of defendant 3 and he was born some time in 1938. The object of the suit is to get rid of the mortgage decree and the sale. The allegations in the plaint are of the usual kind in this class of suits. It is alleged that the mortgage bonds were not supported by consideration, that defendant 3, the father, was leading an immoral life and that therefore the debts were illegal and immoral and not binding on the plaintiff. It is further stated that the proceedings in O. S. 14 of 1937 are not binding on the plaintiff because the interests of the joint family were not properly safeguarded by defendant 2, the Manager. Then it is alleged that the execution sale was vitiated by several irregularities and that the price of Rs. 15,400 was too low. The prayer is that ignoring the decree and the sale, the plaintiff should be given his share in the property. Defendant 1 denied these allegations. The other defendants who are members of the family supported the plaintiff. Obviously they are behind the plaintiff. The subordinate Judge held that the mortgage bonds were fully supported by consideration, that the allegations about immorality were baseless, that defendant 2, the manager, duly and adequately represented the entire joint family, that there were no irregularities in the conduct of the sale and he accordingly held that the decree and the sale were all binding on all the members of the family including the plaintiff.

(2) Apart from the above allegations, the plaintiff also stated that defendant 1 purchased the property without getting the sanction of the Court as he was bound to do as a Receiver and for want of that sanction, the sale was illegal and void. Dealing with this question, the subordinate Judge reviewed the authorities and held that the sale was not a nullity and that it was only voidable at the instance of the members of the family. He further held that the sale having been confirmed without any steps being taken by any members of the family for having it set aside, the order of confirmation having been made under O. 21, R. 92(3), neither the plaintiff nor the other members of the family were entitled to attack the sale. On these findings, the suit should have been dismissed. But the subordinate Judge took up a new point. Relying upon certain observations in the case of — 'Nugent v. Nugent', (1907) 2 Ch. 292 (A) the learned subordinate Judge held that defendant 1 was in the position of a trustee by reason of the purchase on 4-12-1940 and that he was a trustee for the mortgagors as well as himself and therefore the plaintiff was entitled as a beneficiary to recover his one-ninth share of the property, but at the same time the plaintiff was bound to pay one-third of the mortgage amount and other incidental expenses. It is against this decree that defendant 1 has preferred this appeal. The plaintiff has also filed a memorandum of cross-objections.

(3) The first question that has to be decided is whether the purchase by defendant 1 on 4-12-1940 is a nullity or it is only voidable at the instance of the judgment-debtors or the other members of the family. We agree with the subordinate Judge that the sale is not a nullity. It was only liable to be set aside in appropriate proceedings at the instance of the members of the family. A Receiver is in a fiduciary relationship to the owners of the property over which he is appointed Re-

ceiver. For that reason, the law prohibits a purchase of the property by him without the sanction of the Court. To permit him to purchase the property without such sanction would be to put him in a position where his interest would conflict with his duty. But this rule is intended only for the benefit of the owners of the property. That benefit can be waived by them, and they can affirm the sale. The subordinate Judge rightly relies upon the following passage in Halsbury's Laws of England, Vol. 28, page 73, para. 137, as supporting the position that the sale is not a nullity:

"If all parties interested are 'sui juris', they may, of course, elect to affirm the sale."

(4) There are other provisions in the Civil Procedure Code which also enact similar prohibitions in the interests of the judgment-debtors. For example, O. 21, R. 72 expressly prohibits a decree-holder from purchasing the property unless it be with the sanction of the Court. It was nevertheless held by the Privy Council in — 'Radha Krishna v. Bisheshar Sahay', AIR 1922 PC 336 (B) that such a purchase is not a nullity and that it will stand until it is set aside in appropriate proceedings. It is unnecessary to refer to other analogical instances. The decisions in which purchases by the Receivers without the sanction of the Court have been set aside are all cases in which applications are made in the very proceedings in which the Receiver was appointed. In — Jiteswari Dassi v. Sudha Krishna', AIR 1932 Cal 672 (C), where the facts are similar to those in the present case, the decree-holder having purchased the property without the sanction of the Court, an application was made under S. 47, C. P. C. and O. 21, R. 90 for setting aside the sale. It was in those proceedings that the sale was set aside. In — 'Subramanyam v. Venkatasubba Reddi', AIR 1935 Mad 421 (D), this decision was followed. That was also a case in which an application was made on the execution side to set aside the sale and the sale was set aside. There is a similar decision in — 'Sankara Pursa v. Govinda Bhatta', AIR 1949 Mad 641 (E) where also there was an application under S. 47 for setting aside the sale and the sale was set aside. We have not been referred to any case in which a sale has been set aside collaterally in independent proceedings.

(5) Mr. T. V. Muthukrishna Ayyar relied upon an unreported decision of this Court in — 'A. S. No. 589 of 1947 (Mad) (F)'. That was a case in which the decree-holder who was appointed Receiver became the purchaser without obtaining the sanction of the Court, as Receiver. A suit was filed by the judgment-debtor within 12 years of the sale. The defendant contested the suit on the ground that an independent suit did not lie and that the appropriate remedy of the plaintiff was to apply for relief in execution proceedings. That was upheld by this Court and the suit was held to be not maintainable. So far as this decision is concerned, we agree with it. But there are observations in the judgment that the sale would be void. Those observations were not made with reference to the point with which we are dealing and they were also made on the basis of the decisions already referred to. The very fact that a separate suit is held to be barred is ground for holding that the sales should be set aside in appropriate proceedings, and unless they are set aside, they cannot be impeached in independent proceedings. We are accordingly of opinion that the purchase by defendant 1 was not a nullity and it stood unless and until it was set aside in appropriate proceedings. Judgment-debtors were entitled to apply to set aside the sale and it would have been so set aside even without proof of damage or any loss if an appropriate application had been put in: but that was not done and the sale was confirmed. It is now too late for the judgment-debtors to have the sale set aside. The order of confirmation has become final and under the circumstances, so far as the judgment-debtors are concerned, defendant 1 has got an indefeasible title.

(6) The plaintiff was not a judgment-debtor and it is argued that whatever the rights of the judgment-debtors the plaintiff is not affected. But defendant 2 in the suit was the Manager. He represented the entire joint family in the litigation. The finding of the subordinate Judge is that he did so represent the joint family. It is well settled that proceedings taken against the Manager of the joint family will bind all the members of the family. The plaintiff will accordingly be bound by it. That in fact is the decision of the subordinate Judge and we agree with it.

(7) Mr. Muthukrishna Ayyar, learned counsel for the respondents, relied on a case in — 'Venkatasubba Rao v. Kanakaraju', AIR 1950 Mad 801 (G) and on the strength of some observations in that judgment, he contended that the rights of defendant 2 as manager to represent the other members of the family came to an end when once a decree was passed and thereafter the rights of the parties should be regulated only by the provisions of the Code of Civil Procedure. In that case there were minors who were represented in the suit by their father. After the decree, the father died and the mother was appointed guardian 'ad litem'. Notice under O. 21, R. 22 which has been held to be the foundation of the jurisdiction for execution proceedings was not served upon the mother. It was served only upon one of the other members. The argument which was advanced on behalf of the purchaser was that the service of notice on a major member was sufficient because they were all members of a joint family. That argument was repelled. It was held that when once they are made parties to the suit, the provisions of the Civil Procedure Code control the provisions of the Hindu law and therefore where there are minors who ought to have notice under O. 21, R. 22 unless the notice is served on the person who is in that suit their guardian, the proceedings would be bad for want of notice. This is no authority for the broad proposition that a guardianship terminates as soon as a decree is passed. Such a proposition will lead to very startling results. If a suit is filed only against the Manager with the object of making the entire joint family properties liable and a decree is obtained, the position will be that as soon as the decree is obtained, the right of representation will be gone, and any proceedings taken in execution against a manager can pass only his own interests. That certainly is not law. The true position is that the provisions of the Civil Procedure Code to the extent to which they go will control the provisions of the Hindu Law. No provision in the Code of Civil Procedure has been brought to our notice which helps the respondent.

We are accordingly of opinion, that the general rule of Hindu law that action taken against the Manager will be binding on all the members of the family must prevail. In this case the Manager did not take any action. He might have applied to set aside the sale in which case the entire sale would have been set aside but he did not do so and it is well settled that members of the family are bound not merely by the action taken by the Manager but even by his omissions. In— 'Krishnamurthi v. Chidambaram Chettiar', AIR 1946 Mad 243 (H) this Court has held that a minor member of a joint Hindu family cannot seek to set aside a decree passed against the

manager on the ground that he was negligent in the conduct of the defence, and that while a minor who is the sole proprietor is entitled to have a decree re-opened on the grounds of the guardian's negligence, where he is a member of the joint family and there is a manager this principle is not applicable and a decree passed against a manager would be binding on him notwithstanding that he was a minor and notwithstanding that he alleges negligence in the conduct of the suit. The result then is that the plaintiff and all the members of the family would be bound by the result of the sale and the confirmation under O. 21, R. 92(3), C. P. C. That is the view taken by the subordinate Judge and we agree with him.

(8) It now remains to consider the new point taken by the subordinate Judge. He held that defendant 1 became a trustee by reason of the purchase and that the plaintiff and the members of the family had an independent right against him for enforcing their rights as beneficiaries. This is what the subordinate Judge says:

"This sale to defendant 1 was wrongful because he did not obtain leave as Receiver to purchase the property. When that sale was made, the judgment-debtors had two remedies open to them. The first was to apply under S. 47, Civil P. C. to have the sale set aside. The second was to obtain a declaration on the basis of the principle embodied in S. 62, Trusts Act, that the property was held by the purchaser in trust for all the persons who had interests in it on the date of the Court sale."

(9) We do not agree with this position. There are no two rights available to the judgment-debtors. When a property is purchased by a Receiver without the sanction of the Court, the rights of all the members are invaded to that extent. The right which the law gives to them is that they are entitled to elect to affirm or disaffirm the sale. They can elect to avoid the sale and if they do so elect, it will be avoided without proof of any loss or damage. The ground for such a relief being granted is that the Receiver is in a fiduciary capacity. There is only one right available to them viz., the right to avoid the sale and the ground on which this right is conferred on them is that the Receiver occupies a fiduciary relationship. These are not two independent rights. If in fact persons interested in the property elect to affirm the sale, then no further rights are available to them. Likewise if for any reason the persons interested in the property lose their right to have the sale set aside then the position is as if they have affirmed the sale and there are no further independent rights. In this case, the judgment-debtors had the option and could have elected to have the sale set aside and if they had so elected, they would have been entitled to have the property restored to them. But once that right was lost to them, there are no further rights available to them on the basis of the anterior fiduciary relationship. Thereafter it is not open to them to ask for any reliefs which will be available to them only when the sale is set aside. In our opinion the view taken by the learned subordinate Judge is not warranted by any principle, and under the circumstances, on the findings given by him the suit ought to have been dismissed. This appeal will accordingly be allowed and the suit will stand dismissed with costs of defendant 1 to be paid by the plaintiff both here and in the Court below. The plaintiff will pay the court-fee payable to the Government. The memorandum of cross-objections is dismissed but there will be no order as to costs.

B/G.M.J. Appeal allowed; Cross-objections dismissed.

A. I. R. 1953 MADRAS 824 (Vol. 40, C. N. 312)

SATYANARAYANA RAO AND RAJAGOPALAN JJ.

S. S. K. Haja Allaudin Maracair Ammapatnam, Appellant v. The Commissioner of Income-tax, Excess Profits Tax, Madras, Respondent.

Case Referred No. 28 of 1950, D/- 25-3-1952.

Partnership Act (1932), S. 6 — Partnership whether real or not.

The cumulative effect of all the circumstances should be considered in arriving at the conclusion whether a partnership is real or not. To take each circumstance by itself and then reject it on the ground that each by itself was not conclusive is not the proper method of approaching the question. (Para 4)

(On the facts of the case held that the partnership in the case was real). (Para 4)

Anno: Partnership Act, S. 6 N. 1.

T. V. Viswanatha Aiyar, for Appellant; C. S. Rama Rao Sahib, for Respondent.

SATYANARAYANA RAO J.: The following question has been referred to us by the Income-tax Appellate Tribunal under S. 66 (1), Indian Income-tax Act:

"Whether there was evidence to hold that the partnership constituted by the deed dated 13-1-1944 was not genuine."

One S. S. K. Haja Allauddin Maracair carried on business in piece goods at Colombo from the year 1935 under the name and style of S. S. K. Haja Allauddin and Sons. Upto the accounting year ending 31-12-1943 his income was assessed in the status of an individual. During the assessment year 1945-46, however, it was claimed by the assessee that the business ceased to be owned by the individual Haja Allauddin Maracair and that it had become the business of a partnership which came into existence on 1-1-1944 evidenced by a deed of partnership of 13-1-1944. The accounting year of the assessee is the calendar year 1944, the assessment year being 1945-46. Under the Business Names Ordinance obtaining in Ceylon this partnership was registered on Haja Allauddin swearing to an affidavit dated 11-2-1944 in which he pleaded that the partnership was real and genuine.

The partners in this partnership were the three major sons of the first wife of Haja Allauddin. He has also minor sons by the second wife but they are not made parties. On an examination of the various clauses of the deed of partnership the revenue authorities and the Appellate Tribunal found that the partnership was not real and therefore assessed Haja Allauddin as an individual during the assessment year. It has been represented to us on behalf of the assessee by Mr. Viswanatha Iyer that there was also an application to register the partnership under S. 26A of the Act and that application is kept pending till this reference has been answered by us.

(2) The point for consideration therefore is whether the view taken by the Appellate Tribunal that this partnership was not real is supported by any evidence in the case. Apart from the circumstance that this firm was registered under the Ceylon Business Names Ordinance, the only other material on which the conclusion of the authorities was based was the deed of partnership. Though the partnership commenced on 1-1-1944, the deed was entered into on 13-1-1944 and was attested by a Notary Public in Ceylon. The father and the three adult sons by the first

wife became partners under this deed, their shares being 30 shares in 100 to Haja Allauddin, 25 shares to Mahomed Owdhu, 25 shares to Mohamed Lebbe and 20 shares to Shaik Mohammad Bhukari. The style of the firm remained the same, viz., S. S. K. Haja Allauddin and Sons.

Clause 5 provides that the capital of the partnership shall consist of the net value of the stock in trade, book debts and other assets of the said business carried on till then solely by the father less the outstanding liabilities of that business which were estimated to be about Rs. 40,000. In substance and in effect the father during his lifetime was admitting these three major sons as sharers in the business and but for this partnership deed the sons would not have any interest in the business. From the point of view of the father, therefore, the recitals in the document are undoubtedly against his pecuniary interest. The net capital, it was perhaps contemplated, could be known only after the Income-tax upto the end of 1943 was paid by all the partners in equal shares out of the said capital as provided by Cl. 6 of the deed of the partnership. Under Cl. 7, provision was made for raising additional capital if it was found necessary or expedient for the efficient carrying on of the business and that it should be contributed by the partners in the shares in which they held the interest in the partnership, is also provided by the said clause.

No term was fixed for the duration of the partnership but it would be terminated by three months' notice by a partner. Death, retirement or expulsion of any partner would not have the effect of terminating or dissolving the partnership. The partners were permitted to draw during the continuance of partnership every month Rs. 50 by the father, Rs. 40 each by his first and second sons and Rs. 25 by the third son. The importance of this provision is that the father is not treated as the sole owner of the capital and the profits and was not given absolute discretion to draw any amounts he liked from the funds of the partnership, but his right was restricted along with the sons to a particular amount per month. This is undoubtedly a curtailment and a restriction on his proprietary rights in the business.

The father being aged was undoubtedly given an important position in the management of the affairs of the business but as rightly pointed out by the Appellate Tribunal such control over the sons by the father is not at all inconsistent with the existence of a real partnership. The sons were required to attend to the business at Colombo and most senior of them in age including the father should be termed the managing partner and in that capacity was entitled to draw every month Rs. 25 in addition to the drawings permitted under the previous clause. The father however was at liberty to stay outside Ceylon for a longer period than the sons in whose case the period was only three months per year. There are also the other usual clauses found in any deed of partnership specifying the duties and the rights of the partners 'inter se' which it is unnecessary to refer or enumerate in the course of this judgment.

To ensure due obedience of the sons the father is given the liberty to dissolve the partnership in case of gross ingratitude or misbehaviour or neglect or disobedience on the part of the sons but in such an event the partner who is sent out would be entitled to receive his share of the capital and the profits. The power to dissolve, though specifically mentioned in cl. 22 of the deed, does not take away the right of the sons to dissolve the partnership if they so chose by giving three months' notice as required by cl. 1 of the deed. In the event of the death of the father it was provided that his minor sons by the second wife should be entitled to the share capital and the profits of the father to the exclusion of the major sons, i.e., modifying the law of inheritance applicable to the parties, viz., the Muhammadan law. A perusal of these provisions does not throw any doubt on the fact that this partnership was real and was not merely a make-believe affair.

(3) It is said by the Appellate Tribunal that the document gave no indication as to why the father preferred the major sons by the first wife to the minor sons of the second wife. It is not usual in a deed of partnership to give reasons for entering into a partnership. It is not as if the father ignored the interests of the minor sons by the second wife as he provided that they should be entitled exclusively to the share capital and the profits of the business belonging to the father in the event of his death. It may be that the father wanted to make a distribution of an available asset belonging to him, viz., the business even during his lifetime so as to avoid future difficulties.

(4) Much was made of the fact that no share capital was distributed nor was it contributed by the sons at the time the partnership came into existence. It must be remembered that the sons had no independent property of their own to make the contribution from their own resources to the partnership. They were entirely dependent upon the father and it is the father that admitted each of them to a share in the business. That is the reason why it was provided that the capital of the partnership should consist of the net value of the stock in trade, book debts and other assets of the business less of course of the outstanding liabilities which were estimated to be about Rs. 40,000. This distribution could not be immediately done as income-tax upto the end of the year 1943 was not assessed till October 1945 and it was thereafter that the net capital could be ascertained and could be distributed between the sons in the accounts.

It is not disputed and it has been adverted to by the Appellate Tribunal itself that the profits of each year were distributed to the sons though it was said that the circumstance was not conclusive. Of course the way in which the Appellate Tribunal and the Income-tax authority treated the matter was to take each circumstance by itself and then reject it on the ground that each by itself was not conclusive. This method of approaching the question in our opinion is not proper. The cumulative effect of all the circumstances should have been considered in arriving at the conclusion whether this partnership was real or not. We have the undoubted fact and a strong circumstance in favour of the assessee that the partnership was recognised immediately by the Ceylon Authorities when it was registered under the Ceylon Business Ordinance. It was not as if they did it as a matter of course. They obtained an affidavit from the father himself to support the statements in the deed of partnership. It is on that information that they acted and registered the partnership deed.

The next circumstance is that the deed itself was attested by the Notary Public and therefore no doubt can be cast upon the existence of the deed on the date which it purports to have come into existence. As regards the reality of the partnership as pointed out above, there are

very many circumstances pointing to the conclusion that the father intended that this partnership should be real and should benefit his children by the first wife as well as the second wife. It would be open to any of the sons if there were disputes to claim under this document their share of the capital and the profits in the business.

Even if it should happen that the father should die, they would not be entitled to claim any portion of the father's share so that the father bound himself by this document to recognise the interest of his sons in the manner and to the extent indicated in the deed and the sons 'inter se' have agreed to share the profits of this business and its capital in the manner which it has been agreed to under this deed. We think, therefore, that the conclusion of the Appellate Tribunal was not warranted by the evidence on record. The question referred to us therefore must be answered in favour of the assessee and we hold that the partnership is real. As the assessee has succeeded he is entitled to his costs which we fix at Rs. 250.

(5) In view of our finding we think that the partnership will be registered as the assessee has already applied for registration of the same under S. 26, Income-tax Act.

C/V.R.B. Reference answered.

A. I. R. 1953 MADRAS 826 (Vol. 40, C. N. 313)

SUBBA RAO J.

Subrahmanya Ayyar and another, Appellants v. Govindasami Moopanar and others, Respondents.

Second Appeal No. 1343 of 1948, D/- 26-2-52.

Civil P. C. (1908), O. 47, R. 8 — Scope of enquiry not restricted by order granting review —Court can reopen entire case. 9 Cal 209; AIR 1927 Cal 21; AIR 1943 Mad 235, Rel. on. (Para 5)

Anno: Civil P. C., O. 47, R. 8 N. 2.

G. R. Jagadeesan, for Appellants; D. Ramaswami Iyengar and P. S. Srinivasa Desikan, for Respondents.

CASES CITED:

(A) ('38) AIR 1938 Mad 573
(B) ('66-67) 9 WR 23: 11 Moo Ind App 487 (PC)
(C) ('83) 9 Cal 209
(D) ('27) AIR 1927 Cal 21: 31 Cal WN 1035
(E) ('43) AIR 1943 Mad 235: 1942-2 Mad LJ 716

JUDGMENT: This second appeal raises a question in regard to the scope of an equiry under O. 47, R. 8, Civil P. C. On 8-4-1929, defendant 1 executed a mortgage-deed for himself and as guardian of his undivided minor brothers, defendants 2 and 3 in favour of the plaintiffs' father. The plaintiffs filed O. S. No. 128 of 1945 on the file of the Court of the District Munsif, Valangiman, for recovery of the amount due under the said mortgage. The defendants raised various pleas. They also claimed that the debt was liable to be scaled down under the provisions of the Madras Agriculturists' Relief Act. The District Munsif gave a decree, but scaled down the mortgage amount under the provisions of the Madras Agriculturists' Relief Act. The defendants preferred an appeal, and the District Judge by judgment dated 30-6-1947 held that a sum of Rs. 150 paid on 30-12-1930 was an unappropriated payment. In regard to the payment of Rs. 300 on 30-5-1938 he held that it was properly appropriated towards the principal and interest due on the date of payment. He negatived the plea of damdupat. In the result with a slight modification he confirmed the decree of the District Munsif. On 27-9-1947 the plaintiffs filed an application under O. 47, R. 1, Civil P. C. for reviewing the judgment and decree of the District Judge on the ground that there was an error on the face of the record. The error according to the petitioners was that the District Judge by mistake stated that Rs. 350 was the principal, whereas the parties agreed that the principal amount was Rs. 453-6-0. On 3-12-1947 the District Judge passed the following order:

> "As there is an error apparent on the face of record, the review application is allowed. But since the actual working out involves arguments, the appeal itself will be reopened and reheard under O. 47, R. 8, Civil P. C."

Arguments were heard subsequently, and judgment was delivered on 20-1-1948. The learned Judge again refused to apply the principle of damdupat. He substituted the figure of Rs. 453-6-0 in the place of Rs. 350 representing the principal amount due on 1-10-1937. In addition, he held that a sum of Rs. 300 paid on 30-5-1938 had to be appropriated only towards interest payable after 1-10-1937 and the balance, in reduction of the principal. He gave a decree for a sum of Rs. 453-6-0 at 6¼ per cent per annum only from 1-10-1937 to 30-5-1938 when he received payment of Rs. 300 and thereafter subsequent interest on Rs. 172-3-0 from 30-5-1938 till the date of the plaint. The result is that though the review application was filed for correcting an obvious error on the face of the record in regard to the principal amount, the learned Judge reviewed his judgment in respect of the appropriation of a sum of Rs. 300 paid on 30-5-1938. The plaintiffs preferred the above appeal against the decree of the learned District Judge.

(2) Mr. Jagadisa Aiyar, learned counsel for the appellants contended that a Court cannot review its own judgment so as to go beyond the scope of the application for review. Alternatively he argued that even if the District Judge had such jurisdiction, in the present case he should have, in his discretion, confined the scope of the rehearing and also the relief to that prayed in the review petition filed by the appellants. The relevant provision governing the situation is O. 47, R. 8, Civil P. C. It reads:

> "When an application for review is granted, a note thereof shall be made in the register and the Court may at once rehear the case or make such order in regard to the rehearing as it thinks fit."

Before I express my view on the question raised, it will be convenient to consider the cases cited by the learned counsel. The various stages in a review application have been stated by Venkatasubba Rao J. in — 'Pakiri Muhammad Rowther v. Swaminatha Mudaliar', AIR 1938 Mad 573 (A), in the following manner:

> "We may at the outset refer to the valuable observations of Jenkins C. J. as to the three stages of a review application. The first is the 'ex parte' stage when the Court may either reject the application at once or may grant a rule calling the other side to show cause why review should not be granted. In the second stage the rule may either be admitted or rejected. If the rule is discharged, the case ends then and there; if on the other hand the rule is made absolute, then the third stage is reached. The case is then heard on the merits and may result in a repetition of the former decree or in some variation of it. In either case, the whole

matter having been reopened, there is a fresh decree."

(3) The scope of the enquiry at the third stage is stated in — 'Bhugwandeen Doobey v. Myna Baee', 11 Moo Ind App 487 (PC) (B). That case turned upon the corresponding provision, S. 378 of Act 8 of 1859. Though there was no discussion the Judicial Committee held that notwithstanding the terms of S. 378, Civil P. C., it was competent to the Judges by whom the order allowing the application for review was made to enlarge those grounds on an oral application by including moveables, if satisfied that there was a proper case on the merits for so doing. In — 'Hurbans Sahye v. Thakoor Purshad', 9 Cal 209 (C), a Bench of the Calcutta High Court had to consider the question whether when a review application was allowed the Court was bound to rehear the whole case under S. 630 of Act 10 of 1877. Section 630 corresponds to O. 47, R. 8 of the present Code. Mitter J. stated the position thus:

"It has been contended that, if the review be granted on a particular ground, we are bound to rehear the whole case under S. 630, Civil P. C.; but the words "or make such order in regard to the rehearing as it thinks fit" in the section in question, leave it to our discretion either to rehear the whole case or any particular point that seems to us fit. The observation of the Judicial Committee in — "11 Moo Ind App 487 (PC) (B)' supports this view."

The other Judge, Maclean J. agreed with the aforesaid observations.

(4) A careful and analytical treatment of the subject is found in — 'Bhaniram Rathi v. Ambica Charan', AIR 1927 Cal 21 (D). Page J. after considering the various cases cited before the Bench observed as follows at p. 24:

"The conclusion at which I have arrived, as the result of my investigation, is that at the time when an application for review of a judgment on the ground of the discovery of new and important evidence is before the Court it is open to the Court under O. 47, R. 8 to determine whether the case shall be reheard in part or in its entirety. In the absence of any special directions in that behalf by the Court granting the review the whole case is reopened, and the Court is not restricted to a consideration of the particular point upon which the application for a review succeeded."

The same view was expressed by King J. in — 'Gangaraju v. Venkatarayulu Naidu', AIR 1943 Mad 235 (E). In that case the auction-purchaser at a court sale deposited the money required including poundage and that amount remained in Court for four years. On an application filed by the judgment-debtor the sale was set aside. The auction-purchaser took back the purchase-money with interest, but he was informed that he should apply to the Government if he wished to obtain refund of the poundage. The decree-holder applied for review on the ground that he should not have been called upon to pay interest. The Court granted the review and passed an order refusing to call upon the decree-holder to pay any interest to the auction-purchaser. The Court further held that one half of the poundage should be paid by the decree-holder to the auction-purchaser, and that in respect of the other half he should apply to the Government. The decree-holder filed a revision to the High Court and contended that the Court was not justified in directing half the poundage to be returned by the decree-holder, though there was no application either by himself or his opponent for any modification of the order in so far as it related to the poundage. The learned Judge in dealing with that contention observed at page 236:

"It seems to me that this contention must fail inasmuch as Rule 8 of O. 47 clearly lays it down that when the Court grants an application for review it may at once "rehear the case". That surely means that it may hear the case in full and deal with every point which it is necessary to consider before passing a fresh order."

(5) In my view, the words of O. 47 R. 8, namely "may at once rehear the case or make such order in regard to the rehearing as it thinks fit" are rather wide. The Court may, in exercise of the powers conferred under that rule, not only give directions in regard to procedural matters but also can define the scope of the enquiry. It may, for instance, confine the scope of rehearing to that part of the appeal or suit which was vitiated by the defect found or affected by the new evidence discovered. The discretion is vested in the Court directing rehearing, as otherwise on the pretext of an error on the face of the record affecting an insignificant part of the decree the entire trial sometimes covering a wide field and involving an examination of innumerable witnesses and a scrutiny of countless documents will have to be reheard, though the trial was otherwise free from any defect. It is unnecessary to attribute that intention to the Legislature, unless the clear words compel that conclusion. The aforesaid words have been designedly used by the Legislature conferring a discretionary jurisdiction on a Court directing a rehearing of a concluded trial. Of course, if the Court allowing a review petition does not restrict the scope of the enquiry, it may reasonably be held that it intended to reopen the entire case.

(6) Bearing the aforesaid principles in mind, I shall proceed to consider the scope of the order of the District Judge dated 3-12-1947. The learned Judge after allowing the review petition definitely stated that since the actual working out involved arguments the appeal itself would be reopened and reheard under O. 48, R. 8, Civil P. C. In exercise of his discretion he did not limit the scope of the enquiry but directed the rehearing of the entire appeal. The order was certainly within his jurisdiction, and in the circumstances of the case I cannot even say that the exercise of discretion was irregular or otherwise unjust. In the result, the appeal fails and is dismissed with costs. (No leave).

B/V.S.B. Appeal dismissed.

A. I. R. 1953 MADRAS 827 (Vol. 40, C. N. 314)

MACK AND SOMASUNDARAM JJ.

In re Macherla Balaswamy of Guntur, Accused-Appellant.

Criminal Appeal No. 41 of 1951, D/- 4-12-51.

Penal Code (1860), Ss. 85, 86 and 300 — Intoxicated person killing another by repeated stab wounds — Requisite knowledge and intention can be presumed — Offence cannot be reduced to one under S. 304 — (Evidence Act (1872), S. 14).

Intention, of course, in many cases, is an inference from knowledge. As an intoxicated man is assumed to have the knowledge, he must, in the generality of cases, be assumed to have had the intention. But there may be cases in which a person by reason of intoxication may, under certain circumstances, be incapable of knowing the nature of a parti-

cular act he commits or that it is either wrong or contrary to law, although his state of intoxication may not be such as to render him incapable of knowing the nature of all his acts. In such cases, in determining the quality of the offence, evidence may be necessary of a specific state of mind, which must be found as a fact and not assumed. It is only in such cases, which are rare, that S. 86 can be invoked by a person in some stage of intoxication to mitigate culpability, and to limit it to knowledge without inference of criminal intention, where the offence with which he is charged, such as murder, requires proof of a specific intention. (1909) 1 KB 895, AIR 1916 Mad 489, Rel. on. (Paras 5, 7, 8)

Anno: Penal Code, S. 85 N. 1; S. 86 N. 1; S. 300 N. 3; Evidence Act, S. 14 N. 2, 3.

K. S. Jayarama Ayyar, for Messrs. C. K. Venkatanarasimham and A. V. Krishna Rao, for Appellant; Asst. Public Prosecutor, for the State.

CASES CITED:
(A) (1920) 1920 AC 479
(B) (1909) 1909-1 KB 895
(C) ('16) AIR 1916 Mad 489: 38 Mad 479: 16 Cri LJ 627

MACK J.: Appellant, a cooly aged 32, has been found guilty under S. 302, Penal Code of the murder of a woman, Bhudevamma by inflicting on her a single stab in the abdomen when she intervened when the appellant was stabbing her brother Venkayya (P. W. 1). He has also been found guilty under S. 324, Penal Code, in respect of injuries he inflicted on Venkayya, although charged in that connection of attempting to murder him under S. 307, Penal Code. He has been sentenced to transportation for life and to two years rigorous imprisonment respectively.

(2) Appellant and P. W. 1 lived very close to each other in Guntur Town. P. W. 1 had a bunk or petty shop by the road-side. There is evidence of some previous ill-feeling between them over the purchase of a house, which was ultimately bought by P. W. 1 in competition with the appellant. P. W. 1 says he filed a complaint against the appellant about a year before this offence, which was dismissed.

(3) The prosecution case based on the evidence of P. W. 1 and two eye-witnesses P. Ws. 2 and 3, whom the trial Court believed, was that between 6-30 and 7 P.M., on 19-4-1950, P. W. 1 was sitting on a bench near his shop. Appellant suddenly came near him with a knife and started stabbing him. When his sister, who was sitting at the shop counter came up to intervene, he stabbed her in the stomach. Appellant then ran away. Bhudevamma and P. W. 1 were both taken to the Central Crime Station, where two statements Exs. P-1 and P-2 were recorded from them. In dying declarations, Exs. P-3 and P-8 made before the Stationary Sub Magistrate, both P. W. 1 and Bhudevamma described the appellant as being fully drunk, though there is no reference to this either in Ex. P-1 or Ex. P-2. In his evidence, P. W. 1 admitted that in the committing Court he said that appellant came staggering in a drunken state. Appellant was arrested at 7 P.M., on 21-4-1950, two days later by a Head Constable (P. W. 11), who says he was even then in a drunken condition.

There can be no doubt that despite the opinion of the assessors, who thought that appellant was not guilty, the learned Sessions Judge has rightly found that appellant it was who stabbed both P. W. 1 and Bhudevamma. Mr. Jayarama Ayyar for the appellant has not seriously challenged this finding and concentrated his argument before us on the plea of intoxication, which he urged in this case would, under S. 86, Penal Code reduce the offence from murder to culpable homicide not amounting to murder.

(4) The injuries on P.W. 1 may well have had fatal consequences. He was stabbed twice in the chest and once in the abdomen. One chest wound was 1½" deep and the abdominal wound is also described as 1½" deep. As the doctor P.W. 13 has deposed these wounds were on vital parts of the body and if they had penetrated a little further, they may have caused danger to life. Bhudevamma had a penetrating wound, not so deep, viz., ¾" x ¼" x ½" on the left side of the chest which unfortunately, however, punctured the stomach. In consequence of this. she died in the hospital the following night.

(5) As we understand Mr. Jayaram Ayyar's argument it is that appellant was in a state of intoxication and therefore under S. 86, Penal Code, he is not guilty of murder which requires a particular knowledge or intent and would be liable to be dealt with as if he had only the same knowledge as he would have had if he had not been intoxicated. Section 86 may be set out 'in extenso':

> "In cases where an act done is not an offence unless done with a particular knowledge or intent, a person who does the act in a state of intoxication shall be liable to be dealt with as if he had the same knowledge as he would have had if he had not been intoxicated, unless the thing which intoxicated him was administered to him without his knowledge or against his will."

Sections 85 and 86 crystallize in tabloid form the law relating to intoxication or drunkenness as a defence or plea in mitigation of a criminal offence. Section 85 gives the same protection as S. 84 does to a person of unsound mind, who is by reason of intoxication "incapable of knowing the nature of the act or that he is doing what is either wrong or contrary to law", provided that the thing which intoxicated him was administered without his knowledge or against his will. A person, who gets into a state of intoxication voluntarily, is presumed to have the same knowledge he would have had if he had not been intoxicated. When the state of intoxication is such as to make him incapable of knowing the nature of the act or that he is doing what is either wrong or contrary to law, he can only be punished on the basis of knowledge and not of a particular intention.

What is the "state of intoxication" referred to in S. 86, Penal Code? There are, of course, many varying degrees of drunkenness, which culminate in a state in which the person becomes incapable of knowing the nature of any act. Mr. Jayarama Ayyar's argument would include in the state of intoxication under S. 86, Penal Code, intermediate stages, which witnesses may describe as drunk or fully drunk, but which may not have reached the stage of incapability contemplated under S. 85. We have no doubt that the words "state of intoxication" in S. 86 can only mean intoxication, which renders a person incapable of knowing the nature of the act in question or that he is doing what is either wrong or contrary to law when he commits it. It would be extremely dangerous to extend the protection under S. 86, Penal Code, to persons, who commit serious offences under the influence of liquor in varying stages and differentiate culpa-

bility in their favour as opposed to similar offences by perfectly sober persons.

(6) Mr. Jayarama Ayyar has referred us to the House of Lords decision — 'Director of Public Prosecutions v. Beard', 1920 AC 479 (A). That was a case in which Beard ravished a girl 13 years old and, in furtherance of the act of rape, placed his hand upon her mouth and his thumb upon her throat, thereby causing death by suffocation. The sole defence raised was drunkenness. Bailhache, J. directed the Jury that if they were satisfied that the accused was so drunk that he did not know what he was doing or did not know that he was doing wrong, the defence of drunkenness succeeded to the extent of reducing the crime to man-slaughter. Beard was convicted of murder and sentenced to death. The Court of Criminal Appeal substituted a verdict of man-slaughter on the ground that the Judge was wrong in applying to a case of drunkenness the test of insanity and should have directed the Jury in accordance with the rule laid down in — 'Rex v. Meade', (1909) 1 KB 895 (B) ner Lord Coleridge J. summed up to the Jury as follows:

"Where it is part of the essence of a crime that a motive, a particular motive, shall exist in the mind of a man who does the act, the law declares this — that if the mind at that time is so obscure by drink, if the reason is dethroned and the man is incapable therefore of forming that intent, it justifies the reduction of the charge from murder to man-slaughter."

The House of Lords in appeal restored the conviction of murder passed on Beard. Lord Birkenhead, delivering the judgment of the Court, held that the rule in — '(1909) 1 KB 895 (B)', did not apply and that the summing up by Bailhache J. did not amount to a mis-direction although he was mistaken in applying to a case of drunkenness the test of insanity.

(7) In their close juxtaposition, S. 84 dealing with a person of unsound mind and S. 85 dealing with a person incapable of judgment by reason of intoxication against his will use the same criterion viz., an incapability "of knowing the nature of the act or that he is doing what is either wrong or contrary to law" and place insanity and involuntary drunkenness on the same footing. We are unable to see any real distinction in the view that we have taken of S. 86 and the position in English law as laid down in — '(1909) 1 KB 895 (B)', or in — '(1920) AC 479 (A)'. The view that we have taken is in accord with our own case law, though the approach is somewhat different.

Ayling J. in — 'Re Mandru Gadaba', AIR 1916 Mad 489 (C), held that ordinary drunkenness makes no difference to the knowledge with which a man is credited and if an accused knew what the natural consequences of his act were, he must be presumed to have intended to cause them. Intention, of course, in many cases, is an inference from knowledge. As an intoxicated man is assumed to have the knowledge, he must, in the generality of cases, be assumed to have had the intention. But there may be cases in which a person by reason of intoxication may, under certain circumstances, be incapable of knowing the nature of a 'particular act' he commits or that it is either wrong or contrary to law, although his state of intoxication may not be such as to render him incapable of knowing the nature of all his acts. In such cases, in determining the quality of the offence, evidence may be necessary of a specific state of mind, which must be found as a fact and not assumed. It is only in such cases, which are rare, that S. 86 can be invoked by a person in some stage of intoxication to mitigate culpability, and to limit it to knowledge without inference of criminal intention, where the offence with which he is charged, such as murder, requires proof of a specific intention. Sections 85 and 86 were enacted in the Indian Penal Code in the year 1860 at a time when English judge-made law in the domain of intoxication had not been settled. It is a tribute to the anticipatory genius of the authors of that Code that we find even 90 years later no real difference between the law as sought to be crystallized there and English judicial decisions since then, which have gone up to the House of Lords. Sections 85 and 86 appear to us clear and unambiguous and we need not look beyond these sections, which appear to us to leave no room for doubt as to what the statutory law is and how it should be applied in defences raised on the ground of intoxication.

(8) In this particular case, we are quite satisfied that although the appellant may have been the worse for liquor, he knew perfectly well what he was doing when he came up to P.W. 1 with a knife and set about stabbing him, it would appear, murderously in his chest. The learned Sessions Judge appears to us to have taken a lenient and charitable view of the attack on P.W. 1, which was really more murderous than that on his sister Bnudevamma, who intervened and received only one stab in her abdomen. A man, who keeps on stabbing persons in vital parts, must clearly be presumed to know the consequences of his acts and it is not open to him to plead that he was so drunk at the time as not to know or intend what he was doing. We have no hesitation in rejecting this defence based on the distinction between knowledge and intention in S. 86, Penal Code, put forward to reduce the offence to one under S. 304, Penal Code. One of the witnesses to the stabbing, P.W. 2, told the investigating officer that he saw the appellant and P. W. 1 fighting before the stabbing. The learned Sessions Judge gave this as one of the reasons for not passing on the appellant the extreme penalty. On the whole, we do not think that the extreme penalty was called for in this case. We confirm the convictions of the appellant and also the sentences passed on him, though we think, as regards the attack on P.W. 1, he should have been more correctly convicted as charged under S. 307 Penal Code, instead of under S. 324, Penal Code. With these observations, we dismiss the appeal.

(9) SOMASUNDARAM J.: I had the pleasure of perusing the judgment of my learned brother and I entirely agree with him. I would, however, add a few words to it.

(10) When a person voluntarily drinks and he is in a state of intoxication S. 86 says that he shall be dealt with as if he had the same knowledge as he would have had if he had not been so intoxicated. Can he be dealt with as if he had the same intention is the question. A man is presumed to know the natural or the necessary consequences of his act, and intention being an inference of knowledge he is presumed to intend the natural consequences of his act. This is true in a majority of cases but there may be some cases where knowledge alone may not be sufficient and specific intention may have to be proved to fix the person with liability for the crime. Suppose a man in a state of complete intoxication is found in the house of another during night time. From this circumstance alone can it be presumed that he had the inten-

tion to commit theft or any of the things mentioned in S. 441, Penal Code. I think not. The section, no doubt, imputes to him knowledge, the knowledge here being that it is wrong to enter another man's house during the night. But that is not enough for convicting him for criminal trespass. There must be further proof that he had the intention to commit an offence or one of the things mentioned in S. 441. The intention in such cases cannot certainly be inferred merely from the fact that he was found inside the house though in a state of intoxication. It is to cases of this kind that S. 86 in my opinion will apply and not to cases where the intention is ordinarily inferred from knowledge.

C/R.G.D. Appeal dismissed.

A. I. R. 1953 MADRAS 830 (Vol. 40, C. N. 315)

RAJAMANNAR C. J. AND
VENKATARAMA AIYAR J.

Rechuri Suryaprakasa Rao and others, Appellants v. Gottumukkala Venkatraju and others, Respondents.

Appeal No. 607 of 1949, D/- 18-12-1952.

T. P. Act (1882), S. 58 (c), Proviso—Sale or mortgage — Tests of distinction.

A transaction which consists of an ostensible sale accompanied by a separate agreement for repurchase can, in the light of the proviso to S. 58 (c), be only a mortgage by conditional sale. It cannot be any other of the known kinds of mortgage for to hold so will stultify the enactment contained in the proviso. AIR 1946 Mad 456, Foll. (Para 3)

The rule laid down in the proviso is rigid and where the condition for retransfer is not embodied in the document of sale the transaction shall not be treated as a mortgage. What the proviso says is that when the condition is not embodied in the same document in no case shall a sale be deemed to be a mortgage. AIR 1946 Nag 264, Rel. on. Observations in AIR 1931 Bom 371 and AIR 1934 Nag 18, Not Appr. (Paras 6, 8)

The word "deemed" is used in the proviso because ostensibly the transaction is only a sale. When the condition of reconveyance is embodied in the same document, it is open to the Court to hold that what purports to be a sale is really a mortgage. Then it can be said that the sale is "deemed" to be a mortgage. (Para 8)

Anno: T. P. Act, S. 58 N. 33 Pts. 44, 45.

P. M. Srinivasa Ayyengar, for Appellants; Kasturi Seshagiri Rao and Kasturi Sivaprasada Rao, for Respondents.

CASES CITED:

(A) ('46) AIR 1946 Mad 456: 1946-1 Mad LJ 342
(B) ('35) AIR 1935 Rang 212: 157 Ind Cas 179
(C) ('31) AIR 1931 Bom 371: 134 Ind Cas 337
(D) ('47) AIR 1947 Pat 345: 25 Pat 666
(E) ('34) AIR 1934 Nag 18: 149 Ind Cas 354
(F) ('46) AIR 1946 Nag 264: ILR (1946) Nag 278
(G) ('40) AIR 1940 Nag 84: 187 Ind Cas 594

RAJAMANNAR C. J.: The plaintiffs in O. S. No. 47 of 1947 on the file of the Court of the Subordinate Judge of Narasapur appeal against the dismissal of their suit for redemption of properties which they along with the fourth defendant conveyed to one Venkataramaraju under a deed of sale dated 20-1-1932. On the same day as the sale deed, there was an agreement to reconvey executed by the vendee under the sale deed. The contention on behalf of the appellants was that both these documents embody a single transaction which was either a mortgage by conditional sale or an anomalous mortgage. In this view they claimed redemption of the same. There were also other allegations challenging the validity of the transaction, but the learned Subordinate Judge found against them and we are not concerned with them in this appeal.

(2) The defence to the claim for redemption was twofold. The contesting respondent, namely, first respondent, who is the son of Venkataramaraju, pleaded that it was not open, in view of the proviso to S. 58 (c), Transfer of Property Act, to contend that the transaction should be held to be a mortgage as the agreement to reconvey was not embodied in the document of sale. He also pleaded that even assuming that it was permissible to hold so, it was not the intention of the parties that the transaction should be considered to be a mortgage. The learned Subordinate Judge held in favour of the first respondent on both the points.

(3) In the appeal learned counsel for the appellants tried to get over the hurdle in the way of his success, namely, the proviso to S. 58 (c) in two ways. He first contended that as the proviso was only a proviso to Cl. (c) of S. 58, it will be open to him to plead that the transaction is another kind of mortgage, that is, a mortgage other than a mortgage by conditional sale. This point is covered by a direct decision of a Bench of this Court in — 'Venkata Subbarao v. Veeraswami', AIR 1946 Mad 456 (A). The learned Judge there repelled an exactly similar argument thus:

> "This argument cannot be accepted. The construction suggested would involve reading into the proviso words which are not there, & it would moreover stultify the new enactment as it would leave the previous state of the law practically unchanged. For it would not make much difference in the legal effect of a sale accompanied by a separate agreement for repurchase to provide that it shall not be deemed to be a mortgage by conditional sale but may be regarded as an anomalous mortgage. We do not think that the proviso was intended to have that effect. Its object evidently was to shut out an enquiry whether a sale with a stipulation for retransfer is a mortgage where the stipulation is not embodied in the same document."

The learned Judges followed the ruling of the Rangoon High Court in — 'Ma Sein Nyo v. Maung San Pe', AIR 1935 Rang 212 (B). With great respect to the learned Judges we entirely agree with this decision. No authority has been cited to us which takes a different view on this point. The argument of the learned counsel to the contrary proceeded on a misapprehension of the effect of holding a transaction which consisted of an ostensible sale and an agreement to reconvey to be a mortgage. It was evidently an implication underlying his argument that such a transaction could be held to be any of the known kinds of mortgages. In this he erred because if a Court came to the conclusion that an ostensible sale taken along with an agreement was not in reality a sale but only a mortgage then it followed that the mortgage was a mortgage by conditional sale.

It could not be any other kind of mortgage. This is evidently why the proviso was inserted as a proviso to clause (c). The proviso does not say that such a transaction shall not be deemed to be a mortgage because if it can be deemed to be a mortgage it could be only a mortgage by conditional sale.

(4) The next way in which counsel for the appellant sought to get over the proviso was to contend that "shall be deemed to be" is an expression which does not necessarily prohibit a court from coming to the conclusion that even if the transaction is contained in more than one document it nevertheless is a mortgage. The argument was that if the condition to reconvey was not embodied in the document of sale the court will not presume that it was a mortgage, but in a proper case nothing prevented the court from coming to that conclusion and giving effect to it. In support of this contention he relied not upon any decided cases, but on observations in cases decided by other High Courts. He first relied upon a passage in — 'Kuppa Krishna v. Mhasti Goli', AIR 1931 Bom 371 at p. 372 (C) where Patkar J. made the following observations:

> "In case a mortgagor passes in favour of a mortgagee an ostensible sale deed and the intention of the parties is to be arrived at by the construction of the document, the proviso says that the right of repurchase must be embodied in the same document, and that if it is embodied in more than one document the inference of a mortgage would not necessarily arise, and that no transaction should be deemed to be a mortgage by conditional sale unless the condition is embodied in the document of the ostensible sale."

These observations were not necessary to dispose of the case before the learned Judges which arose out of a document executed long before the proviso was inserted in the Act. Indeed there was only one document of sale in which the condition to reconvey was embodied. We do not think that the learned Judges were construing seriously the effect of the proviso. But we must say that so far as it goes we are unable to accept this construction as sound. Reliance was placed on these observations in — 'Jaggannath v. B. K. Ray', AIR 1947 Pat 345 (D). But the learned Judges with respect dissented from them (see p. 346). In that decision, the learned Judges held that the proviso shows clearly that if the condition is not embodied in the document which purports to effect the sale, then it is not open to the court to treat the transaction as a mortgage. They also followed the ruling in — 'AIR 1935 Rang 212' (B), which was followed by the Bench of this Court in — 'AIR 1946 Mad 456' (A).

(5) Learned counsel for the appellants then relied upon certain observations in — 'Ramnarayan v. Ramratan', AIR 1934 Nag 18 at p. 19 (E). Niyogi A. J. C. said in that case:—

> "That proviso cannot be interpreted as laying down any rigid rule that if the agreement to sell and the covenant of repurchase are embodied in more than one document the inference of a mortgage would not necessarily arise, or that when the condition of repurchase is embodied in the document of sale the transaction should necessarily be regarded as one of mortgage."

So far as the latter portion of the sentence is concerned, we need not say anything because in this case the condition of repurchase is embodied in a separate document. But we must respectfully dissent from the learned Judge's observations contained in the first part of the sentence which implies that in spite of the proviso even if the agreement to sell and the covenant to repurchase are embodied in more than one document, a court could hold that the transaction amounted to a mortgage.

(6) In a later decision of the Nagpur High Court reported in — 'Samsher Khan v. Vithaldas', AIR 1946 Nag 264 (F) these very observations of Niyogi A. J. C. were not approved. The learned Judges said:

> "In — 'AIR 1934 Nag 18' (E) which was one of these cases, Niyogi J. suggested that the proviso to S. 58 (c) could not be interpreted as laying down any rigid rule that if the agreement to sell and the covenant of repurchase were embodied in more than one document the inference of a mortgage would not necessarily arise. That point was not one that arose for consideration in that case and with the greatest respect we think that the only meaning that can be put upon the proviso is that where the condition for retransfer is not embodied in the document that effects or purports to effect a sale, the transaction shall not be treated as a mortgage".

It was held in that case that the rule laid down in the proviso is rigid and where the condition for retransfer was not embodied in the document of sale the transaction shall not be treated as a mortgage.

(7) The decision of a single Judge in — 'Saheba Deochand v. Jagannath Gundharilal', AIR 1940 Nag 84 (G) was also cited to us and a passage in the judgment dealing with the proviso was relied upon. But it has no bearing whatever on the question which falls for decision in this case as the learned Judge was dealing with a case in which the agreement to reconvey was embodied in the same document.

(8) Learned counsel for the appellants relied upon the meaning of the word "deemed" as given in law lexicons. "Deemed" is a word with which we are sufficiently familiar. It has been evidently used because ostensibly the transaction is only a sale. When the condition of reconveyance is embodied in the same document it is open to the Court to hold that what purports to be a sale is really a mortgage. Then it can be said that the sale is "deemed" to be a mortgage. What the proviso says is that when the condition is not embodied in the same document in no case shall a sale be deemed to be a mortgage. We see no substance in any of the contentions raised on behalf of the appellants.

(9) We may mention that even on the merits the learned Subordinate Judge has held that the transaction was not a mortgage. The appeal fails and is dismissed with costs of the first respondent. As the appeal was filed 'in forma pauperis' the appellants shall pay to the Government the court-fee payable on the memorandum of appeal.

B/V.S.B.

Appeal dismissed.

A. I. R. 1953 MADRAS 831 (Vol. 40, C. N. 316)

GOVINDA MENON AND RAMASWAMI GOUNDER JJ.

Bhupathiraju Venkatapathiraju, Appellant v. Ravipati Venkataratnam and another, Respondents.

A. A. O. No. 33 of 1948, D/- 29-8-1951.

Debt Laws — Madras Agriculturists' Relief Act (4 of 1938), S. 19A(1) — Admittedly nothing was due from debtor on date of application — No application lies under S. 19A.
(Paras 1, 2)

P. Somasundaram and P. Suryanarayana, for Appellant; O. Chinnappa Reddy and P. Ramakrishna, for Respondents.

GOVINDA MENON J. It is unnecessary to decide the question whether the payment of Rs. 6515 under Ex. P. 1(a) on 19-7-1946 was in part payment of the debt or in full discharge of the debt, for it is the admitted case of both the parties that on the date of the application there was no amount of debt due by the debtor to the creditor. Section 19-A(1), Madras Agriculturists' Relief Act states that where a debt incurred before 2-3-1938 is due by any person who claims that he was an agriculturist both on that date as well as 1-10-1937 the debtor or the creditor may apply to the Court having jurisdiction for a declaration of the amount of the debt due by the debtor 'on the date of the application'. Both sides admit that on the date of the application nothing was due from the appellant to the respondents. What the appellant says is that the payment of Rs. 6515 not only discharged the entire debt but that a sum of money would be due to him from the creditor. On the other hand, the respondents' case is that Rs. 6515 was paid in full settlement of the amount due to them on that date. The learned Judge in the Court below was inclined to accept the case of the respondents and therefore dismissed the application.

(2) In our view, on the pleadings an application under S. 19-A(1) does not lie at all. The necessary prerequisites for the maintainability of an application under S. 19-A is that the debtor must say that either there should be a declaration that the whole debt is wiped off or that a sum of money is due from him to the creditor; but whereas in the present case the creditor admits that no sum of money is due, there is no scope for the applicability of S. 19-A. The petition ought to have been dismissed on the plea of the respondents that no money was due to them from the appellant. The lower Court ought to have given a declaration that no money was due from the appellant to the respondents. Since we are of opinion that S. 19-A is not applicable to the facts of the present case, the appeal fails and is dismissed with costs.

C/D.H. Appeal dismissed.

A. I. R. 1953 MADRAS 832 (Vol. 40, C. N. 317)

RAJAMANNAR C. J. AND VENKATARAMA AIYAR J.

Sabella Sahaba Reddy and others, Petitioners v. Karri Venkata Reddy and others, Respondents.

C. M. P. of 1953 in S. R. No. 11015 of 1953, D/- 17-3-1953.

Constitution of India, Art. 227 (1) — Power of superintendence — Extent of.

The power of the High Court under Art. 227(1) is confined to subordinate courts and judicial and quasi-judicial tribunals which are also subordinate to it. A judge of the High Court is not as such subordinate to the High Court.
(Para 2)

O. Chinnappa Reddy, for the Petitioners.

CASES CITED:
(A) ('83) 10 Ind App 4: 9 Cal 482 (PC)
(B) ('81) 7 Cal LR 543: 6 Cal 594

RAJAMANNAR, C. J.: The apppellant in C. M. A. No. 670 of 1949 on the file of this court seeks to file an appeal against the judgment of Mack J. dated 13-2-1953 dismissing his appeal. The matter comes up before us on an objection by the Office that the appeal is not maintainable.

(2) It is obvious that an appeal is not maintainable under Cl. 15, Letters Patent. Learned Counsel appearing before us has not sought to raise any contention on this clause. What he contended was that an appeal would lie under Art. 227(1) of the Constitution, which runs as follows:

> "Every High Court shall have superintendence over all courts and tribunals throughout the territories in relation to which it exercises jurisdiction."

This provision is a substantial re-enactment of S. 107 of the Government of India Act, 1915 and S. 15 of the earlier Charter Act. So far as we are aware, this provision has never been understood to confer a right on the High Court as such to interfere with judicial orders and judgments made and passed by individual Judges or Division Benches of the High Court. It cannot be said that a Judge of the High Court disposing of a Civil Miscellaneous Appeal is a court within the meaning of Art. 227 (1) of the Constitution and that the High Court has power of superintendence over him so that it could interfere with his judgments. In our opinion the power of the High Court under Art. 227(1) is confined to subordinate courts & judicial & quasi-judicial tribunals which are also subordinate to it. A Judge of the High Court is not as such subordinate to the High Court.

(3) Learned counsel relied upon the observations of the Privy Council in — 'Hurrish Chunder v. Kalisundari Debi', 9 Cal 482 at p. 493 (A), where their Lordships did not accept the view of Garth C. J. in — 'Kally Soondary Dabia v. Hurrish Chunder', 6 Cal 594 at p. 607 (B). We do not think that these observations help the appellants in any way. Those observations must be read in the light of the context and obviously have reference to the view of Garth C. J. as to the nature of the order of Pontifex J. in that case, namely, that it was merely ministerial and it could not be said that the learned Judge was usurping any jurisdiction in passing the order.

(4) The proposed appeal is incompetent. The memorandum of appeal will therefore be rejected.

A/G.M.J. Order accordingly.

A. I. R. 1953 MADRAS 833 (Vol. 40, C. N. 318)

RAJAMANNAR C. J. AND
VENKATARAMA AYYAR J.

Mittadar G. Ramaswamy Chettiar, Appellant v. K. K. Vallabha Anandar alias Subbier, Respondent.

Letters Patent Appeal No. 22 of 1949, D/- 3-3-1953, from judgment of Satyanarayana Rao J., in A. S. No. 304 of 1947, D/- 15-12-1948.

(a) Civil P. C. (1908), S. 35 — Interference by appellate Court.

Though when discretion is exercised in one way on particular facts it should not be interfered with by a Court of Appeal; it is open to the appellate Court to come to a different conclusion on the facts on which the Court below exercised its discretion, and interfere with the order for costs made by the Court below. (1903) 2 KB 756, Rel. on. (Para 2)

Anno: Civil P. C., S. 35 N. 29.

(b) Civil P. C. (1908), S. 35 — By whom costs are to be paid.

Held that it was the plaintiff that was responsible for the institution of the suit and that the real object was to throw costs on the defendant, and the defendant should not be made liable for the costs of the suit. (Para 3)

Anno: Civil P. C., S. 35 N. 7, 9.

A. Viswanatha Iyer; K. V. Srinivasa Iyer and O. K. Ramalingam, for Appellant; T. M. Ramaswami Ayyar, for Respondent.

CASES CITED:

(A) ('40) AIR 1940 Mad 519: 1940-1 Mad LJ 388

(B) ('40) AIR 1940 Mad 589: 1940-1 Mad LJ 764

(C) ('50) AIR 1950 Mad 36: 1949-2 Mad L J 243

(D) ('46) 50 Cal WN 296

(E) (1903) 72 LJKB 933: (1903) 2 KB 756

VENKATARAMA AYYAR J.: This is an appeal under the Letters Patent against the judgment of Satyanarayana Rao J. The plaintiff is the appellant, and the dispute relates only to the liability of the defendant to pay costs. The facts necessary for the purpose of this appeal are these: The 2nd defendant, Vallabha Ayyangar alias Subbier, was carrying on business in the name and style of Sri Varalakshmi Stores. On 8-3-1943, he borrowed a sum of Rs. 5000 from the father of the plaintiff on a promissory note. There was a partition in the family of the plaintiff, and in that partition this promissory note fell to the share of the plaintiff. On 15-9-1945, the promissory note was endorsed in favour of the plaintiff. On 1-1-1946, the 2nd defendant renewed the promissory note in favour of the plaintiff. It is on this promissory note that the present suit was filed on 17-9-1946. The first defendant in the suit was the Varalakshmi Stores which became a partnership firm from 1944, the partners being the 2nd defendant and one Narasimhachari, and the second defendant was Vallabha Anandar 'alias' Subbier the maker of the promissory note. Along with the plaint, an application for attachment before judgment was filed and it was served on the 2nd defendant on 6-10-1946. The summons in the suit was served also on the same date, and 17th October was the date fixed for the hearing of the suit. On that date, the 2nd defendant paid the plaintiff's advocate a sum of Rs. 5223-15-4, being the entire amount of principal and interest due on the promissory note upto that date; and contended that he was not liable to pay the costs of the suit. The only point for decision in the suit thereafter was whether the 2nd defendant should be made liable for costs of the action. The Subordinate Judge held that the plaintiff was entitled to costs and granted a decree thereafter. Against that, the second defendant preferred an appeal, A. S. No. 304 of 1947 to this Court. That was heard by Satyanarayana Rao J. who held on a consideration of the facts that the 2nd defendant should not be made liable for the costs of the suit. He accordingly reversed the judgment of the Court below with reference to costs. It is against this judgment that the plaintiff has preferred this appeal.

(2) Mr. A. Viswanatha Iyer learned counsel for the appellant, argues that costs are in the discretion of the first Court and that it was beyond the province of the appellate Court to interfere with the exercise of that discretion unless a question of principle was involved and that therefore the decree of reversal passed by Satyanarayana Rao J. was erroneous. He quoted a number of authorities in support of the position that when the Court of first instance exercised a discretion with reference to costs in a particular way, that should not be interfered with in appeal, even though the Court of appeal might feel that it would have exercised its discretion differently. He relied in support of this position on the authorities in — 'Raghavachariar v. Ponnuswami Mudali', AIR 1940 Mad 519 (A); — 'Kozhuvammal v. Paru Amma', AIR 1940 Mad 589 (B); — 'Narayana Reddi v. Gopalareddi', AIR 1950 Mad 36 (C) and — 'Prokash Krishna v. Radhamadan Gopal', 50 Cal WN 296 (D). To the general proposition as thus stated, there could be no demur. But the point here is something different. It is whether it is not open to the appellate Court to come to a different conclusion on the facts on which the Court below exercised its discretion. It is one thing to say that when discretion is exercised in one way on particular facts it should not be interfered with by a Court of Appeal; it is quite a different thing to say that even when the Court of Appeal differs on its view of the facts, it could not interfere with the order for costs made by the Court below. In — 'Civil Service Co-operative Society v. General Steam Navigation Co.', (1903) 2 KB 756 (E), the principles were thus stated by the Earl of Halsbury, L. C.:

> "No doubt, where a Judge has exercised his discretion upon certain materials which are before him, it may not be, and I think is not, within the power of the Court of appeal to overrule that exercise of discretion. But the necessary hypothesis of the existence of materials upon which the discretion can be exercised must be satisfied. In the present case, so far as the evidence before me goes, I can see no materials whatsoever upon which the learned Judge could exercise a discretion at all."

What Satyanarayana Rao J. has done is, on the materials, to reverse the findings of fact of the Subordinate Judge, and the variation in the decree for costs was consequential on the reversal of the findings of fact of the Court below. We are of the opinion that in the view taken by Satyanarayana Rao J. of the facts. it was within his power to vary the order for costs made by the Subordinate Judge.

(3) Mr. Viswanatha Ayyar next contends that the findings of fact given by Satyanarayana Rao J. are not supported by the evidence. The facts which are established by the evidence are these: The 2nd defendant is stated to be an old custo-

mer of the plaintiffs' family which had been carrying on a money-lending business. Mr. Viswanatha Ayyar concedes that the interest on the promissory note had been paid regularly; therefore it is a case in which it cannot be said that the debtor was a person who was very much in default. In fact, the evidence discloses that at the time when the promissory note dated 8-3-1943 was renewed under Ex. P-1 on 1-1-1946, there were arrears of interest due on the old promissory note and that notwithstanding that such interest was in arrears that promissory note was returned to the 2nd defendant, and in March when the plaintiff wanted payment of interest on the promissory note, Ex. P-1, he was paid not merely the interest on Ex. P-1 due down to that date but also arrears of interest payable under the promissory note. Ex. D-1, which was superseded by Ex. P-1. All this clearly indicates that the plaintiff had full confidence in the solvency of the 2nd defendant and that he was content to collect interest from time to time on the promissory note. It is found that as a matter of fact no demand in writing was made by the plaintiff calling for payment of the amount due under the promissory note. The plaintiff no doubt stated in evidence that he made oral demands. We agree with Satyanarayana Rao J. that in the absence of a written demand it will not be safe to act upon oral demands of the kind spoken to by the plaintiff. No satisfactory explanation has been given by the plaintiff for not making a demand in writing. It is admitted that the plaintiff made no demand whatsoever on the partner of the 2nd defendant, Narasimhachari. Mr. Viswanatha Aiyar argues that the liability under Ex. P-1 arose on 8-3-1943 before Narasimhachari was taken as partner by Sri Varalakshmi Stores and that in law he would not be liable. But the plaint does not proceed on the footing that Narasimhachari is not liable. The allegations in paras. 3 and 4 of the plaint clearly show that the plaintiff considered that he was liable. When it is admitted that the plaintiff did not make any demand on Narasimhachari whom he thought to be liable, that certainly supports the conclusion of Satyanarayana Rao J. that he made no demand on the 2nd defendant. The fact remains that the entire amount was paid by the latter on the very first day of the hearing. The point for consideration under these circumstances is whether there was any necessity for the plaintiff to file the suit and whether there was any default on the part of the 2nd defendant after a demand was duly made for the payment of the amount due under the promissory note. Satyanarayana Rao J. had ample materials on which he could come to the conclusion that it was the plaintiff that was responsible for the institution of the suit and that the real object was to throw costs on the 2nd defendant.

(4) Accepting as we do the findings of facts reached by the learned Judge and following the principles laid down in the decisions cited on behalf of the appellant, we do not find any sufficient ground for interfering with the discretion exercised by the learned Judge in the matter of costs.

(5) The appeal is dismissed with costs.

B/D.H.Z. Appeal dismissed.

A. I. R. 1953 MADRAS 834 (Vol. 40, C. N. 319)

MACK J.

Ramayya and another, Appellants v. Venkatachellamma and another, Respondents.

A. A. O. No. 15 of 1950, D/- 22-1-1953.

Arbitration Act (1940), S. 47—Arbitration in pending suit without knowledge of Court.

Private arbitration in a pending suit without the knowledge of the Court — No original award produced signed by all the arbitrators — Arbitrators differing from each other—No consent of parties — Only course for a Court is to ignore the arbitration and decide the suit on its merits. AIR 1945 Mad 294 and AIR 1928 Mad 1025 (FB), Distinguished. (Para 8)

Anno: Arbitration Act, S. 47 N. 1.

B. V. Ramanarasu, for Appellants; M. S. Ramachandra Rao and M. Krishna Rao, for Respondents.

CASES CITED:

(A) ('45) AIR 1945 Mad 294: ILR (1946) Mad 39

(B) ('28) AIR 1928 Mad 1025: 51 Mad 800 (FB)

(C) ('53) AIR 1953 Mad 781: (C. R. P. Nos. 1783 to 1785 of 1949) (FB)

(D) ('46) C. M. A. No. 623 of 1946 (Mad)

JUDGMENT: The appellants are the plaintiffs, who sued the two defendants on 25-6-1948 for a permanent injunction restraining them from opening a doorway into an alleged private lane belonging to them and for a mandatory injunction directing the removal of a wall which encroached on their site. This appeal arises out of a reference to arbitration outside court subsequent to the filing of the suit, which degenerated into a regrettable fiasco as between the arbitrators themselves, three of them giving the lie direct to the fourth arbitrator one S. Rattiah. The learned District Munsif accepted the evidence of three arbitrators examined for the plaintiffs as P. Ws. 1, 2 and 3 that there was an award in writing signed by all the four arbitrators and decreed the suit in accordance with a copy kept by P. W. 1. The finding on their evidence was that Rattiah suppressed the signed award. The learned Subordinate Judge in appeal preferred to believe Rattiah and remanded the suit for fresh disposal.

(2) The relevant facts briefly are these. The suit was preceded by the usual preliminary canter in the Magistrate's Court. The first defendant who is a woman one Venkatachellamma bought a site next to the plaintiff's house and started building. The 2nd defendant is said to be some relation of hers but said to be looking after her affairs. When they were obstructed by the plaintiffs, they filed M. C. No. 7 of 1948 in the Magistrate's Court and got an 'ex parte' order under S. 144, Cri. P. C. On 18-6-1948, plaintiffs retaliated by filing M. C. No. 9 of 1948 for cancellation of this order and followed it up with the suit O. S. No. 362 of 1948. On 17-7-1948, both parties referred their dispute to the arbitration of four persons by a signed reference Ex. A. 1. It is common ground that on 5-8-1948 the four arbitrators took measurements. According to three of them P. Ws. 1 to 3, they were all in agreement as to the terms of the award, which was written in Rattiah's house and the parties who were waiting outside were orally informed. The award was left with Rattiah for further action. Then on 10/8/1948 the defendants

issued a notice Ex. B. 1 to the arbitrators not to proceed with the enquiry. On 16-8-1948 the three arbitrators P. Ws. 1 to 3 appeared in the Criminal Court and filed a memo there Ex. A. 6 embodying the terms of their award, alleging that the original signed by all the four arbitrators had been left with Rattiah.

The terms of the award were, 'inter alia', that the door way into the lane was to be closed, but the wall alleged to be an encroachment was to be permitted to remain and the defendants were to pay Rs. 100 to the plaintiffs by way of compensation. The criminal proceedings were withdrawn and O. P. No. 52 of 1948 was filed in the suit by the plaintiffs for a decree in terms of the award on 5-10-1948. This was countered by an application by the defendants to set aside the alleged award. The only witnesses examined were the four arbitrators, three ranging themselves on one side and swearing that they had signed an award, which was left with Rattiah, who stoutly swore to the contrary that the measurements which were begun could not be completed because the parties themselves started disputes which nearly led to their beating each other. He was prepared to swear that he and the other arbitrators went and reported the matter to one Anne Sanjivayya, who advised the execution of a document choosing him as a fifth arbitrator but that this was not done. According to P. W. 1, each party deposited Rs. 500. According to Rattiah, R. W. 1, Rs. 900 of this deposit is with him and Rs. 100 is still due from the defendants. It would appear that plaintiffs chose two of the arbitrators and defendants two, a rather unsatisfactory arrangement, but in the present case we have three of the arbitrators including one chosen by the defendants, all sticking together and swearing to all four of them signing an award in agreement with each other and entrusting the award to Rattiah. The learned District Munsif, who heard the arbitrators, accepted the sworn testimony of three of them as against Rattiah. The learned Subordinate Judge took the view that there was absolutely no motive for Rattiah to take sides, admitted as he was to be a very respectable man and he considered him at least as good and respectable, if not better than the other three arbitrators. He concluded his comparative estimate of respectability of the arbitrators in paragraph 52 of his judgment by the following sentence.

"I opine that he is a much better man than respondents 3 to 5."

(3) One of the numerous grounds on which the learned Subordinate Judge set aside the award was that there was no proper selection of arbitrators, there being some evidence that two of them P. Ws. 1 and 2 were not well disposed to the defendants. He however overlooked the fact that the third arbitrator selected by the defendants supported them in the witness box. The parties were not examined. The non-examination of Anne Sanjivayya has been stressed on behalf of the appellants as a defect in the case of the defendants as it left Rattiah's testimony alone and uncorroborated, whereas if as he deposed all the arbitrators went to Anne Sanjivayya when they could not agree, this man would have given evidence of great value to demolish the case of the plaintiffs that there was in fact a written award signed by all the arbitrators. The learned Subordinate Judge was of the view that the plaintiffs could as well have cited him to show that he was not approached at all. It is difficult to see how they could do this, anticipating the evidence given by Rattiah.

(4) I have found great difficulty in following and appreciating the numerous grounds given in several brief paragraphs by the Subordinate Judge for rejecting the evidence of three of the arbitrators P. Ws. 1 to 3. One was that the award, if written, should have been served on the parties then and there. Another was the failure to purchase the requisite stamp then and there on the afternoon of 5-8-1948 and so on. It is regrettable that the four arbitrators to whom the parties by a signed reference entrusted their dispute for resolution who are seemingly respectable persons should give each other the lie direct in this way. The reasons given by the Subordinate Judge for reversing the finding of the District Munsif, who had the great advantage of hearing all the arbitrators in the witness box are so unconvincing, that in fairness to the arbitrators themselves the rejection in toto of the evidence of three of the arbitrators, P. Ws. 1 to 3 should not, I think be permitted to stand. It is often difficult and embarrassing for a court to resolve so strong and direct a conflict in oral testimony between seemingly respectable persons. The view to which I am inclined is that there was, as P. Ws. 1 to 3, have deposed, an agreement as between them and Rattiah as regards the award which should be passed and that it was in fact reduced to writing and signed at any rate by P. Ws. 1 to 3 before they left the award with Rattiah. It is probable that Rattiah was influenced to change his mind, it may be after a conversation with Anne Sanjivayya, who has avoided the witness box, and that he did not in fact sign the award at all. I find it extremely difficult to believe that P. Ws. 1 to 3 would have gone to the length of swearing falsely that they all signed an agreed award which was left with Rattiah in whose custody the deposit money was also kept for formal notice to the parties and for further action.

(5) The far more important point of law that remains is whether such an "award" can be made the basis of a court decree without the consent of parties.

(6) Prima facie it would appear that S. 47 of the Arbitration Act governs such references to arbitration by parties in a pending suit without reference to or knowledge of the court. Under the proviso to S. 47, an award otherwise obtained, that is, not under the specific provisions of the Act, may, with the consent of all parties interested, be taken into consideration as a compromise or adjustment of a suit by any Court before which the suit is pending. Chapter II of the Act provides for arbitration without the intervention of court; Chapter III, for arbitration with the intervention of court where there is no suit pending; and Chapter IV for arbitration in suits through the court. The Act does not provide for arbitration in pending suits except through Court; and, according to the proviso to S. 47, an award on the footing of such arbitration may only form the basis of a decree by consent.

(7) A different view was taken by Leach C. J. and Lakshmana Rao J. in — 'Arumugha Mudaliar v. Balasubramania Mudaliar', A I R 1945 Mad 294 (A). In that case there was a reference in a pending suit to a single arbitrator who passed a signed award to which objection was taken. It was held that the Arbitration Act of 1940 did not change the law as laid

down in — 'Subbaraju v. Venkataramaraju', AIR 1928 Mad 1025 (FB) (B) by a Full Bench of our High Court that an award in a private arbitration in a pending suit can be treated as an agreement for compromise and form the basis of a decree under Order 23, R. 3, C. P. C. although the parties did not accept it. The correctness of this Bench decision has been doubted by single Judges of this Court and my attention has been drawn to a reference to a Full Bench by Venkatarama Aiyar J. in — 'Abdul Rahman v. Muhammad Siddiq', AIR 1953 Mad 781 (C). That reference was made in view also of some Bench decisions outside Madras where a different view was taken. It may also be said the correctness of this decision was doubted by Happell and Govindarajachari JJ. in — 'C. M. A. No. 623 of 1946 (Mad.) (D)' in a reference to a Full Bench which however did not specifically determine the point for reasons which need not be gone into.

(8) I have carefully considered the bearing of the decision in — 'AIR 1945 Mad 294 (A)', on the present case which can, I think, be readily differentiated, as there is here no original award produced signed by all the arbitrators as in that Bench decision and also in — 'AIR 1928 Mad 1025 (FB) (B)'. When in a private arbitration in a pending suit without the knowledge of the court arbitrators begin to differ from each other, give each other the lie, if not begin to quarrel with each other, another dispute is in consequence created and the only course is for a court to ignore the arbitration and decide the suit on its merits.

(9) For these reasons, I dismiss this appeal with a direction to the District Munsif to give this long pending suit as expeditious a disposal as possible. I would further direct the parties to bear their own costs both in the appeal in the lower appellate Court and also in this civil miscellaneous appeal irrespective of the result of the suit.

(10) No leave.

B/D.H. Appeal dismissed.

A. I. R. 1953 MADRAS 836 (Vol. 40, C. N. 320)

RAMASWAMI J.

Pulimarathinkeel Katheesa and another, Appellants v. Puthiapurayil Assema (died) and another, Respondents.

Second Appeal No. 1102 of 1949, D/- 9-3-1953.

Registration Act (1908), S. 17(2)(vi) — Compromise decree.

Pre-1929 compromise recorded and covering properties involved in suit — Compromise need not be registered. AIR 1949 Mad 245 and AIR 1940 Mad 897, Rel. on. (Para 1)

Anno: Reg. Act, S. 17 N. 59.

M. C. Sridharan, for Appellants; V. P. Gopalan Nambiar, for Respondents.

CASES CITED:

(A) ('49) AIR 1949 Mad 245: 1948-2 Mad LJ 475

(B) ('40) AIR 1940 Mad 897: 1940-2 Mad LJ 319

(C) ('19) AIR 1919 PC 79: 47 Cal 485 (PC)

JUDGMENT: The short point for determination in this second appeal is whether with regard to a pre-1929 compromise which has been "recorded" and which covered the property involved in the suit, the compromise should have been registered. In my opinion, there are two good reasons why it need not be registered. First of all, the compromise itself is of the year 1927. Section 17(vi), Registration Act was amended by Act 21 of 1929 and for the words "and any award" the following words "except a decree or order expressed to be made on a compromise and comprising immovable property other than that which is the subject-matter of the suit or proceeding" were substituted. This amendment has no retrospective effect. Secondly, I have just mentioned that the property which is the subject-matter of the compromise is also the subject-matter of the suit. It has been held by this Court in — 'Annapurnamma v. P. L. Swami', AIR 1949 Mad 245 (A) relying on a prior decision in — 'Ranganayaki Ammal v. Sampathkumaran', AIR 1940 Mad 897 (B) that a decree affecting immovable property, which is the subject-matter of the compromise and which is also the subject-matter of the suit, need not be registered. It is on the foot of this distinction that this Court has issued H. C. P. Dis. 612 of 1936 which has been incorporated at pages 122 and 123 of the Civil Rules of Practice and Circular Orders, Vol. I (second edition, 1940) and framed question No. 2(f) in the Notes of Inspection of Subordinate Courts, Form No. 15 (see ibid Appendix III-L, page 345, Vol. II).

The Circular Order states:

"It has come to the notice of the High Court that in drafting a decree passed in terms of a compromise entered into between the parties the procedure prescribed in O. 23, R. 3 and O. 20, R. 9, Civil P. C. is not followed in some Courts, and that where a compromise includes matters which do not form part of the subject-matter of the suit it has been the practice to include all the terms of the compromise in the operative portion of the decree. This practice, besides being opposed to the abovementioned provisions of the Civil Procedure Code, is said to present some difficulty to the Registration Department in ascertaining whether property not forming part of the subject-matter of the suit has or has not been included in the compromise decree.

The High Court directs that, in drafting compromise decrees, Courts should strictly observe the provisions of O. 23, R. 3 and O. 20, R. 9, Civil P. C., and that the second of the two methods indicated by their Lordships of the Judicial Committee in — 'Hemantha Kumari v. Midnapur Zamindari Co.', AIR 1919 PC 79 at p. 81 (C) be adopted. After reciting that the compromise set out in the schedule refers to not only the subject-matter of the suit but also to certain properties extraneous to it, the decree should in the operative portion deal only with the subject-matter of the suit, which will be clearly and fully described as is done in the plaint schedule or schedules. The compromise itself should be introduced as a schedule to the decree."

The point of law has therefore been correctly decided by both the Courts below and the second appeal has got to be and is hereby dismissed with costs. No leave.

B/D.H.Z. Appeal dismissed.

A. I. R. 1953 MADRAS 837 (Vol. 40, C. N. 321)

MACK J.

P. C. Abdulla Kutty, Appellant v. Cheriyamparambath Janaki, Respondent.

A. A. O. No. 313 of 1952, D/- 28-1-1953.

(a) Workmen's Compensation Act (1923), S. 30 — Finding of fact — Commissioner finding that deceased earned certain wage — This is finding fact — No interference unless it is so incorrect, so opposed to the evidence or so perverse as to be brought into the category of a question of law. (Para 1)

Anno: Workmen's Comp. Act, S. 30 N. 2, 3.

(b) Workmen's Compensation Act (1923), S. 3 and Sch. I — Contributory negligence.

The Act does not make provision for the reduction of the scheduled compensation on the score of any contributory negligence on the part of a workman who dies in consequence of injuries he receives in the course of his employment, which ordinarily would not be fatal or which in fact are simple. Where the workman got injuries on his finger but due to the primitive treatment given by the employer, and his re-employment, the injuries got worse and the workman died about three weeks after the injuries by tetanus which had developed as a result of the negligence, the compensation awarded by the commissioner to the widow cannot be reduced on the ground of contributory negligence, when the employer knew of the injuries, took upon himself to give him medical treatment and avoided coming in witness-box and give evidence on matters which were best known to him. (Para 2)

Anno: Workmen's Comp. Act, S. 3 N. 1.

K. K. Sridharan, for Appellant; S. Mohan Kumaramangalam and A. Mahadevan, for Respondent.

JUDGMENT: This is an appeal by an employer who runs a saw mill in Beypore in South Malabar against an order by the Additional Commissioner for Workmen's Compensation, Madras awarding compensation of Rs. 1500 to the widow of one Velayudhan, an employee in the saw mill who is said to have died in consequence of injuries sustained in the course of his employment. It is not disputed that when he was feeding the saw with timber he got his hand cut. There is divergence of testimony as to the extent of the injuries. According to his widow, he was rather seriously cut on three fingers and came home with his hand bandaged saying that he was treated with native medicine by the mill authorities. According to the employer who did not go into the witness-box and examined a driver in his employ, Velayudhan received only a small cut on his little finger.

The Commissioner found that the injury was sustained on 21-6-1950 after which Velayudhan came regularly to work till he was taken to the Government hospital and died there the day after he was admitted that is on 13-7-1950, more than three weeks after the receipt of the injuries. According to the hospital inpatient register, Ex. A-1 and his history sheet, Ex. A-2, Velayudhan died of tetanus. The Commissioner held that death was the result of injuries sustained in his employment in the saw mill and finding that he was paid Rs. 1-14-0 a day awarded him compensation of Rs. 1500 in the category of wage earners between Rs. 45 and Rs. 50 a month. The employer's absence from the witness-box a notable omission in his case would justify the admission in toto of the evidence of Velayudhan's widow which there are no grounds for rejecting.

Under S. 30, Workmen's Compensation Act no appeal shall lie against any order awarding compensation unless a substantial question of law is involved and unless the amount in dispute in the appeal is not less than Rs. 300. The correctness of findings of fact has been however canvassed before me. Even as regards the category of wage earners in which the Commissioner placed Velayudhan it was urged that he was earning only Rs. 1-10-0 a day on the evidence of the driver examined by the employer and not Rs. 1-14-0 a day. In the widow's application Rs. 1-14-0 was written in figures and Rs. 1-10-0 was written in words. But she claimed Rs. 1500 as compensation rather obviously on the basis of Rs. 1-14-0 a day. In view of the employer not giving evidence in a matter of this kind, the learned Commissioner accepted the evidence of the widow. I am precluded under the Act from interfering with a finding of fact such as this by the Commissioner unless it is so incorrect so opposed to the evidence or so perverse as to be brought into the category of a question of law.

(2) The only legal point raised is that in this case no connection has been established between the injuries sustained in the course of Velayudhan's employment and his death in hospital about three weeks later. There is evidence by the widow supported by two other witnesses to the effect that his injuries were treated in the mill and that he got worse. According to P. Ws. 2 and 3, he was also given light work to do in the mill and this evidence, if true, clearly establishes death as being the consequence of cuts he received. It is true that a little more care both on the part of the workman and on the part of the employer and with proper medical attention this workman should ordinarily have been cured of these injuries in the course of a few days. Tetanus may develop as a result of negligence or dirt finding its way into the injury at any time. The evidence shows that the employer knew perfectly well about the injuries this workman had sustained and that he also gave him rough and ready medical attention of a somewhat primitive type. As Mr. Kumaramangalam urges the workman cannot altogether be blamed for relying on this treatment of his injuries which he received in the mill. The Act does not make provision for the reduction of the scheduled compensation on the score of any contributory negligence on the part of a workman who dies in consequence of injuries he receives in the course of his employment, which ordinarily would not be fatal or which in fact as in the present case are simple.

The learned advocate for the employer has attempted an argument on the analogy of criminal law which finds a man guilty only of simple hurt although the simple hurt caused may, as a result of other circumstances including the neglect of the person injured, or the inadequacy of medical treatment, may prove fatal. That analogy cannot however apply in all cases to compensation awardable under the Workmen's Compensation Act, particularly in

a case of this kind where the employer knew of the injuries sustained by his workman, took it upon himself to give him medical treatment and last but by no means least, avoided coming before the Commissioner and giving evidence on matters which were best known to him. I can see no legal grounds for any interference with the order of compensation passed and dismiss the appeal with costs.

B/R.G.D. Appeal dismissed.

A. I. R. 1953 MADRAS 838 (Vol. 40, C. N. 322)

RAMASWAMI J.

Governor-General in Council, represented by the General Manager, Madras and Southern Mahratta Railway, Appellant v. Gujrathi Sankarappa being minor by next friend and paternal uncle Moroji, Respondent.

Second Appeal No. 1106 of 1949, D/- 25-2-53.

(a) Civil P. C. (1908), S. 80 — Essentials of notice — Notice against Railway administration.

The terms of S. 80 are explicit; these terms should be fulfiiled in order to come within the proper notice contemplated thereunder. The three essential requirements are, namely, that the addresses should be identified and must have received the communication; secondly there should be no vagueness or indefiniteness about the person giving the notice and who must also be the person filing the suit and the notice must also give the details which are specified in the section and thirdly two months' time allowed must expire before the suit is laid. Once these requirements are fulfilled the minor details like the misdescription of the person to whom the communication is addressed will not make it an improper notice which does not comply with the requirements of S. 80. (Para 7)

A notice claiming damages for loss of goods in railway transit was sent to the Member-in-charge of the Railway Board as the competent authority to deal with the matter. This notice was forwarded by the Railway Board to the General Manager, M. & S. M. Railway as the competent authority to deal with the matter.

Held that the notice was a proper notice under S. 80. A I R 1951 Mad 327; AIR 1951 Mad 416; AIR 1952 Mad 502; AIR 1933 Mad 105 and AIR 1949 Pat 416, Rel. on. (Para 11)

Anno: Civil P. C., S. 80 N. 1 and 9.

(b) Limitation Act (1908), S. 22 — Misdescription.

Where no new party is added but only a correction of a mis-description of the defendant is made by an amendment of the plaint, the suit cannot be said to have been instituted on the date the amendment is allowed. (Para 12)

Anno: Lim. Act, S. 22 N. 10.

C. Govindaraja Iyengar instructed by King and Partridge, for Appellant; Ch. Suryanarayana Rao and Ch. Ramakrishna Rao, for Respondent.

CASES CITED:

(A) ('27) AIR 1927 PC 176: 51 Bom 725
(B) ('35) AIR 1935 Mad 389: 156 Ind Cas 333
(C) ('41) AIR 1941 Mad 446: 1941-1 Mad L J 328
(D) ('46) AIR 1946 Mad 366: 1946-1 Mad LJ 267
(E) ('47) AIR 1947 Mad 64: 1946-2 Mad LJ 65
(F) ('51) AIR 1951 Mad 327: 1950-2 Mad LJ 506
(G) ('51) AIR 1951 Mad 416: 1950-2 Mad LJ 656
(H) ('49) AIR 1949 Pat 416: 28 Pat 292
(I) ('47) AIR 1947 Pat 81: 230 Ind Cas 274
(J) ('52) AIR 1952 Mad 502: 1951-1 Mad LJ 463
(K) ('33) AIR 1933 Mad 105: 140 Ind Cas 458

JUDGMENT: This is a second appeal which has been preferred against the decree and judgment of the District Judge of Kurnool in A. S. 101 of 1947 reversing the decree and judgment of the learned District Munsif in O. S. 167 of 1945.

(2) The facts are: Six bundles of cotton cloth were consigned on 14-9-1943 by the plaintiff's deceased father Devappa from the Tuggali railway station under R. R. No. 63/17791 and invoice No. 116 for delivery to himself at Hindupur. Of these six bundles, only three bundles, weighing 3 maunds & 26 seers, arrived at Hindupur on 16-9-1943. The plaintiff's father took delivery of these three bundles under protest and informed the railway authorities on 30-9-1943 about the non-delivery of the remaining three bundles. The Chief Commercial Manager, M. & S. M. Railway wrote to the plaintiff's father on 14-10-1943 that he would make enquiries into the matter and send a reply in due course. As no reply was however received by the plaintiff's father for nearly a month afterwards, he got a notice sent through his lawyer on 14-11-1943 claiming compensation of Rs. 2955-13-0 for the non-delivery of the remaining three bales. The Chief Commercial Manager by his letter dated 17-2-1944 replied that the bales in question had been lost from a running train and that the property recovered by the police and kept in the Sub-Magistrate's Court, Gooty would be delivered to the plaintiff's father in due course. On 15-6-1944, 63 items of cloth valued at Rs. 571 were delivered to the plaintiff's father by the Traffic Inspector, Guntakkal. The remaining cloth of the value of Rs. 1964-13-0 was not delivered to the plaintiff's father. Nor was its value paid to him. The Chief Commercial Manager by his letters dated 31-5-1944 and 14-7-1944 declined to entertain the plaintiff's claim in respect of it. The plaintiff is entitled to recover as compensation Rs. 1964-13-0 being the value of the remaining cloth, Rs. 100 being the amount spent by the plaintiff's father towards travelling expenses and Rs. 300 which the plaintiff's father would have realised as profit had the cloth not delivered been sold by him during the Dasara season of 1943 making up in all Rs. 2364-13-0 from the defendant. Notice under S. 80, C. P. C. has been given to the defendant prior to the institution of the suit. The plaintiff had instituted the suit on 14-7-1945 impleading the defendant as "The Madras and Southern Maharatta Railway Co., represented by the Member to the Railway Board, Government of India, New Delhi." On 8-2-1946, he put in I. A. No. 145 of 1946 for leave to amend the description of the defendant as "Governor General of India in Council represented by the General Manager M. & S. M. Railway". This application was allowed on 18-2-1946.

(3) The defendant denied first of all the liability sought to be fastened by the plaintiff and secondly pleaded that there was no proper notice and thirdly that the suit was barred by limitation.

(4) On the point of fact namely whether the plaintiff was entitled to any amount, the trial Court found that the plaintiff was entitled to a sum of Rs. 1964-13-0 as compensation. On the ground of want of proper notice following the decisions in — 'Bhagchand Dagdusa v. Secy. of State', AIR 1927 P. C. 176 (A); — 'Apparao v. Secy. of State', AIR 1935 Mad 389 (B), — 'Marina Ammayi v. Secy. of State', AIR 1941 Mad 446 (C), — 'Governor General in Council v. Krishnaswami Pillai', AIR 1946 Mad 366 (D) and — 'Governor-General of India v. Raghunandan', AIR 1947 Mad 64 (E) and also that the suit was barred by limitation by reason of the fact that on the date when the amendment was allowed it was beyond the time prescribed under Art. 30 or 31, Limitation Act, the trial Court dismissed the suit.

(5) There was an appeal therefrom and the learned District Judge held that there was proper notice in this case and secondly that the suit was not barred by limitation. Therefore he decreed the suit for Rs. 1964-13-0 and proportionate costs.

(6) In regard to the concurrent finding of fact as regards compensation there can be no dispute before me and there can be no interference by me. In fact it was not raised before me.

(7) Turning to the want of proper notice it is quite true that the terms of S. 80, C. P.C. are explicit and that these terms should be fulfilled in order to come within the proper notice contemplated thereunder. But the three essential requirements are, namely, that the addressee should be identified and must have received the communication; secondly there should be no vagueness or indefiniteness about the person giving the notice and who must also be the person filing the suit and the notice must also give the details which are specified in the section and thirdly two months' time allowed must expire before the suit is laid. The object of S. 80, C. P. C. is to give time for the Government to consider the whole matter and see whether it cannot be settled out of Court and wasteful litigation avoided. It is after all no pleasure for the State to embark upon a wasteful litigation against its own subjects and therefore this period of time is given for effecting possible settlement of these disputes. Once these requirements are fulfilled, the minor details like the misdescription of the person to whom the communication is addressed would not make it an improper notice which does not comply with the requirements of S. 80, C. P. C. In regard to this matter the learned advocate for the respondent as also the learned advocate for the appellant have also brought to my notice the subsequent decisions to which reference will be made briefly now.

(8) Horwill J. in — 'Governor-General of India in Council v. Krishna Shenoy', AIR 1951 Mad 327 (F), has held that where although the name of the Secretary of State was inadvertently given at the head of the notice, yet it was treated by the Governor-General in Council as notice to him and action was taken in the same way as if the notice had been addressed to the Governor-General-in-Council and that it is sufficient compliance with the requirements of S. 80, C. P. C. because the Governor-General in Council was in fact given notice. It must be held that the notice was given to the Governor-General in Council notwithstanding the error in the matter of designation. The learned Judge distinguished — 'AIR 1946 Mad 366 (D)'. In — 'Subramaniam v. Union of India', AIR 1951 Mad 416 (G), Panchapagesa Sastry J. has dealt with this matter with a new approach. He has pointed out the manner in which S. 80, C. P. C. should be construed. He states thus:

> "The argument on behalf of the respondent is that unless the notice expressly states in itself that the suit will be against the Governor-General in Council S. 80 is not complied with. I think this reading of S. 80 is not warranted. I realise that the terms of S. 80 are explicit and mandatory and cannot be waived. It requires that the notice should state the name, the residence etc., of the plaintiff, the cause of action and the relief. There is no objection in this case that the notice was not delivered to the proper person. The only objection is that the notice does not say in the last paragraph where a reference to the proposed suit is made that the suit will be against the Governor-General in Council. Any person who reads this notice can have no doubt that it is a suit proposed to be filed against the Crown or the Government. There is no reason to think that the suit was to be against the Secretary as a Public Officer concerned."

The learned Judge distinguished — 'AIR 1946 Mad 366 (D), & followed —'Bholaram Shibdhan Firm v. Governor-General in Council', AIR 1949 Pat 416 (H).

(9) Turning to the decision relied on by Panchapagesa Sastri J. in — 'AIR 1949 Pat 416 (H)', the Patna Bench laid down that it is not correct to say that because under S. 79 in the case of a suit against the Central Government the suit is to be instituted by naming the Governor-General in Council as defendant the notice under S. 80 must also be addressed to the Governor-General in Council, that S. 80 is complete in itself and provides for a notice in such a case to be delivered to or left at the office of the Secretary to Government and that it must obviously mean that the notice has also to be addressed in such a case to the Secretary to that Government. 'Governor-General in Council v. Amilal', AIR 1947 Pat 81 (I), was relied on and — 'AIR 1946 Mad 366 (D)', was distinguished. Panchapagesa Sastri J. in a subsequent decision reported in —'Sankunni Menon v. South Indian Rly', AIR 1952 Mad 502 (J), has stated that the notice under S. 80, C. P. C. after setting out the despatch of goods and the non-delivery in time and their late arrival and the deterioration of the goods and the loss sustained by the plaintiff ended with this paragraph:

> "Please therefore take notice that unless you make good the loss I have sustained by reason of your negligence, I intend instituting a suit against your railway for such loss as mentioned above."

The letter was addressed to the Secretary for Railways, Central Government, New Delhi and the agents of the three railways concerned. The learned Judge has held that though S. 80, C. P. C. is mandatory it is equally well settled that the Court should not be hypercritical in examining the language used but should interpret the Code in a free and liberal spirit and that on a fair reading of the notice in the present case it may well be taken as an intimation which will satisfy the requirements of Ss. 79 and 80, C. P. C., and that the name of the proposed defendant need not be stated although of course it is expected that the person against whom the relief is sought would be particularised.

(10) To sum up as Pandalai J. observed in — 'Ramaswami v. Secy. of State', AIR 1933 Mad 105 (K), in effective language,

> "We are not bound to abandon all common sense, but on the contrary we must look at the document and understand it in a fair and reasonable sense in the way in which the writer meant and the addressee understood it."

(11) In this case applying these principles, what are the facts? The plaintiff wanted only to address the State or the Government. The Government also understood the matter only in that way. The notice was sent to the Member-in-charge of the Railway Board as the competent authority to deal with the matter. This notice was forwarded by the Railway Board to the General Manager, M. & S. M. Railway as the competent authority to deal with the matter. Therefore the instant case falls within the four corners of the decisions which have been set out above and I have no hesitation in agreeing with the District Judge of Kurnool that the notice was a proper notice under S. 80, C. P. C. In this connection we must remember what has been stated in a House of Lords decision by Lord Penzance cited with approval in the Civil Justice Committee Report that:

"Procedure is the machinery of the law after all — the channel & means whereby law is administered and justice reached. It strangely departs from its proper office if in place of facilitating it is permitted to obstruct and even to extinguish the legal rights, and is thus made to govern where it ought to subserve."

(12) As regards the point regarding limitation the question is whether when the amendment was made there was an addition of party or only a correction of a misdescription. I have set out sufficiently all the facts to show that no new party had been added. On the other hand a misdescription when recognised as such has been corrected by means of an amendment and against which also no revision has been filed. Therefore the suit has been filed within time.

(13) The result is that this second appeal has got to be dismissed and is hereby dismissed with costs. No leave.

B/V.S.B. Appeal dismissed.

A. I. R. 1953 MADRAS 840 (Vol. 40, C. N. 323)

VENKATARAMA AIYAR J.

Voruganti Seshireddi, Appellant v. Vanka Venkata Subbayya and others, Respondents.

Second Appeal No. 1159 of 1949, D/- 29-1-1953.

(a) Negotiable Instruments Act (1881), S. 51 — Endorsement by payees on different dates.

The section does not require that all the payees should endorse at the same time; endorsement on different dates is valid. 24 Mad 654 and AIR 1922 Mad 210, Foll. (Para 2)

Anno: Negotiable Instruments Act, S. 51 N. 1.

(b) Negotiable Instruments Act (1881), S. 48 — Endorsement and delivery.

Where a promissory note is endorsed and delivered by only one of the payees there is no valid endorsement and delivery of the note is ineffectual to operate as negotiation of the note. It is therefore open to the other payees at any time thereafter to make a fresh and valid endorsement and negotiation. (Para 3)

Anno: Negotiable Instruments Act, Ss. 46-48 N. 1.

P. Babulu Reddy, for Appellant; K. Kotayya, for Respondents.

CASES CITED:

(A) ('01) 24 Mad 654

(B) ('22) AIR 1922 Mad 210: 1922 Mad WN 263

JUDGMENT: This second appeal raises a question under S. 51, Negotiable Instruments Act. The first defendant is the appellant. On 23-10-1943 he executed a promissory note for Rs. 2500 (Ex. P-1) in favour of the fourth defendant Illuri Yallamanda Reddi and his three sons, defendants 5 and 6 and one Koti Reddi since deceased. The plaintiff sued as endorsee of this promissory note, to recover the balance of the amount due thereunder. The appellant resisted the suit on various grounds. But the only defence that is now material is that there was no proper endorsement or negotiation of the promissory note in favour of the plaintiff and that in consequence, no action is maintainable thereon. This contention is based on the fact that on 17-4-1944 the 4th defendant alone made the endorsement (Ex. P-3) and delivered the promissory note to the plaintiff and that the other payees Koti Reddi and defendants 5 and 6 endorsed (Ex. P-4) and redelivered the promissory note to the plaintiff on 29-12-1945. The contention is that under S. 51, Negotiable Instruments Act where there are several payees, all of them should endorse and deliver the instrument and there having been one endorsement and delivery by the 4th defendant on 17-4-1944 and another by his sons on 29-12-1945, the requirements of the section have not been complied with.

(2) Section 51, Negotiable Instruments Act runs as follows:

"Every sole maker, drawer, payee or indorsee or all of several joint makers, drawers, payees or indorsees, of a negotiable instrument may, if the negotiability of such instrument has not been restricted or excluded as mentioned in S. 50, indorse and negotiate the same."

This section requires that where there are several payees, all of them should endorse the instrument. Here, there is an endorsement by all the payees, though on different dates. The section, however, does not require that all of them should endorse at the same time. In — 'Muhammad Khumarali v. Rangarao', 24 Mad 654 (A), the defendant had executed a promissory note in favour of the plaintiff and one Maligiri Rao. The latter endorsed it to the plaintiff who sued to recover the amount due on the note. It was held that to operate as a valid endorsement u/s. 51, it must have been endorsed by all the payees and that the plaintiff could not recover as the endorsee of the instrument. Bhashyam Aiyangar J. went on to observe:

"If, in the present case, the plaintiff also had signed the endorsement in his favour at the time of the endorsement or even prior to the institution of the suit, the action would have been maintainable by him as endorsee."

These observations were followed in — 'Annamalai Chetti v. Muthiah Chetti', AIR 1922 Mad 210 (B). In that case the first defendant had executed a promissory note in favour of the second defendant who had endorsed it to defendants 3, 4 and 5. The third defendant then endorsed the note in blank and delivered it to defendants 4 and 5 who subsequently endorsed and delivered it to the plaintiff. The suit was contested by the maker on the ground that as defendants 3 to 5 had endorsed the promissory note on two different dates, the same was not valid under S. 51, Negotiable Instruments Act and conferred no title on the plaintiff as endorsee. Following the observations in 24

Mad 654 (A), Kumarswami Sastri and Devadoss JJ. held that there was a valid endorsement. It must, therefore, be held that the endorsement on the suit promissory note under Exs. P-3 and P-4 on 17-4-1944 and 29-12-1945 is valid and entitles the plaintiff to sue as endorsee of the instrument.

(3) It was next contended that in any event there was no valid negotiation of the promissory note in favour of the plaintiff, as there was no delivery of the instrument by defendants 5 and 6 and Koti Reddi on 29-12-1945. Section 48, Negotiable Instruments Act is as follows :

"Subject to the provisions of S. 58, a promissory note, bill of exchange or cheque payable to order, is negotiable by the holder by indorsement and delivery thereof."

That section requires both endorsement and delivery for a valid negotiation and what is argued is that as the promissory note had been delivered by the fourth defendant to the plaintiff on 17-4-1944, there was on 29-12-1945 only an endorsement by defendants 5, 6 and Koti Reddi and no delivery by them and that therefore, there was no valid negotiation. The decision in AIR 1922 Mad 210 (B) on which the respondent relied was distinguished on the ground that the delivery of the promissory note by the third defendant in that case was not to the plaintiff but to his joint endorsees defendants 4 and 5 and that when the latter endorsed and delivered the note to the plaintiff, the requirements of Ss. 48 and 51, Negotiable Instruments Act were complied with whereas in the present case there was a delivery to the plaintiff by the 4th defendant on 17-4-1944 without a valid endorsement as required by law and an endorsement in favour of the plaintiff on 29-12-1945, by defendants 5, 6 and Koti Reddi without delivery of the instrument. The plaintiff did not therefore acquire a valid title as endorsee. That is the contention.

But the delivery of the promissory note on 17-4-1944 by the 4th defendant cannot be held to be a delivery constituting negotiation of the instrument as that could be done only if there was a valid endorsement. If on 17-4-1944 there was no valid endorsement and there was no valid endorsement because it was only by the 4th defendant — the delivery of the promissory note by the latter to the plaintiff could not be regarded as delivery vesting in him the title to the promissory note as a negotiable instrument. Such delivery being ineffectual to operate as a negotiation of the promissory note, it was open to the payees at any time thereafter to make a fresh and valid endorsement and negotiation. When the other payees decided on 29-12-1945 to join in the endorsement and the promissory note was handed over by the plaintiff to them for that purpose, they had the right to make an endorsement in accordance with S. 51 of the Act and deliver the promissory note to the plaintiff.

Therefore, when defendants 5, 6 and Koti Reddi made the endorsement on 29-12-1945 and then delivered the promissory note to the plaintiff, there was a valid endorsement and negotiation of the promissory note to the plaintiff so as to vest the title in him as holder. There is the further fact found in this case that the endorsement dated 29-12-1945 was made by defendants 5, 6 and Koti Reddi under the directions of the fourth defendant. It must therefore be held that the requirements of the statute as to endorsement and delivery have been satisfied and that the plaintiff is entitled to recover as an endorsee of the promissory note. In this view, it is unnecessary to discuss the question whether the endorsements could operate as assignment of choses in action.

(4) In the result, the second appeal fails and is dismissed with costs. No leave.

B/V.R.B. Appeal dismissed.

A. I. R. 1953 MADRAS 841 (Vol. 40, C. N. 324)

RAJAMANNAR C. J. AND VENKATARAMA AYYAR J.

The Royal Calcutta Turf Club, Appellant v. V. K. T. Raman Menon and another, Respondents.

O. S. Appeal No. 10 of 1953, D/- 13-2-1953, from order of Panchapakesa Ayyar J., in Appln. No. 4622 of 1952, D/- 11-12-1952.

Letters Patent (Madras), Cl. 15 — Orders which are not judgments.

An order allowing or refusing to allow inspection of certain documents of a party to a suit on the Original Side of the High Court is not a "judgment" within the meaning of Cl. 15, and therefore no appeal lies from it. AIR 1927 Mad 409, Foll.; 35 Mad 1 (FB), Applied. (Paras 2, 4)

Anno: C. P. C., Letters Patent, Cl. 15 N. 2, 3.

King and Partridge, K. Veerasami, G. John Arthur and C. K. Vedachalam, for Appellant; S. Gopalaratnam, for Respondents.

CASES CITED :

(A) ('27) AIR 1927 Mad 409: 52 Mad LJ 192

(B) ('12) 8 Ind Cas 340: 35 Mad 1 (FB)

RAJAMANNAR C. J. : This is an appeal under Cl. 15 of the Letters Patent against an order made by Panchapakesa Ayyar J. on 11-12-1952 on an application by the plaintiff in C. S. No. 255 of 1952. By this order, the learned Judge directed the 2nd defendant in the suit to grant copies of certain original statements to the plaintiff on or before 22-1-1953 and that till the copies are granted the advocate for the plaintiff was free to have inspection and discovery of true copies in the two files by applying to the learned counsel for the 2nd defendant. The 2nd defendant is the appellant.

(2) A preliminary objection was taken on behalf of the respondent that no appeal lies, because the order of the learned Judge does not amount to a judgment within the meaning of that term in Cl. 15, Letters Patent. We are of opinion that the preliminary objection is well founded. It is sufficient for us to refer to the decision in — 'D. K. Asher v. V. Gopalaratnam', AIR 1927 Mad 409 (A), wherein it was held that an order refusing to allow inspection of certain accounts which were disclosed in the affidavit of documents of a party to a suit on the Original Side of the High Court was not a "judgment" within the meaning of Cl. 15, and therefore no appeal lay from it. In this case, the order allowed the inspection. We see no difference in principle which would prevent the application of the rule laid down in this decision to the present case.

(3) Mr. O. T. G. Nambiar, learned counsel for the appellant relied upon the test which was laid down by White C. J. in the leading case of — 'Tuljaram Row v. Alagappa Chet-

tiar', 35 Mad 1 (FB) (B). The learned Chief Justice laid down the following test:

"The test seems to me to be not what is the form of the adjudication but what is its effect in the suit or proceeding in which it is made. If its effect, whatever its form may be, and whatever may be the nature of the application on which it is made, is to put an end to the suit or proceeding so far as the Court before which the suit or proceeding is pending is concerned, or if its effect, if it is not complied with, is to put an end to the suit or proceeding, I think the adjudication is a judgment within the meaning of the clause."

It is contended that if the order under appeal is not complied with there is the danger of the defence of the appellant being struck off on an application by the plaintiff under O. 11, R. 21, C. P. C. That rule says:

"Where any party fails to comply with any order to answer interrogatories, or for discovery or inspection of documents, he shall, if a plaintiff, be liable to have his suit dismissed for want of prosecution, and, if a defendant, to have his defence, if any, struck out, and to be placed in the same position as if he had not defended, and the party interrogating or seeking discovery or inspection may apply to the Court for an order to that effect, and an order may be made accordingly."

It is obvious that the order now under appeal is not an order passed under this rule. If and when the appellant fails to comply with the order under appeal, then it is open to the plaintiff to apply under the above rule to have the defence struck out, and on that application, the Court may, or it may not, make an order striking out the defence. It is, therefore, clear that the order now under appeal, if not complied with, does not by itself put an end to the suit or to the defence of the appellant. The test laid down by the learned Chief Justice in the above case is, therefore, not fulfilled in this case.

(4) Following the decision of the Division Bench in AIR 1927 Mad 409 (A) and the principle of the decision in 35 Mad 1 (FB) (B) we hold that the appeal is not maintainable.

(5) The appeal, is therefore, dismissed with costs.

B/D.R.R. Appeal dismissed.

A.I.R. 1953 MADRAS 842 (Vol. 40, C. N. 325)

GOVINDA MENON AND BASHEER AHMED SAYEED JJ.

Padmanabha Bhatta and others, Appellants v. H. Ramachandra Rao and others, Respondents.

Second Appeals Nos. 2 and 47 of 1949, D/-19-2-1953.

(a) Limitation Act (1908), Art. 144 — Adverse possession of property of temple.

Where property belonging to a temple is held by a Hindu family as trustees of the said property and in the original partition in the family evidenced by a deed there is a clear recital that the property is the deity's 'uttara' (which means, 'full fee simple') property incapable of being alienated then any subsequent treatment of the property on the footing that it is joint family property will not amount to an assertion of claim adverse to the trust as such. AIR 1936 Mad 294, Rel. on. AIR 1943 Mad 558, Not applied. (Para 4)

Anno: Lim. Act, Arts. 142 and 144 N. 49.

(b) Limitation Act (1908), S. 10 and Art. 144 — Limitation for suit for recovery of trust property claimed by adverse possession.

The word "person" in S. 10 includes joint family. If the properties in the hands of the family are impressed with the character of trust, the trustee-family, by becoming sub-divided, cannot throw out that character. If, by the arrangement in the family, one person is to discharge certain religious duties, that does not mean that the family as such renounced the trusteeship and the other members can claim to be holding trust properties adversely to the trust. By mere assertion it is impossible to prescribe a hostile title against the trust because the assertion must be against a person who would be entitled to face the opposition and get rid of that assertion. AIR 1950 PC 44, Disting. (Para 5)

Anno: Lim. Act, S. 10 N. 27; Arts. 142 and 144 N. 49.

(c) Limitation Act (1908), S. 10 and Art. 144 — Adverse possession of temple property by archakas.

Archakas cannot acquire proprietary rights in the lands as against the temple to which the properties had been granted, because they should be deemed to have been in possession in a fiduciary capacity and as such cannot claim adverse possession. AIR 1948 Mad 72 and AIR 1946 Nag 401, Rel. on. (Para 5)

Anno: Lim. Act, S. 10 N. 11; Arts. 142 and 144 N. 49.

K. Srinivasa Rao and T. Krishna Rao, for Appellants; M. K. Nambiar and A. Narayana Pai, for Respondents.

CASES CITED:

(A) ('43) AIR 1943 Mad 558: ILR (1944) Mad 98
(B) ('37) AIR 1937 PC 185: ILR (1937)-2 Cal 447 (PC)
(C) ('36) AIR 1936 Mad 294: 70 Mad LJ 424
(D) ('51) AIR 1951 Mad 213: 1950-2 Mad LJ 338
(E) ('50) AIR 1950 PC 44: 1950-1 Mad LJ 243 (PC)
(F) ('48) AIR 1948 Mad 72: 1947-1 Mad LJ 287
(G) ('46) AIR 1946 Nag 401: ILR (1946) Nag 518

GOVINDA MENON J.: These two second appeals arise out of O. S. No. 113 of 1944 on the file of the Subordinate Judge's Court of South Kanara. The appellants in each of these appeals are persons who allege themselves to be the owners of the properties which are the subject-matter of dispute. Defendants 10, 11 and 8 are the appellants in S. A. No. 2 of 1949 and defendants 2 and 4 are the appellants in S. A. No. 47 of 1949. The plaintiffs, who are the contesting respondents, are the trustees of the suit temple appointed by the Hindu Religious Endowments Board and they seek to recover possession of the plaint properties from the defendants on the ground that they are temple properties. The

appellants in these appeals originally belonged to one family which became divided long ago and they put forward the contention that the properties are not temple properties but belonged to the joint family of which they constituted members, though there was an obligation fastened on them, viz., that with part of the income from the properties certain ceremonies in the temple should be conducted. Both the lower Courts found that the temple is the owner and directed surrender of possession of the properties by the defendants. Hence these second appeals.

(2) The first argument put forward is that the plaint temple is not the owner of the properties mentioned in Schs. A to C and in support of it counsel for the appellants in each of these appeals relied upon certain documents which, according to them, have been misconstrued by both the lower Courts. It is the admitted case that the family of the appellants was at one time the trustee of this Sri Mahalingeshwara Mahadevaru Devastanam and it had also the right of archakatvam i.e., performing the pooja in the temple. Both Messrs. K. Srinivasa Rao and T. Krishna Rao for the appellants contend that the lower Courts are wrong in interpreting the expression "Mahalinga Devaru Uttara" occurring in Exs. P. 1 and P. 2 as meaning absolute ownership of the temple. The learned Judges in the Courts below have understood the expression in these documents as signifying that there have been admissions by the managers of the defendants' family as early as 1858 and 1863 that the plaint properties are the deity's properties. It is now contended that the word "uttara" does not connote any absolute right in the temple but that what is meant is only that the temple has some sort of right over the income of the properties to be utilised for the performance of the religious ceremonies. In Ex. P. 2 Ram Bhatta, the then head and manager of the defendants' family, styles himself as the mokthessor or trustee of Srimath Pervaje Mahalinga Devaru and the property dealt with therein is described as "Mahalinga Devaru's uttara". There is no word mentioned anywhere in the judgment of either of the lower Courts that this expression means anything other than complete ownership of the temple. Both the trial Judge and the appellate Judge have understood the expression as vesting the ownership in the temple. Moreover, Ex. P. 4, the settlement register, describes the temple as "wargdar" or the owner of these properties. The contest in both the lower Courts was that the defendants' family is the owner as contradistinguished with the ownership of the temple. Some recent documents were produced on behalf of the defendants justifying their contention that the temple cannot be said to have absolute rights over the properties. D.W. 1 who is defendant 1 and one of the chief contesting defendants, did not depose that the expression "uttara" meant anything other than absolute rights. The learned Subordinate Judge in paras. 17 and 18 of the judgment discusses the meaning and import of the expression "uttara" occurring in Exs. P. 1 and P. 2 and nowhere do we find any statement by him that the defendants put forward the contention that the expression "uttara" meant anything except "full fee simple". In view of the admissions contained in Exs. P. 1 and P. 2 and the fact that in the settlement register the properties are described as temple properties, whatever might have been the assertions made by the members of the defendants' family who were the trustees of this temple as well as to the effect that they are the owners of the properties, we have no hesitation in agreeing with both the lower Courts that the properties mentioned in Schs. A to C are endowed properties belonging to the temple. Even if the word "Uttara" meant anything other than absolute rights we cannot say that Ex. P. 2, not being a deed of dedication, can be interpreted as limiting the rights which the temple had. Exs. P. 1 and P. 2 can by no means be called "deeds of dedication". At the time Exs. P. 1 and P. 2 came into existence there was the basic fact that the family was both the trustee as well as the archaka. In Ex. P. 3 also there is the description that the properties granted in mulgeni belong to Mahalinga Mahadevaru. As stated by the learned District Judge, the few documents on the defendants' side in which private ownership of the properties is claimed are of very recent origin and cannot therefore outweigh the effect and importance of the earlier documents. In such circumstances, it seems to us that both the lower Courts were right in coming to the conclusion that the temple is the owner of the properties.

(3) The next question that has been elaborately argued relates to the acquisition of ownership in the family by adverse possession. The earliest document by which an arrangement was made for the enjoyment of some of the properties is Ex. P. 1 by which the two branches of the family agreed to keep some properties for the performance of the ceremonies and the festivals in the temple and divided the rest of them among the branches, with a stipulation that since the properties belong to the deity as "uttara" property, the branches to whom the same have been allotted should not alienate them at all. This state of things continued till about the year 1917 when one of the branches divided the properties it got possession of without any reference to the temple and treated them as its absolute properties. The other branch also, later on, divided the properties in the same manner and some of the properties have been alienated to third parties as well. What is now urged is that when in 1863 some properties alone were retained for the performance of the ceremonies in the temple and the others were divided between the two branches and only the manager of one branch was made responsible for the performance of the ceremonies, at least over the properties allotted to the other branch, the persons in possession dealing with them subsequently, must be deemed to have acquired ownership by adverse possession and prescription. Exs. D. 2, D. 3 and D. 4 which are partition deeds in the respective branches dealt with the properties on the footing that the temple has no rights over them at all.

(4) Strong reliance was placed upon the decision in — 'Rajagopala v. Anjaneya', AIR 1943 Mad 558 (A), where this Court, following — 'Iswari Bhubaneshwari v. Brojo Nath', AIR 1937 PC 185 (B), held that if property dedicated for a public charity, of which the father of a joint Hindu family was the trustee for the time being was treated by the father and son together as belonging to the family for more than 12 years, disclaiming thereby the right of the public trust to that property, then, so far as the son was concerned, his claim was adverse to the trust and as such he had acquired an interest to the extent of one-half. We do not think that the principle enunciated there should be applied to the present case. In the original partition in the family evidenced by Ex. P. 1 there is a clear recital that the property is the deity's uttara property incapable of being alienated; and the subsequent treatment of the property on the footing that it is joint family property would not be an assertion of claim adverse to the trust as such. The

trusteeship is vested in the family. There are observations in — 'Alasinga Bhattar v. Venkatasudarsana Bhattar', AIR 1936 Mad 294 (C), wherein Venkataramana Rao J. states:

"So far as the trust is concerned, whoever manages the office by turns must be deemed to be managing on behalf of all and management by one of them in rotation is not considered to be adverse or exclusive to other co-trustees."

At page 299 also the learned Judge observes:

"In every case of partition where several branches enjoy the office by turns there is no surrender or renunciation. It is always subject to the implied condition that the resumption of actual management can be availed of either by consent of parties or through Court and there is no question of divesting themselves of all control over the offices."

Such being the case, it cannot be contended for a moment that by dividing the trust properties between themselves the members have in any way disclaimed the interest of the trust in the properties.

(5) Mr. T. Krishna Rao for the appellants in S. A. No. 2 of 1949 would put his case in this way. Section 10, Limitation Act cannot apply to the facts of the present case because the various branches among whom the properties have been divided cannot be said to be assignees as contemplated under S. 10, Limitation Act and therefore the principle that a trustee or his assignee, not being assignee for valuable consideration, cannot prescribe against the trust, will not be applicable to the present case. Learned counsel developes his argument by stating that under the circumstances of the present case, Art. 134 B, Limitation Act will also be inapplicable, for this Article applies only to transferees for consideration. Therefore the only provision of the Indian Limitation Act which could properly be applied is Art. 144 and since more than twelve years had elapsed after the oldest of the partitions between the family, the suit with regard to the properties set apart to the various branches other than those specifically assigned for the performance of the ceremonies in the temple will be barred by limitation. In order to show that partition is not an assignment as contemplated, under S. 10, Limitation Act, our attention was drawn to a recent judgment in — 'Radhakristnayya v. Sarasamma', AIR 1951 Mad 213 (D); where the learned Judges held that partition is really a process in and by which joint enjoyment is transformed into an enjoyment in severalty. It cannot, therefore, be considered to be an assignment at all with the usual requisites of a transferor and a transferee. In our opinion the various branches to which the properties have been allotted under the different partitions still form a family and the trusteeship is vested in them all though by arrangement between them one individual performs the functions of the trustee and hence it is unnecessary to invoke the use of the word "assigns" occurring in S. 10, Limitation Act in order that the same might be made applicable to them. In addition to the above case, a decision of the Privy Council in — 'Sudarsan Das v. Ram Kirpal Das', AIR 1950 PC 44 (E), was also brought to our notice. What happened there was that property belonging to a trust was sold in execution of a decree against the trustee and a third party purchased the same and continued in possession for more than twelve years. In a suit by a succeeding trustee, the question as to whether Art. 134-B or Art. 144 was applicable was mooted and their Lordships held that it was Art. 144 that applied, because adverse possession against the trust starts under Art. 144 from whatever date after the sale the purchaser obtained effective possession of the disputed property and not from the date of the death of the trustee.

When once we hold that each of the branches amongst whom the properties were divided still continued to be the family of trustees, it is impossible to hold that any one of them can prescribe adversely to the trust. It has been held that the word "person" in S. 10, Limitation Act includes joint family and therefore if the properties are impressed with the character of trust, the trustee-family, by becoming sub-divided, cannot throw out that character. If, by the arrangement in the family, one person is to discharge certain religious duties, that does not mean that the family as such renounced the trusteeship and the other members can claim to be holding trust properties adversely to the trust. By mere assertion it is impossible to prescribe a hostile title against the trust because the assertion must be against a person who would be entitled to face the opposition and get rid of that assertion. In this case, since the trusteeship is vested in the family, the members of the family cannot assert a hostile title against themselves. In the present suit, the written statements of defendants 1 and 2 had not disclaimed the trusteeship of the family. In para. 15 of the written statement of defendant 1 he admits that this family had both the hereditary mokthessorship and the hereditary archakaship of the plaint temple. Defendant 2 in his written statement also says that he learns and verily believes that his family had the mokthessorship and the archaka vritti in the suit temple. It is, therefore, plain that there is no claim that apart from the family as such any member had a right of trusteeship. If that is so, the members of the family in whom the trusteeship is vested cannot, by mere declaration that the property belongs to them, assert a hostile title against the family as such and prescribe a right to adverse possession.

The evidence of D.W. 3 who is defendant 10, also brings out the fact that his branch has also the liability to perform some of the viniyogas in the temple and the C list in Ex. D. 32 shows properties out of the income from which devata viniyogas have to be performed. The learned District Judge in paragraph 11 of his judgment discusses the question regarding the delegation of the actual management of the institution to one branch and the appropriation of the income of some properties by the other branches as remuneration for the performance of the archakatwam in the temple. We are in entire agreement with him that the partitions cannot be said to be assertions of hostile title against the trust as such. That archakas cannot acquire proprietary rights in the lands as against the temple to which the properties had been granted, because they should be deemed to have been in possession in a fiduciary capacity, and as such could not claim adverse possession is clear from — 'Venkatadri v. Seshacharyulu', AIR 1948 Mad 72 (F). The learned Judges refer to various cases and concluded that the archakas in possession cannot claim adverse title against the trust. In the present case, the holding of the property by the various branches can also be related to their status as archakas of the temple. To the same effect are the observations in — 'Abdul Rahim Khan v. Fakir Mohammad Shah', AIR 1946 Nag 401 at p. 417 (G)', regarding the inability of a person in a fiduciary capacity to claim prescriptive rights against the trust. As we

are of opinion that by the various partitions the branches have not lost or disclaimed the hereditary right of trusteeship, their holding the property must be in their capacity as such trustee and therefore they cannot acquire a right by prescription. The above discussion disposes of the points raised by the appellants.

(6) But it is contended by learned counsel that there are improvements on the properties effected by the defendants and if we disagreed with their contention regarding the ownership, at least the value of improvements should be decreed to them when properties are directed to be surrendered. We would certainly have acceded to this argument if there had been evidence let in on this point. Issues 9 and 10 in the Court of first instance related to the improvements, if any, effected by defendants 2 to 4 and 6 and the learned Subordinate Judge says that no evidence had been led on their behalf in this connection and therefore the claim for improvements must fail for lack of proof. Such being the case it is not possible for us to say whether the appellants are entitled to the value of improvements at all. But the appellants can prove the claim for improvements in execution proceedings. The decree for possession will be conditional on the plaintiffs paying the respective defendants the value of the buildings and other improvements effected by them which the defendants will be at liberty to prove in execution proceedings. The second appeals therefore fail and are dismissed with costs — one advocate fee.

(7) The respondents have preferred a memorandum of cross-objections with regard to the D schedule properties which were obtained by the family of the defendants under a darkhast from the Government. The plaintiffs claim them as accretions to the temple properties. There is no material to show that the darkhast was granted by the Government to the trustees of the temple as such, though the plaintiffs contend that the defendants' family would not have got the same if they had not been the trustees. There is no evidence on record regarding this claim and it cannot be presumed that the Government intended to give the darkhast to the temple trustees as such. Both the lower Courts have observed that it cannot be held that the grant was made on the consideration that the adjoining temple properties were held by the family on warg right. We agree with both the lower Courts that so far as D schedule properties are concerned the temple has no right whatever. The memorandum of cross-objections is also dismissed with costs.

B/V.S.B. Appeals and cross-objections dismissed.

A. I. R. 1953 MADRAS 845 (Vol. 40, C. N. 326)

RAJAMANNAR C. J.

Pottimurthi Sadasivayya, Appellant v. Tadepalli Venkata Narayana and Co., Respondent.

Second Appeal No. 1266 of 1949, D/- 6-2-1953.

Contract Act (1872), S. 23 — Contract with illegal object — (Vegetable Oil and Oil-cakes (Forward Contracts Prohibition) Order, 1944, Cl. 1).

A contract object of which is to evade the provisions of the Forward Contracts Prohibition Order of 1944 is illegal and unenforceable. (Para 2)

Damages for the breach of such an illegal contract cannot form consideration for promise to pay them by another contract. The latter contract is also illegal and unenforceable. (Para 4)

Anno: Contract Act, S. 23 N. 3, 6.

Ch. Suryanarayana Rao, for Appellant; K. Kotayya, for Respondent.

JUDGMENT: There is no substance whatever in this second appeal. There was a forward contract for the sale and purchase of 301 tins of groundnut oil entered into on 6-10-1944 on which date the Vegetable Oil and Oil-cakes (Forward Contracts Prohibition) Order 1944, was in force, which prohibited all forward contracts in grcundnuts and groundnut oil. The plaintiff who was the purchaser, evidently to evade the provisions of this order, prevailed upon the defendant to agree to pay Rs. 504-6-6 towards compensation and this arrangement was embodied in another contract, dated 13-12-1944, under which the plaintiff was described as the seller and the defendant as the buyer. The price was fixed at a higher rate than the price fixed by the original contract. On the back of this document, there was the following endorsement:

"The contract whereby the seller herein bought from the buyer herein 301 tins at the rate of Rs. 6 is settled hereby without any need for delivery of the commodity relative to this contract (thus):

Settled that the difference in price of the said 301 tins (413 maunds) viz., Rs. 504-6-6 at the rate of Rs. 1-3-6 (per tin) is to be paid to Pottimurti Sadasivayya Garu (plaintiff) by Tadepalli Venkatanarayana (defendant) before 31-12-1944. If it is not paid within the due date, it is to be paid with interest at the rate annas eight per rupee one hundred per month."

The result of this arrangement is set out in para 4 of the plaint as a compromise between the parties that the defendant should pay to the plaintiff Rs. 504-6-6 towards compensation for the loss incurred by the plaintiff. The suit was brought for the recovery of this amount with interest. One of the defences was that the contract was illegal and unenforceable by reason of the provisions of the Vegetable Oil and Oil Cakes (Forward Contracts Prohibition) Order, 1944. Both the Courts have upheld this plea and dismissed the suit. Hence this second appeal.

(2) Obviously, the Courts below were right. The contract dated 6-10-1944 was clearly an illegal and void contract. The promise to pay Rs. 504-6-6 as damages for breach of this contract which was itself an illegal contract cannot certainly be enforced. It is clear that the object of the parties was to evade the provision of law which prohibited forward contracts.

(3) Two points were raised before me by learned counsel for the appellant. One was that the suit contract was exempted under a subsequent notification of the Central Government. That notification exempted forward contracts which were not transferable to third parties. It surely cannot be contended that the suit contract was such a contract. It is an ordinary contract of a sale of goods and was transferable.

(4) The second point is that though the original contract of sale was illegal, nevertheless the subsequent promise to pay Rs. 504-6-6 was enforceable because according to the defendant he did not know that the contract was prohibited by law. No authority was cited in support of this extraordinary contention. Learned counsel wanted to cite cases in which it has been held that even if a party enters into an obligation in ignorance of his rights, nevertheless such a promise will be binding on him. We are not concerned with ignorance of rights; we are concerned here with an illegal contract. Damages for breach of a void and illegal contract cannot form the consideration for a promise to pay them.

(5) There are no merits in this second appeal, which is dismissed with costs.

B/D.R.R. Appeal dismissed.

A. I. R. 1953 MADRAS 846 (Vol. 40, C. N. 327)

SUBBA RAO J.

Chandra Bhogi and another, Appellants v. Guddappa Bhandary, Respondent.

Stamp Register Nos. 1257 and 3174 of 1953, D/- 24-2-1953.

Court-fees Act (1870), S. 7 (iv) (b), Sch. II Art. 17 (vi), Art. 17-B (Mad) — Appeal in partition suit.

If the relief of accounting or any other relief is an inherent part of the main relief of partition and implied therein the court fee paid on the relief for partition would cover the other relief also. In such a case, if the relief claimed in an appeal is only that implied in the main relief for partition, the fixed court fee under Art. 17-B of Schedule II will suffice: Case law discussed. (Paras 6, 7)

Anno: Court-fees Act, S. 7 (iv) (b) N. 9, 13; Sch. II Art. 17-B (Mad.) N. 1.

T. Krishna Rao and A. V. Narayana Pai, for Appellants.

CASES CITED:
(A) ('16) AIR 1916 Cal 500 (2): 43 Cal 459
(B) ('30) AIR 1930 Pat 1: 8 Pat 818
(C) ('40) AIR 1940 Mad 113: ILR (1940) Mad 259 (FB)
(D) ('50) AIR 1950 Mad 26: 1949-2 Mad LJ 402
(E) ('38) AIR 1938 Mad 435: 1938-1 Mad LJ 628 (FB)
(F) ('50) AIR 1950 Mad 353: 1949-2 Mad LJ 782
(G) ('52) 1952-2 Mad LJ (N. R. C.) 47
(H) ('28) AIR 1928 Cal 878: 56 Cal 188
(I) ('24) AIR 1924 Lah 325: 69 Ind Cas 196
(J) ('35) AIR 1935 Lah 14: 157 Ind Cas 787
(K) ('36) AIR 1936 All 221: 159 Ind Cas 802

ORDER: These are references under S. 5, Court-fees Act. O. S. No. 201 of 1949 was filed on the file of the court of the Subordinate Judge of South Kanara for division of the plaint B schedule immoveable properties and the C schedule moveables into 16536 shares and for allotment to the plaintiff 851 shares therefrom and to direct the first defendant to account for the income of the family properties realised by him and sale proceeds of the clay sold by him from items 13 and 14 of the B schedule to defendants 99 to 102, and other incidental reliefs. The suit was valued in respect of the relief of partition at a sum of Rs. 100. On 30-7-1952 the learned Subordinate Judge passed a supplementary preliminary decree whereunder, defendants 1, 4 and 8 were directed to render accounts to the family for the sale proceeds of clay realised by them and they were also made liable to pay the other members of the family their shares of Rs. 21600 after deducting their own share. Defendants 1, 4 and 8 preferred separate appeals to the High Court. The appeal preferred by the first defendant is S. R. No. 3174 of 1953 and that by defendants 4 and 8 is S. R. No. 1257 of 1953. Both the memoranda of appeal were stamped on a fixed court-fee of Rs. 100 under Art. 17-B of the II schedule to the Court-fees Act. The office took the view that as the appeals were directed against the decree for specific amounts, 'ad valorem' court fee should be paid.

(2) The relevant provisions of the Court-fees Act read as follows:

Article 17-B
II Schedule

Plaint or memorandum of appeal in every suit where it is not possible to estimate at a money value the subject-matter in dispute and which is not otherwise provided for by this Act.	When the plaint is presented to or the memorandum of appeal is against the decree of A revenue Court	Ten Rupees
	A District Munsif's Court or the City Civil Court	Fifteen rupees
	A District Court or Sub-Court	One hundred rupees

Section 7 (iv) (f) for accounts.

According to the amount at which the relief sought is valued in the plaint or memorandum of appeal

Schedule I
Article 1

Plaint or written statement pleading a set-off or counter claim or memorandum of appeal (not otherwise provided for in this Act) presented to any civil or revenue Court except those mentioned in Sec. 3.	When such amount or value exceeds one thousand rupees, for every one hundred rupees or part thereof, in excess of one thousand rupees, upto five thousand rupees	Seven rupees eight annas
	When such amount or value exceeds five thousand rupees, for every two hundred and fifty rupees or part thereof, in excess of five thousand rupees, upto ten thousand rupees.	Fifteen rupees

It is settled law that a relief for partition is not capable of valuation and therefore Art. 17-B of Sch.II will apply. It is equally well established that a relief for accounting is governed by S. 7(iv)(f).

It has also been held that in a suit for rendition of accounts, when the amount is ascertained and a decree granted for a specific amount, the defendant should pay 'ad valorem' court fee in an appeal against tnat decree. If a relief for partition and a relief for accounting are two distinct subject-matters they should be separately valued, even though the two reliefs are clubbed together in the same suit. But if the relief for accounting is implied in relief of partition, it cannot be said that the former relief is in respect of a different subject-matter. In that case, though it is framed as a separate relief, in effect and in substance it will be part of the same relief. It is therefore necessary to ascertain the scope of a relief for accounting in a suit for partition.

In — 'Parameshwar Dube v. Gobind Dube', AIR 1916 Cal 500 (2) (A), Fletcher J. after considering the case law in the subject summarised his view as follows at page 502:

"The result of these authorities I think is that in an ordinary suit for partition in the absence of fraud or other improper conduct, the only account the 'karta' is liable for is as to the existing state of the property divisible. The parties have no right to look back and claim relief against past inequality of enjoyment of the members or other matters."

Jwala Prasad J. in — 'Jyotibai v. Lackhmeshwar Prasad', AIR 1930 Pat 1 (B), stated the law thus:

"Now such a 'karta' is not responsible to the other members of the family for the management of the joint family property in respect of the income derived therefrom and the expenditure incurred by him. He is the sole master of the situation and is not in any way controlled by the junior members of the family. He has to use his own discretion unfettered in any way and controlled only by his own sense of right or wrong. He is neither a trustee nor an agent and is not accountable to the members of the family. If any member happens to be dissatisfied with him, his remedy is to separate from the family and to ask for a partition. He is entitled to his share in the family properties, moveable and immoveable, including cash, that may be in existence at the time of partition. He cannot ask for an account of a preceding period, except for the purpose of determining the properties including cash in the hands of the 'karta' so as to be available for partition."

Later on, the learned Judge proceeded to state:

"He can be asked not to render an account as an agent on behalf of the other members, but only to disclose the properties including cash in his hands and that might necessitate looking into the accounts. A disclosure of property is not rendition of account, the word "account" in a suit for partition and accounts against a 'karta' being used for convenience's sake, and not in the legal sense to bring it within the expression used in S. 7(iv)(f) of the Court fees Act. S. 7(iv)(f) applies to a suit for accounts. The test is: "Can a junior member, without claiming partition, bring a suit for accounts against a 'karta?' If he cannot, then the relief as to accounts becomes subsidiary to the principal relief of partition."

(3) I accept the aforesaid observations as a full statement of the law on the subject. It will be seen from the said two judgments that in a partition suit a relief for accounts may be asked for under two circumstances:

1. for the purpose of ascertaining the partible assets of the family and

2. for directing the manager to render accounts on the ground of fraud or improper conduct.

Though the terminology used is similar in both the cases, in substance the reliefs are essentially different in context. In the former, the relief of accounting is incidental and subsidiary to the relief of partition as the accounting is only for the purpose of ascertaining the assets, in the latter case, the relief for the rendition of accounts is distinct and separate matter and it is an accident that it is clubbed along with the relief for partition in the same suit.

(4) Bearing the aforesaid principles in mind I shall now proceed to consider the cases cited. In — 'Ramaswami v. Rangachariar', AIR 1940 Mad 113 (C), a Full Bench of this court laid down the mode of valuation of the reliefs in a suit for partition. There a Hindu minor sued through his mother as next friend for partition of the properties of the joint family consisting of himself, his father and his three brothers and for possession of his one-fifth share therein. He also joined as defendants several other persons (strangers to the family) either as alienees of family properties or as creditors of the family. His prayers were for:

(i) an account of the moveable and immoveable joint family properties;

(ii) the partition by metes and bounds of his one-fifth share;

(iii) the appointment of a receiver to manage the properties and collect rents and income till the disposal of the suit;

(iv) the costs of the suit; and

(v) such further and necessary reliefs as in the circumstances might be considered necessary and proper.

The learned Judge held that the relief for partition should be valued under Art. 17-B Schedule II of the Act. In respect of the alienations sought to be set aside and for possession of the properties alienated, they directed that those reliefs should be valued under S. 7(v) of the Act. In respect of the setting aside of decrees passed against the plaintiff in suits in which he had been 'eo nomine' impleaded as a party, S. 7(iv-A) of the Act was held to be applicable.

In regard to the other transactions of his father impugned by the plaintiff, it was held that no court fee was necessary. The reason given was that a relief for declaration or cancellation of those transactions was incidental to the relief of partition. The aforesaid judgment therefore is an authority for the position that in a suit for partition, if a relief relates to a distinct subject matter it should be separately valued, and in a case where a relief is only incidental to the relief of partition, no separate court fee need be paid. Mack J. in—'Peravadhannulu v. Peravadhannulu', AIR 1950 Mad 26 (D), appears to lay down a different principle. There a grandson filed a suit against the grandfather for a partition of the joint family property and for the rendition of the accounts. The court directed the defendant to pay a sum of Rs. 20,000 in an account being taken of the outstanding due. In an appeal to the District Court he sought to value it under Art. 17-B of the 2nd schedule of the Court-fees Act. The learned Judge held, following the Full Bench decision in — 'Dhanukodi Nayakar in re', AIR 1938 Mad 435 (E), that the defendant should pay 'ad valorem' court-fee on the subject matter of the appeal. The learned Judge said:

"I am unable to see how for fiscal purposes the liability of a manager of a Hindu joint family

business to account to other members of the joint family can be differentiated from an ordinary suit for accounts as between partners. The simple principle of valuation is contained in Art. I, schedule I of the Court fees Act. In a plaint or memorandum of appeal court-fee is payable on the amount or value of the subject-matter in dispute."

The facts are not clear. It is not known on what basis the rendition of accounts was asked for in that suit. If it was a distinct relief on the ground of fraud or improper conduct of the grandfather, I respectfully agree with the conclusion arrived at by the learned Judge; but, if the relief claimed was only incidental to the relief of partition, for the purpose of ascertaining the assets of the family, I regret my inability to accept the correctness of the decision.

But Krishnaswami Nayudu J. in — 'Veluchami Pillai v. Sankaralingam Pillai', AIR 1950 Mad 353 (F), strikes a different note. In that case the plaintiff, a member of the joint Hindu family, instituted the suit for partition claiming a one fourth share in the properties and paid a court fee of Rs. 100 under Art. 17-B Sch. II of the Court fees Act. The final decree provided that the plaintiff should receive a certain amount from the other parties to equalise the shares and he was also granted a decree for a specific amount in respect of his share of the profits. The plaintiff preferred an appeal and paid a court fee of Rs. 100 provided under Art. 17-B of schedule II. The learned Judge held that the decree for owelty and a share of the profits are incidents in a suit for partition and therefore the court fee paid on the relief for partition was sufficient.

To the same effect is the judgment of Chandra Reddi J. in — 'Kamalam v. Saradambal', 1952-2-Mad L. J. (N. R. C.), 47 (G). There the plaintiff brought an administration suit against her mother and her three sisters for partition of the plaint schedule property into four shares and for delivery of separate possession of her share and for rendition of accounts of other assets and income from the family property. A court fee of Rs. 100 was paid under Art. 17-B of the II schedule of the Court fees Act. A preliminary decree was made. The Commissioner appointed after looking into the accounts found that the second defendant who was virtually in management of the estate was liable to pay the plaintiff Rs. 3152-8-9. The second defendant filed an appeal against that judgment. The question was whether 'ad valorem' court fee should be paid on that amount or whether the court fee of Rs. 100 under Art. 17-B of the 2nd schedule of the Court fees Act would be the correct court fee. The learned Judge held that only the fixed fee of Rs. 100 was payable. The learned Judge also accepted the principle that the accounting was only incidental to the relief of partition.

(5) I shall now proceed to consider the cases of the other High Courts. In — 'Jyoti Prosad v. Jogendra Ram', AIR 1928 Cal 878 (H), Mitter J. held that in an appeal against a final decree awarding costs, only a fixed fee is payable under Art. 17-B of the II schedule of the Court fees Act. To support his conclusion the learned Judge put the following illustration at page 879:

"Suppose in a partition suit a sum of money has been awarded to one of the parties as owelty money and the party against whom the payment of the owelty money has been directed is aggrieved by such a decree, then he is entitled to prefer an appeal to this court; and it can hardly be said that in such a case although the matter arises in a partition suit the court fees leviable would be the amount of the owelty money which forms the subject matter of the complaint in the appeal."

This decision also is in accord with the view expressed by the learned Judges of this court. Where the object of the appeal is to attack various items allowed or disallowed in the final decree, Broadway and Martineau JJ. held in — 'Majid Ullah Khan v. Hamid Ullah Khan', AIR 1924 Lah 325 (I), that 'ad valorem' court fee should be paid on the amounts entered in the various grounds of appeal. In — 'Sukhanand v. Mt. Shiv Devi', AIR 1935 Lah 14 (J), the same High Court held that 'ad valorem' court fee should be paid on the sum claimed in appeal. In — 'Ram Prasad v. Krishnanand Singh AIR 1936 All 221 (K), it was held that where the appellants sought to lessen the amount of charge on the properties, which they claimed on partition they had to pay 'ad valorem' court fee on the amount for which they sought to escape liability. The aforesaid three judgments certainly support the contrary view. But with great respect to the learned Judges I cannot accept that view as they did not consider the question whether the relief for the recovery of amounts was incidental to the general relief of partition.

(6) From the aforesaid discussion of the case law the following principles emerge:

(1) The court fee payable for a relief of partition in a suit as well as in the appeal is only the fixed court fee payable under Art. 17-B of Schedule II of the Court-fees Act.

(2) If the relief of accounting or any other relief is an inherent part of the main relief of partition and implied therein, it is not necessary to value that relief separately. The court fee paid on the relief for partition would cover the other relief also. In such a case if the relief claimed in an appeal is only that implied in the main relief for partition, the fixed court fee under Art. 17-B of Schedule II will suffice.

(3) But if the relief for rendition of accounts relates to a different subject matter such as a relief for accounting against a manager of a joint Hindu family on the ground of fraud or improper conduct, a separate court fee has to be paid both in the suit as well as in the appeal. In such cases the principle of the Full Bench decision in — 'AIR 1938 Mad 435 (E)', will apply and 'ad valorem' court fee is payable in appeal on the amount decreed.

(7) In the instant case, the appeals relate only to the sum of Rs. 21600 representing the share of the other members in the sale proceeds of the clay realised by the appellants. That amount, therefore, only represents the value of the respondents' share in one of the assets of the family. Looking into the accounts by the Commissioner or the court for ascertaining the value of that asset is incidental to the relief of partition and is implied therein. I therefore hold that the appellants have correctly valued their relief in the appeals by paying the fixed fee of Rs. 100 under Art. 17-B of Schedule II of the Court-fees Act.

B/D.H. Order accordingly.

A. I. R. 1953 MADRAS 849 (Vol. 40, C. N. 328)

RAMASWAMI J.

Moidin Kunhi Beavy and another, Appellants v. K. Gopalakrishna Mallya, minor and another, Respondents.

Second Appeal No. 215 of 1948, D/- 4-2-1953.

Easements Act (1882), Ss. 7(b), 12, 15, 28, 33, 35 — Right to light and air — Natural right and easementary right — Acquisition — Disturbance — Remedy.

The right to light and air may be either a natural right forming one of the incidents of property or it may be an easement.

These two easements though very similar are acquired under different circumstances. Both of them constitute an adjunct to and are inherent in land 'exjure naturae' and exist 'prima facie' in all cases as between the landowner and his neighbour and secondly they can be acquired as an easementary right. (Para 5)

(Distinction between these two rights pointed out). (Para 6)

The natural corollary of these natural rights is that they are subject to the rights of adjoining owners who for the benefit of the community have and must have rights in relation to the use and enjoyment of their property that qualify and interfere with those of their neighbours' rights to use their property in the various ways in which property is commonly and lawfully used. (Para 7)

There is, however, a fundamental feature in regard to the exercise of natural right to lateral flow of air and light. If the owner of a property who is entitled to ancient lights the lateral passage of adequate light and unpolluted free air, finds himself obstructed to an appreciable and sensible extent by an adjoining trespasser then he can come forward and seek abatement of this private nuisance. If the person who is obstructing the light and air happens to be the owner of the property, then there can be no cause of action, the simple distinction being that that owner would also be entitled to build right up to the edge of his own property and exercise the same right as the complaining owner 'cojus est solum ejusest usgue ad coelum et ad inferos.' (Para 8)

But if a owner of the property acquires an easementary right in regard to air and light laterally coming to him (every owner of land or building has a natural right to light and air vertically coming to his property and this need not be acquired as an easementary right) and makes the adjoining tenement a servient one on which the burden is cast of not doing anything which would prevent the exercise of that easementary right he can come forward with a suit claiming his right to easement whenever that right is sought to be interfered with. But if a owner of a property happens to sleep over his rights for a period of 20 years and allows the adjoining owner or even the trespasser acquiring an easementary right to obstruct lateral light and air coming to him he would have been held to have acquiesced in it and he cannot turn round at the end of the period of 20 years and ask for his rights which have become extinguished by the acquisition of easementary rights by the other party to be protected by Court. Such rights may also arise under contract express or implied. (Para 9)

In other words in the case of an easementary right there is no distinction in case of interference with light and air about the adjoining occupier being either a trespasser or an owner. In either case if the complaining person had allowed the other person to obstruct for over a period of 20 years his right to relief becomes extinguished. On the other hand, in the case of the natural right to light and air if even within the period of 20 years an owner finds himself cut off from light and air by an adjoining occupier who is a owner he is not entitled to any relief. On the other hand, if the adjoining owner is a wrong doer and is shutting light and air and causing a private nuisance interfering materially with the physical comfort of the plaintiff, it is certainly open to this owner of the property suffering from that private nuisance to come forward and ask for proper relief which may be similar to the relief which would be granted in the case of easementary right, namely injunction or damages for actual injury sustained. (Para 10)

Anno: Easements Act, S. 7 N. 3; S. 15 N. 5; S. 28 N. 1; S. 33 N. 3; S. 35 N. 2.

B. Pocker and P. A. Q. Meeran, for Appellants; K. Vittal Rao, for Respondents.

CASES CITED:

(A) (1738) 9 Rep 57b (page 70 of Peacock on Easement)
(B) (1879) 48 LJ CP 380: 4 CPD 172
(C) ('69) 3 Beng LR OCJ 18
(D) ('23) AIR 1923 Cal 256: 36 Cal LJ 406
(D-1) (1911) 80 LJ KB 739: (1911) 1 KB 869
(E) (1838) 4 Beng NC 183: 5 Scott 500
(F) ('05) 7 Bom LR 352
(G) ('75) 15 Beng LR 361
(H) ('95) 5 Mad LJ 24
(I) (1851) 20 LJ Ex 14: 5 Ex 792
(J) (1859) 28 LJ Ex 182: 4 H & N 153
(K) ('97) 1897 All WN 22: 19 All 153
(L) ('11) 6 Ind Cas 266: 34 Mad 173
(M) ('36) AIR 1936 Mad 142: 160 Ind Cas 955
(N) (1907) 76 LJ Ch 365: 1907 AC 121
(O) (1904) 73 LJ Ch 484: 1904 AC 179
(P) (1890) 43 LT 380: 49 LJ Ch 655
(Q) (1832) 1 M & R 230
(R) (1868) 38 LJ Ch 58: 6 Eq 311
(S) (1836) 56 LJ Ch 344: 33 Ch D 238

JUDGMENT: This is an appeal preferred against the decree and judgment of the learned subordinate Judge of South Kanara in A. S. No. 203 of 1946 confirming the decree and judgment of the learned District Munsif of Kasargod in O. S. No. 503 of 1944.

(2) The established facts are: The plaintiffs have constructed a shop and a building in 1930 and adjoining their premises there was vacant poromboke land. Defendants have occupied this poromboke land and have put up a building, a portion of which they are using as a coffee hotel. There is no dispute that this was long subsequent to the construction of shop and building by the plaintiffs. In putting up that building, the defendants who are tres-

passers upon the poromboke property have done the following things. They have interfered with the walls of the plaintiff's shop and building in order to raise their roof. In addition they have so put up their roof that they have practically cut off light and free air which used to enter the plaintiffs' upstairs through the windows U and R; they have also constructed an oven in room L-2 and the smoke and offensive smell emanating therefrom gets through these windows into the upstairs of the plaintiffs' shop making the upstairs uninhabitable and constitute an unmitigated nuisance. Therefore they came to Court with this suit for mandatory and permanent injunction in regard to the obstruction of light and air.

The contention of the defendants was that the plaintiffs have not acquired an easementary right for light and air and that they were within their rights in doing what they had done. Both the Courts have found that the plaintiffs' version regarding the facts set out above is true and that the plaintiffs interfered with, in their natural right of enjoying the light and air and are entitled to the injunction asked for. Hence the appeal by the defeated defendants.

(3) The sole point for determination before me is whether in order to maintain the suit the plaintiffs should have proved that they had acquired an easementary right to light and air.

(4) In my opinion, the plaintiffs are not bound to show that they have acquired an easementary right in order to obtain the reliefs asked for by them and which have been granted. Here are my reasons.

(5) The right to light and air as pointed out by Peacock in the law relating to Easements in British India (3rd Edn.) may be either a natural right forming one of the incidents of property or it may be an easement. It is unnecessary for the purpose of this appeal to go into the question whether the popular amalgamation of both these rights in the phrase "light and air" is accurate or inaccurate. It is enough to point out as mentioned in Combe's Law of Light, page 15 that that phrase is misleading and these two easements though very similar are acquired under different circumstances. That both of them constitute an adjunct to and are inherent in land 'ex jure naturae' and exist 'prima facie' in all cases as between the landowner and his neighbour and secondly that they can be acquired as an easementary right cannot be disputed.

(6) The distinction between natural rights and easements is drawn by Peacock on Easements (3rd Edn.) at page 24 as follows :

> "Natural rights are by law annexed to, and are inherent in, land 'ex jure naturae', of natural right, and exist 'prima facie' in all cases as between a landowner and his neighbour, otherwise, as Mr Goddard says in his work on Easements (Edn. 7 p. 3) no man would be assured that his land would not at any moment be rendered useless by a neighbour's act otherwise lawful, or a neighbour might deprive a landowner of the benefit of certain things which in the course of nature have been provided for the common good of mankind.
>
> Further, natural rights are rights 'in rem', that is, enforceable against all who may violate them, and they are either affirmative, as rights to do something or negative, as rights which every owner of immoveable property has, that his neighbour shall not disturb the natural conditions under which he enjoys his property.
>
> Natural rights though resembling easements in some respects, are clearly distinguishable from them.
>
> The essential distinction between easements and natural rights appears to lie in this that easements are 'acquired restrictions' of the complete rights of property, or, to put it in another way, 'acquired rights' abstracted from the ownership of one man and added to the ownership of another, whereas natural rights are themselves part of the complete rights of ownership, belong to the ordinary incidents of property and are 'ipso facto' enforceable in law. Natural rights are themselves subject to restriction at the instance of easements."

(7) The basis for both these rights has been set out in —'Aldred's case, (1738) 9 Rep. 57 b. (page 70 of Peacock on Easements) (A)', where it was set out that

> "in a house four things are desired, — the habitation of man, the pleasure of the inhabitant, the light and wholesome air, and for nuisance done to the habitation of a man, for that is the principal end of a house, an action lies and so for the hindrance of light and air for both are necessary".

The natural corollary of these natural rights is that they are subject to the rights of adjoining owners who for the benefit of the community have and must have rights in relation to the use and enjoyment of their property that qualify and interfere with those of their neighbours' rights to use their property in the various ways in which property is commonly and lawfully used (per Bramwell L. J. in — 'Bryant v. Lefever', (1879) 4 C. P. D. 172 at p. 176 (B). These principles were known and recognised in (1) Hindu Law (See Halhed's Gentoo Law, p. 162) (2) Muslim Law (See Hedaya, Hamilton's edition page 132) and judgment of Norman J. in —'John George Bagram v. Khettranath Karformah', 3 Beng LR O. C. J. 18 at p. 37 (C) and Anglo Indian Law preceding Indian Enactments relating to easements (Peacock on Easements, pp. 40 and 604).

(8) There is, however, a fundamental feature in regard to the exercise of natural right to lateral flow of air and light. If the owner of a property who is entitled to ancient lights the lateral passage of adequate light and unpolluted free air, finds himself obstructed to an appreciable and sensible extent by an adjoining trespasser then he can come forward and seek abatement of this private nuisance. If the person who is obstructing the light and air happens to be the owner of the property, then there can be no cause of action, the simple distinction being that that owner would also be entitled to build right up to the edge of his own property and exercise the same right as the complaining owner 'cujus est solum ejusest usgue ad coelum et ad inferos'. —'(1879)-4 C. P. D. 172 (B)'; —'Sarojini Devi v. Kristalal', AIR 1923 Cal 256 (D)

(9) But if a owner of the property acquires an easementary right in regard to air and light laterally coming to him—every owner of land or building has a natural right to light and air

vertically coming to his property and this need not be acquired as an easementary right (Indian Easements Act, S. 7, ill. (d)) — and makes the adjoining tenement a servient one on which the burden is cast of not doing anything which would prevent the exercise of that easementary right he can come forward with a suit claiming his right to easement whenever that right is sought to be interfered with. But if a owner of a property happens to sleep over his rights for a period of 20 years and allows the adjoining owner or even the trespasser acquiring an easementary right to obstruct lateral light and air coming to him he would have been held to have acquiesced in it and he cannot turn round at the end of the period of 20 years and ask for his rights which have become extinguished by the acquisition of easementary rights by the other party to be protected by Court (such rights may also arise under contract express or implied : —'Campbell v. Peddington Corporation, 1911-1-KB 869 (D-1)).

(10) In other words, the distinction between these two sets of rights, viz., natural right and easementary right is this. In the case of an easementary right there is no distinction in case of interference with light and air about the adjoining occupier being either a trespasser or an owner. In either case if the complaining person had allowed the other person to obstruct for over a period of 20 years his right to relief becomes extinguished. In —'Bliss v. Hall (1838) 5 Scott. 500 (E) : "twenty years user", said Hart J. "would legalise (private) nuisance." There can be no prescription to make a public nuisance (Gale on Easements Edn. 12, page 404). On the other hand, in the case of the natural right to right and air which is rested on the foot of the principles laid down in — 'Aldred's case (A)', if even within the period of 20 years an owner finds himself cut off from light and air by an adjoining occupier who is a owner he is not entitled to any relief. On the other hand, if the adjoining owner is a wrong doer and is shutting light and air and causing a private nuisance interfering materially with the physical comfort of the plaintiff (—'Framji v. Framji', 7 Bom LR 352 (F); —'Madhoosoodun Dey v. Bissonath Dey', 15 Beng LR 361 (G), it is certainly open to this owner of the property suffering from that private nuisance to come forward and ask for proper relief which may be similar to the relief which would be granted in the case of easementary right namely injunction or damages for actual injury sustained.

(11) This has been laid down in series of decisions to which I will make a brief reference.

(12) In —'Acchanna v. Venkamma', 5 Mad LJ 24 (H), it has been held by this Court as follows :

"The District Judge has found that the strip of land on which defendant has been attempting to build a wall (as in the instant case) is a piece of Government poromboke between plaintiff's house and the public street and that it does not belong to defendant still. Such being the case we think the Judge was right in holding that it was not necessary for plaintiff to establish prescriptive rights of easement against a wrong-doer and that the mere fact of plaintiff's enjoyment is sufficient to entitle him to an injunction. See —'Jeffries v. Williams', (1851) 5 Ex. 792 (I), Goddard 4th Edn. 467."

(13) The next case is that of —'Bibby v. Carter', (1859) 4 H & N. 153 (J), it was laid down that the

"law has been distinctly laid down in the case of —'Jeffries v. Williams', (I), (Goddard 4th Edn. p. 467) and it would be mischievous to disturb it. We ought not to leave matters at large where there have been decided cases but abide by them".

(14) In —'Dhuman Khan v. Muhammad Khan', 19 All 153 (K), it was held that the owner of a house, the light coming to which obstructed by an erection made upon adjoining land by a person who, qua such adjoining land is a trespasser, may possibly have an action against the person causing obstruction, even though he has not obtained by prescription an easement of light, but where the person causing such obstruction is the rightful owner of the adjoining land or acting with the permission of the owner, no such action as aforesaid will lie against him unless the plaintiff has acquired an easement. —'Jeffries v. Williams', (1851) 20 LJ Ex. 14 (I) & 5 Mad LJ 24 (H), distinguished. It will be noticed that in this case the question whether the adjoining owner was a trespasser or an owner was gone into and that is why the distinction mentioned above was made.

(15) The decision in —'Kondappa Rajah Naidu v. D. K. Suryanarayana', 34 Mad 173 (L), follows —'5 Mad LJ 24 (H)'. There also plaintiffs had not acquired an easement of prescription in regard to the water course. The defendants who had no manner of right to the water-course or the land over which it flowed obstructed the plaintiff's user. It was held that the plaintiff was entitled to an injunction.

(16) In —'Mahaboob Khan v. Govindarajulu', AIR 1936 Mad 142 (M), it was laid down very widely the proposition that the law does not know of any natural right apart from a right of easement with reference to a right of passage or right to light and air and in that no one can claim any natural right against another unless he establishes an easement to that effect. The learned Judge has not given any reason for stating this proposition and what is more as the proposition stands it is certainly opposed to the many decisions cited above and to the principles laid down in well known commentaries upon Easements to which a reference will be made now.

(17) I have already referred to Peacock on the Law relating to Easements in British India which begins the discussion regarding the Easements of Light and Air with the following striking sentence reproduced above, viz., 'the light and air may be either a natural right forming one of the incidents of property or it may be an easement. Then the learned author starts with the proposition that the owner of land can take and use for his own property as much light and air as come within the boundaries of his land. It is apparent that the quantity of light and air available for his use is in a large measure dependent upon the acts of his neighbour. Then he proceeds to show that this "neighbour" may fall within two classes of persons, viz., owners of property and trespassers. In the case of owners no complaint can be made on the ground of obstruction unless easementary right by exercise for over a period of 20 years has been acquired. Otherwise an owner-neighbour will be at liberty to

build up to the edge of his property. Quite different will be the case if obstruction complained of is by a trespasser. If the obstructing trespasser has acquired an easementary right, the adjoining owner will have no remedy. But if the trespasser has not acquired such an easementary right action will lie against him. At page 607 Peacock points out :

"Similarly the obstruction of light and air before the acquisition of the prescriptive right may be actionable if caused by a trespasser."

Again at page 70 Peacock observes:

"Though the acquisition of these rights in British India by enjoyment for a period of 20 years falls within the provisions of the Indian Limitation Act and Indian Easements Act, yet, if, as may be the case, these rights were to arise independently of those two Acts, similar considerations would present themselves as to the manner of their origin, as under the English common law prior to the English Prescription Act which has no force in British India."

In Goddard on the Law of Easements (8th Edn) page 472, it is stated thus:

"It may be taken, then, as settled law, that an owner of buildings cannot maintain any action for removal of support against the owner of the adjacent or subjacent soil, until he has acquired a right to support for his buildings. This, however, is not the case if a wrong doer — a person who has no right in the soil—interferes with it, and by removing the support causes the building to fall, for, in such case, an action will lie against him at the suit of the owner of the damaged building, even though the latter has not acquired any right to support."

Then coming to Gale on Easements (Edn. 12) Chap. 3, page 295, it is pointed out that,

"By the laws of all countries, and by the English law at a very early period, it appears that an action would lie for the obstructing of ancient lights."

Then at page 393 it is pointed out how notwithstanding the fact that right of easement has not been acquired, if the obstruction constitutes a nuisance, certainly a claim for that abatement in the shape of injunction or damages will lie. It need not be pointed out that what constitutes nuisance would be question of fact in each case — Per Lord Loreburn in —'Polsue and Alfeini v. Rushmer', (1907) A. C. 121 (N), quoting Lord Halsbury in — 'Colls v. Home and Colonial Stores', 1904 A. C. 179 (O). It must be an inconvenience materially interfering with the ordinary comfort physically of human existence. In other words the law would not favour the modes of the dainty and would only support the plain sober and simple notions among the people. 'Lex non favet delicatorum votis'.

(18) Then coming to Combe's Law of Light, as already mentioned, it distinguishes between the easement to air and light. Even Combe's discussion shows nothing more than that as between two owners, a landowner has no natural right to the continuance of the flow of air unobstructed by his neighbour's building and he cannot acquire a general right but only acquire a right to the continuance of the passage of air through a strictly defined channel as otherwise legal easement would be too burdensome or indefinite to admit of its recognition in a Court of law (See —'(1879)-4-C. P. D. 172 (B)'; —'Hall v. Lichfield Brewery', (1890)-49 LJ Ch 655 (P); —'Roberts v. Macord', (1832)-1 M & R 230 (Q); —'Potts v. Smith', (1868) 6 Eq. 311 (R); —'Harris v. De Pinna', (1836)-33 Ch. D 238 (S). It will be noticed that even here it is not stated that as against a trespasser there can be no action in regard to nuisance being caused by acts of his shutting light and air which has been found to be in the instant case.

(19) Therefore both the lower Courts have rightly appreciated the evidence and applied the correct principles of law and gave the plaintiffs the proper reliefs asked for by them.

(20) There are no grounds to interfere in the second appeal and it is dismissed with costs. No leave.

B/R.G.D. Appeal dismissed.

A. I. R. 1953 MADRAS 852 (Vol. 40, C. N. 329)

VENKATARAMA AIYAR J.

Minor Balakrishnan and another, Appellants v. Balasundara Gramani and another, Respondents.

Second Appeal No. 1158 of 1949, D/- 28-1-1953.

Hindu Law — Joint Hindu family — Alienation — Setting aside.

In a suit filed by the coparceners for setting aside the alienation, they should be granted possession of the properties subject to the equities in favour of the alienee being worked out in an independent action. AIR 1924 Mad 81, Distinguished. (Para 2)

M. S. Venkatarama Iyer, for Appellants.

CASE CITED:

(A) ('24) AIR 1924 Mad 81: 46 Mad 815

JUDGMENT: The plaintiffs are the appellants. They are the sons of one Vaiyapuri Pillai and all of them constitute members of a joint Hindu family. On 9-3-1944, Vaiyapuri Pillai settled various properties on plaintiff 1 under Ex. A. 1. Thereafter he executed a deed of gift Ex. B. 1 on 11-2-1945 in favour of his step-sister Sendamarai Ammal, who is defendant 2 in the suit. The deed of gift related to one of the properties comprised in the settlement deed Ex. A. 1. On the same day Vaiyapuri Pillai executed the sale deed, Ex. B. 3, in favour of defendant 1, Balasundara Gramani, who is no other than the husband of Sendamarai Ammal, defendant 2. That sale deed related to properties not covered by Ex. A. 1 and that was for a sum of Rs. 200. The plaintiffs claimed that both the deeds, Exs. B. 1 and B. 3 were not binding on them. That contention has been accepted by both the courts below. It has been held that Ex. B. 1, the gift deed in favour of defendant 2, is void and not binding on the plaintiffs. It has also been held that the sale deed Ex. B. 3 in favour of defendant 1 could not be supported as one for necessity and that it was not binding on the plaintiffs. On these findings, the learned District Munsif granted a decree for possession in favour of the plaintiffs. The Subordinate Judge on appeal while accepting the findings merely granted a declaration that the two alienations were not binding on the plaintiffs but refused the prayer for possession. The plaintiffs prefer this second appeal in so far as their prayer for possession has been negatived.

(2) I am unable to see how, on the findings, the plaintiffs can be refused the prayer for possession. So far as Ex. B. 1 is concerned, it is a gift deed and being void, the plaintiffs, who are members of a joint family, are entitled to recover possession of the property concerned therein. The learned Subordinate Judge has not given any legal ground for refusing them this relief. As regards defendant 1 who claims under the sale Ex. B. 3, the judgment of the lower appellate court is based on the decision in — 'Ramaswami Aiyar v. A. S. Venkatarama Aiyar', A. I. R. 1924 Mad. 81 (A). There it was held that an alienee in possession can as a defendant plead that the suit might be regarded as one for partition; and that he might be allotted the alienated properties if that would be less than what his alienor would be entitled to in a suit for partition and on that basis though the alienation may be set aside the properties alienated may be allotted to the deft. as on account of the share of the father. But it has been frequently pointed out that this is an exceptional procedure to be adopted. In that case there were only two coparceners and all the properties of the joint family were ascertained and it was possible to give effect to that equity in favour of the defendant. But here the father is not a party to the suit. We do not know what the extents of the family properties are. We do not know what debts have been incurred chargeable against the share of the father and we do not know what other alienations he has made. Such an equity as this has not been properly pleaded and the necessary materials have not been placed before the Court. Therefore, there is no ground for adopting the exceptional procedure of granting relief on the basis of equity to defendant 1 when the alienation is set aside. The alienee should normally be relegated to filing his own suit for partition and therein ask that in equity the alienated property might be allotted to his alienor's share. But in a suit filed by the coparceners for setting aside the alienation, they should be granted possession of the properties subject to these equities in favour of the alienee, being worked out in an independent action. I am therefore of opinion that there were no grounds for modifying the decree of the first court even as regards defendant 1.

(3) In the result, this appeal will be allowed and the decree of the trial court restored with costs throughout.

(4) No leave.

B/D.H. Appeal allowed.

A. I. R. 1953 MADRAS 853 (Vol. 40, C. N. 330)

RAGHAVA RAO J.

A. Koyan and another, Petitioners v. Rajammal and another, Respondents.

Civil Revn. Petn. No. 1054 of 1952, D/- 30-1-1953.

Court-fees Act (1870), Sch. I, Art. 1 — Written statement claiming set-off.

A written statement pleading a set-off, whether legal or equitable, must bear court-fee whether the set-off is tantamount to an extinguishment of the plaint claim or to a partial reduction of the plaint claim. (Para 1)

Where the written statement on its allegations refers to the payments which will have the effect of either extinguishing or reducing the suit claim as payments which in law must be held to be in the nature of 'payments to the plaintiff himself', the defendant is not under an obligation to pay any court-fee on that amount. This principle is really a corollary to the larger principle applicable to plaints that the payment of court-fee on the plaint must be judged with reference to the allegations in the plaint. (Para 1)

Where therefore the written statement does not claim any particular amounts either in reduction or in extinction of the suit claim on the basis of what he describes a set-off, the defendant should not be called upon to pay any court-fee merely because in the ultimate result after the item have been examined it turns out that what is asked for by the defendant is a set-off. (Para 2)

Anno: Court-fees Act, Sch. I, Art. 1 N. 3.

C. K. Viswanatha Iyer, for Petitioners; C. S. Swaminathan, for Respondents.

ORDER: After the lengthy arguments I have heard in this case the principles that to my mind appear to emerge for consideration and application in this case are these. (1) A written statement pleading a set-off, whether legal or equitable, must bear court-fee whether the set-off is tantamount to an extinguishment of the plaint claim or to a partial reduction of the plaint claim; (2) where the written statement on its allegations refers to the payments which will have the effect of either extinguishing or reducing the suit claim as payments which in law must be held to be in the nature of "payments to the plaintiff himself," the defendant is not under an obligation to pay any court fee on that amount although when he fails to prove the legal effect of the payments in question to be that of payments to the plaintiff himself, the plea of the credit claimed by the defendant on the foot of payments may have to fail. This latter principle is really a corollary to the larger principle applicable to plaints that the payment of court-fee on the plaint must be judged with reference to the allegations in the plaint.

(2) I have carefully examined the present written statement with the aid of counsel and I have come to the distinct conclusion that there is nothing which involves the defendant on the allegations therein in the position that he is pleading a set-off legal or equitable. He is pleading two items of credit with reference to what would be in the nature of an advance payment of rent or payments under the Madras Tenants and Ryots Protection Act (Madras Act 17 of 1946). The defendants here are only resisting the plaintiffs' claim on a very legitimate ground with reference to which on first principles it will be rather difficult to say that the defendants have to pay any amount or court-fee at all. But there is a provision in the Court-fees Act, Schedule I, Art. 1, which says that a written statement pleading a set-off must be stamped in the same manner in which a plaint might have to be stamped ad valorem. Notwithstanding this, I do not see any reason on principle, why if the written statement does not claim any particular amcunts either in reduction or in extinction of the suit claim on the basis of what he describes a set-off, the defendant should be called upon to pay any court fee merely because in the ultimate result after the item have been examined it turns out that what is asked for by the defendant is a set off. For the reasons given

above, I am of opinion that the written statement in this case is not hit at by the provisions of Sch. I, R. 1 of the Court-fees Act. I reverse the decision of the court below and direct it to accept the written statement as properly stamped and proceed with the trial of the suit hereafter. The petitioners will have costs from the respondents in this Court.

B/D.R.R. Petition allowed.

A. I. R. 1953 MADRAS 854 (Vol. 40, C. N. 331)

RAJAMANNAR C. J.

Deva Venkatakrishna Reddi and others, Appellants v. G. Govindaraja Mudaliar, Respondent.

Second Appeals Nos. 1005 to 1009 of 1949 and C. M. P. Nos. 1138 to 1142 of 1953, D/-13-2-1953.

(a) Civil P. C. (1908), O. 1, R. 10 — Suit for rent.

Though a joint owner or a co-sharer is not entitled as such to sue for proportionate rent nevertheless if there is an agreement between the several co-sharers and the ryots to apportion the rent payable to each landholder by each ryot there is nothing illegal in such an arrangement. 16 Ind Cas 458 (Mad) and AIR 1936 Mad 402, Rel. on. (Para 3)

Anno: C. P. C., O. 1 R. 10 N. 20.

(b) Civil P. C. (1908), S. 100 — Concurrent finding of fact.

The finding of both the Courts that the prevailing rents in respect of the suit lands is the cropwar rate is one of fact. There being evidence to support the finding in second appeal it is not open to reject the concurrent finding. (Para 4)

Anno: C. P. C., S. 100 N. 53, 54.

Kasturi Seshagiri Rao and Kasturi Sivaprasada Rao, for Appellants; A. K. Muthuswami Ayyar, for Respondent.

CASES CITED:

(A) ('42) AIR 1942 Mad 282: 1941-2 Mad LJ 1088
(B) ('12) 16 Ind Cas 458: 23 Mad LJ 161
(C) ('36) AIR 1936 Mad 402: 163 Ind Cas 463

JUDGMENT: These second appeals arise out of a batch of suits filed by one of the landholders of Sri Vilasapuram in Tiruttani Division in the Chittoor District against the tenants of the village for the recovery of his share of the rent for faslis 1353 to 1355. The main dispute between the parties in the courts below and before us was in respect of two matters: (1) whether the plaintiff who was only one of the co-sharers was entitled to sue for his share of the rent due, and (2) what is the proper rate of rent, whether it was payable cropwar or in cash. The Special Deputy Collector of Chandragiri as well as the learned District Judge of Chittoor decided against the tenants-defendants on both the points. They are the appellants before me.

(2) The first contention of the learned counsel for the appellants was that as the plaintiff was admittedly only entitled to 29/40th in a portion of the village which remains undivided between the five sharers including him, he cannot maintain the suit for recovery of a proportionate rent without making the other co-sharers parties. He relied on the decision in — 'Ethiraja Mudaliar v. Murugesa Mudaliar', AIR 1942 Mad 282 (A), in support of his contention. That decision, however, does not directly govern the present case. There, an elder brother in a divided family commenced proceedings under Ss. 111 and 112, Madras Estates Land Act, against the tenants in the village belonging to the family without making his minor younger brother a party to the proceedings. He wanted to bring the entire holding to sale for the arrears of rent due. It was held that it was not competent for him to initiate such proceedings without making the other co-sharers parties. The principle laid down in that decision is to be found in the following passage:

"If there is more than one landholder .....it would not be competent for one landholder to exercise the power of sale or initiate proceedings in regard thereto without the other landholder or landholders being made parties to such proceedings."

In the present case, the plaintiff is not seeking to do any such thing. He is only seeking to recover his share of the rent due.

(3) It must be taken as well established that a joint owner or a co-sharer is not entitled as such to sue for proportionate rent, but it has been held by a Division Bench in — 'Srinivasa Varadachariar v. Sami Reddi', 23 Mad L. J. 161 (B), that though this is undoubtedly the established rule, nevertheless if the parties, namely, the landholders and the tenant agree to accept and pay proportionate rent according to shares, there was nothing illegal in such an arrangement. In that case, the agreement between the parties was evidenced by the execution of pattas and muchilikas in respect of the particular share of the plaintiff landholder. There are no such pattas and muchilikas in the present case. But I consider that the 'ratio decidendi' of this decision is that there can be an exception to the general rule where there is an agreement between the parties, and presumably this agreement can be proved in one or other of the ways known to law. Execution of pattas and muchilikas would, of course, be very good evidence, but it may be possible for a court to find such an agreement even on other evidence, as for instance, continued practice and usage. The view I take of the decision in — '23 Mad L. J. 161 (B)', is also the view taken in — 'Raju Goundan v. Kuppu Goundan', AIR 1936 Mad 402 (C). The learned Judge observed as follows:

"In—'23 Mad LJ 161 (B)', it was held that though a joint owner is not entitled to sue for proportionate rent, if parties agree to accept and pay proportionate rent according to shares, there is nothing illegal in it and that an owner of 5 1/8 in a shrotriam village was held entitled to tender a patta for his 5 1/8 share. This decision therefore seems to assume that it is open by agreement between the several joint holders and the ryot to apportion the rent payable to each landholder and that in respect of each landholder there can be a tender of pattas and muchilikas with reference to that share."

The question is whether there is proof of such an agreement in this case. No doubt the courts below have discussed this question in dealing with the issue of non-joinder. But I am not satisfied that they have appreciated the correct legal position in dealing with this question. Even the parties did not approach the question in the proper way. It is, therefore, necessary that there should be a fresh finding on this point, after giving an opportunity to both the parties to adduce such evidence as they choose to on the question. I do not think it necessary to remand the case to the trial court. It is sufficient if it is

remanded to the appellate court with a direction that the learned District Judge may admit such additional evidence as the parties may choose to adduce on this question. To make the position clear, I once more repeat the question which arises for decision, namely, whether in this case there is an agreement between the several co-sharers and the ryots to apportion the rent payable to each landholder by each ryot.

(4) It was next contended on behalf of the appellants that the finding of both the courts that the prevailing rents in respect of the suit lands is the cropwar rate should be set aside, as it is not supported by the evidence. I do not think in second appeal it is open to me to reject the concurrent finding of the courts below on what is really a question of fact. It cannot be said that there is no evidence whatever to support the finding of the courts below. I therefore overrule this contention on behalf of the appellants.

(5) The second appeals are allowed. There will be an order of remand of the appeals to the court of the District Judge of Chittoor for final disposal of the appeals after deciding the question mentioned earlier on in the judgment as to the maintainability of the suits. The appellant will be entitled to a refund of the court-fee paid on the memoranda of second appeals. The costs of the second appeals will abide and follow the result.

(6) C. M. P. Nos. 1138 to 1142 of 1953: These applications filed under the provisions of Madras Act 26 of 1948 shall be transmitted to the court of the District Judge for disposal.

B/D.H.Z. Appeals allowed.

A. I. R. 1953 MADRAS 855 (Vol. 40, C. N. 332)

KRISHNASWAMI NAYUDU J.

E. S. Raghavendra Rao and others, Appellants v. Venkammal and others, Respondents.

Appeal Against Order No. 68 of 1947, D/-6-2-1953.

† Limitation Act (1908), Art. 185 (5) — Application not accompanied by succession certificate.

An application by a transferee-decree-holder for execution which was dismissed for want of production of a succession certificate is an application filed in accordance with law to the proper Court for execution. (Paras 1 and 7)

Anno: Limitation Act, Art. 185 N. 59 Pt. 5.

C. A. Vaidhyalingam, for Appellants; K. S. Desikan, for Respondents.

CASES CITED:
(A) ('02) 12 Mad LJ 348
(B) ('09) 5 Ind Cas 120 (1): 7 Mad LT 247 (1)
(C) ('24) AIR 1924 Mad 673: 47 Mad 641
(D) ('27) AIR 1927 Pat 324: 6 Pat 440
(E) ('18) AIR 1918 Mad 1204: 6 Mad LW 19

JUDGMENT: The question that arises for determination in this appeal is as to whether an application by a transferee-decree-holder for execution which was dismissed for want of production of a succession certificate is an application filed in accordance with law to the proper Court for execution.

(2) In O. S. No. 64 of 1936 on the file of the District Munsif of Erode a money decree was passed against the defendants on 25-7-1936. The decree-holder died sometime after the passing of the decree leaving behind him, as his heirs, three grandsons by his daughter who were minors. The father of these minors acting as their guardian assigned the decree to one Rama Rao. Rama Rao, the assignee decree-holder filed E. P. No. 1172 of 1939 on 18-7-1939 and asked for recognition of himself as the assignee-plaintiff under O. 21, R. 16, Civil P. C.; for a declaration that as the original plaintiff was dead, his minor grandsons may be impleaded as his heirs under O. 21, R. 3, Civil P. C. and that the immovable properties which belonged to the defendants may be attached under O. 21, R. 54, Civil P. C. and that a sale proclamation may be issued under O. 21, R. 21, C. P. C. The said execution petition was adjourned from time to time and the transferee decree-holder-petitioner was directed to produce the succession certificate. He was taking time to produce the same. He had already filed a petition, O. P. No. 62 of 1939 for that purpose but it eventually transpired that he was unable to furnish the security required for obtaining the succession certificate.

On 11-12-1939 his advocate endorsed on the execution petition that the petitioner was unable to furnish security in O. P. No. 62 of 1939, that the execution petition was filed to save limitation and that if it was rejected without being filed it may not save limitation and that the petitioner will renew his application for a succession certificate after getting the proper security and that this petition may be disposed of without prejudice to the petitioner renewing it after getting the certificate reserving his right to renew the same. On the 12-12-1939 by an order of the District Munsif the petition was dismissed for non-production of the succession certificate.

(3) On 10-12-1942, the transferee decree-holder filed his next execution petition, E. P. No. 33 of 1943, for similar reliefs as those contained in the earlier execution petition and that petition was also returned for the production of the succession certificate. Subsequently, notice was ordered in the petition but the judgment-debtors applied for scaling down the decree and for stay of execution. Execution was stayed on 23-3-1943. E. P. No. 33 of 1943 was also dismissed by an order of court of that date.

(4) The present execution petition, out of which this appeal arises was filed on 26-10-1943. In between, and by the date of that petition, the transferee decree-holder had obtained the succession certificate. Objection was raised in this execution petition that it was barred by limitation as the order dated 12-12-1939 in E. P. No. 1172 of 1939 was not a final order in an application presented in accordance with law to the proper court for execution under Art. 182 (5) of the Limitation Act. E. P. No. 1172 of 1939 was presented under O. 21, R. 16 of the C. P. C. by the transferee-decree-holder who relied on the assignment deed in his favour. There is no dispute that the assignment deed was filed in Court along with E. P. No. 1173 of 1939. This was also verified and found to be correct by the learned District Judge while hearing the appeal.

The only ground therefore for not ordering execution is that the succession certificate was not issued to the decree-holder by the date of the order of 12-12-1939. It is not suggested that the E. P. No. 1172 of 1939 did not contain the particulars that are required to be shown in an execution petition under Rules 11 to 14 of O. 21 of the Civil P. C. It was an application by a person who was claiming to be a transferee

decree-holder under O. 21, R. 16, Civil P. C. He relied for the transfer upon an assignment deed which he had also produced with the petition. Therefore, 'prima facie' there is no reason to hold that E. P. No. 1172 of 1939 was not a petition presented in accordance with law.

(5) The procedure that governs the presentation of applications in the case of a transferee decree-holder is that which is contained in O. 21, Rr. 11 to 14 and 16 of the Code. There is compliance of the said provisions of the Code and it cannot be said that it is not an application presented in accordance with law. Support for this proposition is found in some of the decisions cited at the Bar. In — 'Sreepada Brahmayya Pantulu v. Parasuramayya', 12 Mad LJ 348 (A), a Bench of this Court held that a person who becomes entitled under a decree to realise the amount due under another decree, is a transferee under S. 232, C. P. C. and is the only person who could have applied for execution of the latter decree. Such application is one in accordance with law though the transferee is subsequently held to have no title and the application has the legal effect of saving the bar and enures in favour of all persons entitled to execute the decree.

This decision was cited with approval in — 'Uduman Haji v. Mammi Kutti', 7 Mad LT 247 (1) (B), where it was held that failure to prove the validity of the assignment does not show that the application for execution was not in accordance with law. In — 'Rajithagiripathi v. Bhavani Sankaram', AIR 1924 Mad 673 (C) it was held that the application by the transferee decree-holders for recognition of their transfer and for execution was a step-in-aid of execution of the decree, even though the right of the transferees had been negatived in subsequent proceedings. This decision again quotes with approval the view taken in — '12 Mad LJ 348' (A).

(6) But it is contended by Mr. Vaidyalingam on behalf of the appellants that the decision in — '12 Mad LJ 348' (A) was based on the old Code. But it must be noted that S. 232 of the old Code is in no way substantially different from the present O. 21, R. 16, Civil P. C. and the fact that it is a decision under the old Code is not of much consequence. Section 232 is practically in terms of O. 21, R. 16, C. P. C. under which the application that is now in question has been filed. The Patna High Court had also taken a similar view as could be seen from the decision reported in — 'Mt. Bibi Aisha v. Mahabir Prasad', AIR 1927 Pat 324 (D). It was held therein that an execution application is in accordance with law within Art. 182 (5) if the particulars required by Rr. 11 to 14 of O. 21 are mentioned in the application and that where an application contains these particulars, the fact that it was presented without a succession certificate makes no difference, as an application without a succession certificate is perfectly in order; only no relief can be granted until the succession certificate is produced.

Reliance was placed on behalf of the appellants on — 'Kailasa Pandaram v. Ramanuja Naidu', AIR 1918 Mad 1204 (E), where it was held that the decree-holder having failed to obtain recognition of his right in the prior application, his prior application was by a person not entitled to make it and cannot save the present application from the bar of limitation. It must be noted that in that case the decree was in favour of three minor brothers represented by a guardian. The guardian applied for and obtained an order for sale. One of the minors then attained majority and acting for himself and as guardian of his minor brothers, he assigned the decree to the respondent. The respondent put in an execution petition for executing the whole decree which was however dismissed on the ground that the assignment was invalid to the extent of the minors' shares as leave of the Court was not obtained and execution was wholly disallowed as the petition did not purport to be one by a joint decree-holder. It was therefore held that the Court could not treat the order dismissing it as one recognising the validity of the assignment, or in view of that order, which became final, assume that his assignment was valid. That was a case where the assignment was held to be invalid and in view of that finding it cannot be said that the assignee was the proper person to maintain the application and obviously the petition was not one in accordance with law.

(7) I am of the opinion that E. P. No. 1172 of 1939 was presented by the proper person in accordance with law and the order of 12-12-1939 was the final order in such an application which could save limitation. Once it is shown that the petition complied with the requirements of O. 21, Rr. 11 to 14 and 16 of the Code, the application for execution in this case being one by a transferee decree-holder, the effect or otherwise of a succession certificate not having been produced along with the execution petition, would not be of consequence, since it is nowhere said in the rules referred to, much less in R. 16 of O. 21, that a transferee decree-holder's application should also be accompanied by the succession certificate when the transfer is by persons who have become entitled to the decree by operation of law. The want of a succession certificate may deprive the assignee decree-holder of the remedy or the relief which he seeks in the execution petition. But it certainly cannot vitiate the petition itself as there is nothing which says that a succession certificate should be filed along with such an application.

(8) In the result I find that the order of the lower appellate Court is correct. The appeal is dismissed with costs. No leave.

B/V.R.B. Appeal dismissed.

A. I. R. 1953 MADRAS 856 (Vol. 40, C. N. 333)

RAGHAVA RAO J.

Chellammal and another, Appellants v. K. T. A. Abdul Rahiman Rowther and others, Respondents.

Civil Revn. Petn. No. 229 of 1951, D/- 5-2-53.

(a) Suits Valuation Act (1887), S. 8 — Suit for partition.

In a suit for partition the jurisdictional value must be ascertained with reference to the plaintiff's share in the property of which partition is sought. (Paras 3 and 4)

Anno: Suits Valuation Act, S. 8 N. 4 Pts. 3 and 4.

(b) Court-fees Act (1870), Sch. II, Art. 17 (VI) — Suit for declaration of joint right in impartible property.

In a suit in which the plaintiff seeks declaration of a joint right in respect of impartible land the value of the trees stand-

ing thereon cannot affect the question of valuation of the suit. (Para 4)

Anno: Court-fees Act, Sch. II, Art. 17 (vi) N. 1.

R. Kesava Ayyangar and K. Parasaran, for Appellants; Govt. Pleader and U. Somasundaram, for Respondents.

CASES CITED:

(A) ('47) AIR 1947 Mad 273: 1947-1 Mad LJ 112

(B) ('24) AIR 1924 Mad 19: 46 Mad 782 (FB)

(C) ('34) AIR 1934 Mad 714: 67 Mad LJ 688

ORDER: The question in this case is one of court-fee and jurisdiction. The Court of first instance returned the plaint for presentation to the proper Court finding that it exceeded its pecuniary jurisdiction. The Court of appeal having affirmed the order of return of plaint the plaintiff in the case comes up here in revision.

(2) The petitioner is interested in a 2/13th share of 'Dharmasanam' village. Items 1 to 5 are the 'Dharmasanam' items and items 6 to 8 are certain 'porombokes'. He sought partition and delivery of 2/13th share in respect of items 1 to 5, because they were partible in character and sought a declaration of a joint right in respect of the impartible items 6 to 8. A Commissioner appointed in this suit valued items 6 to 8 with reference to the trees that stood thereon as at Rs. 2700. It is on the basis of this valuation and on the basis of the supposition that the plaintiff's right in respect of the items in suit was in respect of the whole in each one of them and not a share only that the Courts below held this suit as beyond the pecuniary jurisdiction of the trial Court.

(3) It is contended by Mr. Kesava Aiyangar that the jurisdictional value must be ascertained with reference to the plaintiffs' 2/13th share in respect of the 'Dharmasanam' half of the plaint items. It is also contended that so far as items 6 to 8 are concerned, they are not capable of partition and that therefore the value put by the plaintiffs on the relief sought in respect of them is final.

(4) I am of opinion that the contentions for the petitioners are well founded and must prevail. The first contention is supported by the authority of cases relating to partition suits in which it is the value of the share of the plaintiff that has been held to matter: vide — 'Kalander v. Kunhipaki', AIR 1947 Mad 273 (A). The second contention is supported by the analogy of cases relating to temple properties or such other trust properties which have been held to be not capable of valuation: vide—'Rajagopala Naidu v. Ramasubramania Aiyar', AIR 1924 Mad 19 (FB) (B) and — 'Manikam Pillai v. Nagasami Aiyar', AIR 1934 Mad 714 (C). The difficulty, however, in the way of Mr. Kesava Aiyangar suggested by the learned advocates for the respondents is that items 6 to 8 were valued as at Rs. 2700 with reference to the trees thereon, which by themselves are capable of being valued. But if the case of the trees is to be judged as not dissociable from the land on which they stood and if the land itself being impartible and communal property not capable of valuation it follows that the value of the trees cannot affect the question of valuation of the suit. It follows that this revision petition must be allowed with costs, here and in the Courts below.

B/V R.B. Revision allowed.

A. I. R. 1953 MADRAS 857 (Vol. 40, C. N. 334)

RAGHAVA RAO J.

Sha Gomraj Poonamchand; Petitioner v. Ponnuru Venkatrathnam Chetty, Respondent.

Civil Revn. Petn. Nos. 1678 and 1789 of 1952, D/- 28-1-1953.

Houses and Rents — Madras Buildings (Lease and Rent Control) Act (25 of 1949) (as amended by Act 8 of 1951), S. 7(2)(a) Proviso — Decree for eviction — Competency of objection taken in executing Court.

An objection on the ground that if the default were to be found not wilful then the execution of the decree passed against the tenant for his eviction which followed upon the original Rent Controller's order for eviction is not competent can be entertained by the executing Court. AIR 1953 Mad 378, Foll. AIR 1952 Mad 159, Expl. (Para 2)

P. S. Kothandapani, for Petitioner; C. A. Vaidhyalingam, T. Venkatadri, K. Ramachandra Rao and P. Venkataswami, for Respondent.

CASES CITED:

(A) ('53) AIR 1953 Mad 378: (1952) 1 Mad LJ 628

(B) ('52) AIR 1952 Mad 159: (1951) 2 Mad LJ 531

JUDGMENT: C. R. P. No. 1678 of 1952: In answer to an execution petition before the City Civil Court in respect of an order of eviction originally passed by the Rent Controller which became final by the dismissal of the civil revision petition by Ramaswami Goundar J. in this Court, it was urged by the tenant in the execution application filed by him that the question of his default in the matter of payment of rent was a matter to be decided with reference to its wilfulness or otherwise under the provisions of S. 7(2)(a) proviso of the Madras Buildings (Lease and Rent Control) Act, 1949. If the default were to be found not wilful it was urged for the tenant that the execution of the decree for eviction which followed upon the original Rent Controller's order for eviction would not be competent. The City Civil Court refused to go into the question of the wilfulness or otherwise of the default and dismissed the execution application. In this revision against the order of dismissal of the execution application it has been urged on the authority of a ruling of this Court by Basheer Ahmed Sayeed J. in — 'Woodman v. Mrs. Regina Rajan', AIR 1953 Mad 378 (A) that the objection was one which could very well be entertained by the executing Court and that the Court below declined jurisdiction in refusing to go into the question. The decree itself having become inexecutable, by force of the provisions of the Amending Act 8 of 1951 to be found in S. 7(2) proviso, it has been urged that this civil revision petition is good even without reference to S. 12-B of the Amending Act and without reference to the revisional powers under that section which are much wider than the revisional powers vested in this Court by the Code of Civil Procedure. The general proposition is not disputed for the petitioner that the executing Court cannot go behind the decree in execution and entertain objections other than to the jurisdiction of the Court which passed the decree. What is contended is that the non-executability of the decree in the present case which is consequent upon the amending provi-

sion of the Madras Act 8 of 1951 as construed by this Court in the reported ruling just referred to is in the nature of a valid objection to the execution petition in the Court below which renders the orders passed by it illegal, improper or irregular within the meaning of S. 12-B of the Amending Act. In answer to this point for the petitioner, it has been contended by Mr. Vaidhyalingam for the respondent that the judgment of this Court between the very parties before me reported in — 'Poonamchand v. Venkataratnam Chetti', AIR 1952 Mad 159 (B) precludes the petitioner before me from raising the point even if that point is otherwise well founded. What is argued by the learned counsel for the respondents is that in the revision petition preferred to this Court against the order of the appellate authority which confirmed the order of eviction made by the Rent Controller, a point was raised to the effect that the default in the case on the part of the present petitioner was not wilful and that if that were so under the provisions of the Amending Act, Act 8 of 1951 which had by that time come into force the order for eviction could not stand. It is further pointed out by the learned counsel for the respondent that that point was overruled by the learned Judge of this Court who disposed of the civil revision petition, Ramaswami Goundar J. on the ground that the Amending Act cannot govern the parties to this revision petition for the reason that there was no proceeding pending at the time the Amending Act came into force which could be said to be governed by it. Says learned counsel, whether that view of the learned Judge is right or wrong that is the view of law binding upon the parties to that proceeding in the subsequent stages of the same litigation of which the execution petition with which we are concerned happens to be one. In my opinion the exact limits within which the judgment of Ramaswami Goundar J. should be held operative are to be understood with reference to the particular proceeding which was in question before the learned Judge and the operation of His Lordship's view cannot be extended to other proceedings, if regard is to be had to the reasoning which was employed by the learned Judge in the revision petition which His Lordship disposed of. There is, in my opinion, here no question of constructive 'res judicata' analogous to that enacted by Explanation IV to S. 11, Civil P. C. nor can the question be regarded as one of actual 'res judicata' except with due regard to the scope of the exact proceeding in which the view of His Lordship was expressed. It cannot be disputed nor indeed has it been, by the learned counsel for the respondent that the later proceeding which is an execution proceeding is a proceeding governed by the Amending Act.

(2) No attack has been made too before me against the correctness of the ruling in AIR 1953 Mad 378 (A). I am in the circumstances content in the interests of the comity of judicial decision to accept that ruling. The result is that this civil revision petition must be allowed with costs to abide the result of the enquiry into the objection made in the execution application before the Court below on the question of wilfulness or otherwise of the default committed by the tenant.

(3) C. R. P. No. 1789 of 1952: The matter connected with C. R. P. No. 1678 of 1952, will in view of the foregoing also go back to the Court below for appropriate orders being passed on it after the question of wilful default in the execution application is disposed of by it, in the light of such disposal as well as the foregoing.

B/V.S.B. Revision allowed.

A. I. R. 1953 MADRAS 858 (Vol. 40, C. N. 335)

PANCHAPAKESA AYYAR J.

Coral Indira Gonsalves, falsely called Iswariah, Petitioner v. Joseph Prabhakar Iswariah, Respondent.

O. M. S. No. 5 of 1952, D/- 27-1-1953.

(a) Evidence Act (1872), S. 45 — Doctor's medical certificate filed — It does not prove itself — Doctor must be called and cross-examined on it. (Para 7)

Anno: Evidence Act, S. 45 N. 3, 5, 8.

(b) Divorce Act (1869), S. 19 (1) — Nullity of marriage on ground of complete impotency of respondent — Impotency at time of marriage is not enough — Marriage will not be declared a nullity, if respondent becomes potent even before the date of such disposal of petition. (Para 8)

Anno: Divorce Act, S. 19 N. 1.

(c) Divorce Act (1869), Ss. 16 and 19 — Parties Christian — Husband's complete impotency — Suit for declaration of nullity of marriage — No collusion — Petitioner wife is entitled to absolute decree of nullity and dissolution — Decree nisi to be made absolute, need not be passed — (Specific Relief Act (1877), S. 42). AIR 1945 Cal 75, Ref. (Para 11)

Anno: Divorce Act, S. 16 N. 1; S. 19 N. 1: Specific Relief Act, S. 42 N. 2 (c).

K. Narasimha Iyer, for Petitioner: Alvares of Messrs. Pais, Lobo and Alvares, for Respondent.

CASE CITED:

(A) ('45) AIR 1945 Cal 75: ILR (1944) 1 Cal 258

JUDGMENT: This is a petition by one Coral Indira Gonsalves, aged 23, for declaring her marriage with Joseph Prabhakar Iswariah a nullity, on the ground of his impotency and continuing and total inability to have sexual intercourse with her. At first the respondent opposed the petition vigorously, alleging that he was not impotent. Both the petitioner and the respondent are Protestant Indian Christians.

(2) The following issues were framed:

1. Is the defendant impotent and unable to have sexual intercourse with the plaintiff, as alleged?
2. To what relief, if any, is the plaintiff entitled?

(3) Before the matter came on for final hearing and disposal, the respondent, Iswariah, wanted this Court to have him examined by a competent doctor for finding out whether he was really impotent and totally unable to have sexual intercourse. Ultimately, Lt. Col. Krishnamoorthi, No. 2 Boag Road, T. Nagar, was appointed by Court as the doctor for examining him carefully and giving a certificate about his potency or impotency, and ability or inability to have sexual intercourse. This doctor, after examining him, gave a certificate as follows:

"I have carefully examined Sri Joseph Prabhakar Iswariah on two separate occasions. I am of the opinion that Sri Joseph Prabhakar Iswariah is potent and that he is capable of the act of sexual intercourse."

This certificate was granted on 21-10-1952. This petition had been filed on 27-2-1952. So, even if the certificate was proved to be correct (it was not), it will not prove potency before 21-10-1952. Mr. Narasimha Iyer, for the petitioner, persisted in contesting the potency of the respondent, even on 21 10-1952, and strongly relied on the letters of the respondent written to the petitioner, including a letter, Ex. P. 2, wherein the respondent had written to his wife, the petitioner, that he was physically quite unfit to give her any sexual satisfaction, and that she could get such satisfaction by having sexual intercourse with other men, provided that she did not ask him to support any children born out of these extra-marital relationships, and that he hoped that she would go back to him, as he was giving her enough compensation for the sexual satisfaction he was unable to give her, himself. Though the respondent at first contested the genuineness of this letter, and wanted permission to have a photograph of it taken and a hand-writing expert appointed to determine whether he had really written and signed such a letter, he finally gave up that idea, and, on 20-1-1953, his counsel intimated to Court that "the defence was not intended to be pressed." So, the suit was posted to today for the petitioner's examination to prove her case.

(4-5) The petitioner examined herself as P. W. 1 today. (His Lordship went through her evidence and proceeded):

(6) As already stated, the respondent has finally remained 'ex parte'. His counsel has informed this Court that he is not going to press his defence.

(7) Now, I shall give my findings on the issues, on the uncontradicted evidence of the petitioner, and the exhibits.

Issue 1: On the evidence on record, I have absolutely no hesitation in holding that the respondent is totally impotent and unable to have sexual intercourse with the petitioner, till today, as alleged. There is the categorical statement of the petitioner, as P. W. 1, to the effect that, even though she embraced and kissed him repeatedly almost every night for nearly seven months, and invited him to have sexual intercourse with her, he was unable to have sexual intercourse with her, and confessed to her that he was impotent, and even showed his defective genitals in corroboration of his statement, and that she was also convinced, by seeing his defective penis, totally incapable of erection, that he was really impotent. Still, she went on living with him for seven months, to see whether he would ever recover his potency and be able to have sexual intercourse with her, for it sometimes happens, according to popular belief, that a man is impotent and unable to have sexual intercourse at a particular time, but becomes, after some time, able to have sexual intercourse, either by prayer and God's grace, or by the restorative processes of nature or by taking some vitality-restoring food or medicine like 'Siddha Kalpa', 'Makaradhwaja' or 'Chyavana Pras' or 'Royal Yakuti', or 'Karunkurangu Lehyam' claiming, (rightly or wrongly), to be able to achieve it, or some western medicines corresponding to these Indian medicines and making the same claims. Anyway, it is clear that the petitioner gave the respondent ample opportunities for recovering his potency and ability to have sexual intercourse with her, by sleeping with him night after night for 7 months and trying her best by kissing and embracing him repeatedly, to induce him to have sexual intercourse with her. What is more, the letter, Ex. P. 2, by making the obscene offer to her, giving her freedom to have sexual intercourse with other man, provided she did not claim maintenance for the bastard children born by such extra-marital relations, corroborates the other evidence and conclusively proves that the respondent is totally impotent and knew that he was impotent. We need not bother about Lt. Col. Krishnamoorthy's certificate that, in his opinion, the respondent was able on 21-10-1952 to have sexual intercourse, and was potent, that day. Certificates, like these, do not prove themselves. They must be 'strictly proved' by the doctor who issues them. He has to state what tests he carried out to arrive at his conclusion and must stand cross-examination and convince the Court that his conclusion about the potency is correct. Here, not even an attempt has been made to examine him, the respondent, having given up his defence, obviously because it was hopeless.

(8) Of course, it is the law that mere impotency at the time of marriage will not do for getting a decree for nullity, if the respondent in question became potent by the time of the filing of the petition. I shall go further and hold that it is enough if the person becomes 'potent before the petition is disposed of', by restorative processes of nature, or by taking vitality-restoring medicines and injections, or through prayer and God's grace, the old-world remedy for what the modern world has to offer in substitution of nature's processes. I am stretching the period up to 'the final disposal of the petition', advisedly, because I think that the Courts in this country will be very unwilling to dissolve any Christian marriage (all such marriages being held to be sacred) and grant a decree for nullity, if it is proved, even on the day of the final hearing, that the respondent, alleged to be impotent, has become potent, either by prayer and God's grace, or by natural processes, or by medicinal or dietetic treatment. So, I am not restricting the period of proof of potency to 'the date of the presentation of the petition.' In divorce and nullity cases, separating married persons for ever, that is the least the Courts can be expected to do. The Christian maxim "Let not man separate those whom God has joined" cannot be unfortunately literally acted on by the Courts today, owing to change in the law. But Courts, none the less, keep that maxim in view before they separate married persons for ever, and will not extend the law to make dissolution easier. But, in this case, till this day, when the petition has come up for final hearing and disposal, I am satisfied that neither prayer nor nature nor diet nor medicine has made the respondent, who was impotent at the marriage, potent and able to have sexual intercourse.

(9) It is also clear to me that it is not a mere case of the respondent's being impotent 'regarding the petitioner alone', as happens in some cases, where the peculiar personality of the man or woman in question makes the other spouse frigid and impotent, by psychological and physiological inhibitions. I am satisfied that this is a clear case where the respondent is impotent as regards 'all women', and not merely regarding this petitioner. His letter, Ex. P. 2, reinforces this conclusion, as no man, however degraded in morals, who has got even one per cent. chance of being able to have sexual intercourse with his wife even once in his lifetime, will write such a letter, and make such an offer,

one of the most degrading offers which any husband can ever make to his wife.

(10) The petitioner has sworn that she has remained a virgin till now. Naturally she does not want her life to be blasted by being tied up to this impotent man, and wants a decree for nullity, and I am satisfied that she is entitled to it.

(11) Issue 2: In view of my finding on issue 1, and the total absence of any collusion, the petitioner is entitled to a decree for nullity. Mr. Narasimha Iyer, for the petitioner, rightly urges that in a petition for nullity, there is no need to pass a decree 'nisi', to be made absolute after six months, and that the correct procedure is to pass at once a plain, simple and absolute decree of nullity and dissolution, as would be passed in a suit for a declaration of nullity of a marriage between non-Christian persons under S. 42 of the Specific Relief Act. He cited the ruling in — 'Grace Isabel Stuedman v. Anneley Eliardo Baresford deCourey Wheeler', AIR 1945 Cal 75 (A), in support of this proposition. I agree, and grant the petitioner, Coral Indira Gonsalves, an absolute decree declaring her marriage with the respondent a nullity. Of course, there are no children, and no claim for maintenance, or costs, is put forth. So, no orders are required either for the maintenance of the petitioner or for children, or regarding any other collateral matter.

(12) In the circumstances, all the parties will bear their own costs.

B/R.G.D. Order accordingly.

A. I. R. 1953 MADRAS 860 (Vol. 40, C. N. 336)

GOVINDA MENON AND BASHEER AHMED SAYEED JJ.

Kalyani Achi, Appellant v. K. N. S. P. R. M. Ramanatham Chettiar and others, Respondents.

A. A. O. No. 369 of 1952 and C. R. P. 1170 of 1952, D/- 11-11-1952.

Civil P. C. (1908), O. 21, R. 69 — Sale from day to day beyond date specified in sale warrant — Validity — Ratification — (Evidence Act (1872), S. 114) — (Contract Act (1872), S. 196).

A sale warrant specifically directed the officer to sell the property on 17th June and to return the warrant on or before 23rd June. The sale list showed that the sale was commenced on 17th June, was continued on 18th, 19th, 20th and 23rd and on 25th June. 21st, 22nd and 24th were holidays. The properties were sold on 25th when there were only two bidders. On objection to the sale the Judge held that the sale was continuous one from day to day, without any adjournment, and was valid. On revision from the order;

Held (1) the Courts have to take it that the judicial and official acts are properly done and therefore when the bidders' list and the sale list show that on all these days the Judge was on casual leave and the sale was continued and would continue the next day, these statements should be taken as correct. (Para 5)

(2) Even granting that the continuation of the sale on 18th, 19th and 20th would not amount to adjournment, still it was incumbent upon the selling officer to return the warrant on or before 23-6-1952. On the evening of 22-6-1952 the selling officer became 'functus officio' so far as the sale proceedings were concerned and it was not open to him to hold the sale on any day subsequent to 22-6-1952. In such circumstances the sale held on 25-6-1952 was null and void being without jurisdiction. AIR 1943 Mad 739 and (1944) 2 Mad LJ 352 (PC), Ref. (Paras 6, 9)

(3) Further, the sale could not be held to be valid on the ground that it was ratified by the executing Court as a selling officer is not an agent of the Court as is contemplated in the Contract Act. He is at best a delegate of the Court and a delegate can function only within the four corners of the power conferred upon him. Any action of an officer of Court empowered to act under an authority from the Court which is in express of such authority is illegal and 'ultra vires' and if his act is illegal and 'ultra vires' it cannot subsequently be ratified under S. 196, Contract Act, which cannot have any application to a matter like this. AIR 1914 Mad 174 and AIR 1925 Mad 249, Distinguished. (Para 8)

Anno: C. P. C., O. 21 R. 69 N. 6, 7; Evi. Act, S. 114 N. 29; Contract Act, S. 196 N. 1, 2.

R. Gopalaswami Iyengar, for Appellant; A. Sundaram Iyer, for Respondents.

CASES CITED:

(A) ('10) 8 Ind Cas 564: 1910 Mad WN 684
(B) ('43) AIR 1943 Mad 739: 1943-2 Mad LJ 295
(C) ('44) 1944-2 Mad LJ 352 (PC)
(D) ('14) AIR 1914 Mad 174: 38 Mad 997
(E) ('25) AIR 1925 Mad 249: 85 Ind Cas 439

GOVINDA MENON J.: These arise out of the order of the Subordinate Judge of Sivaganga in E. P. No. 100 of 1949 in O. S. No. 53 of 1949 dated 16-7-1952. It is a matter of some doubt whether the order in question is one that comes directly under the provisions of S. 47, C. P. C.; but in any event there is the civil revision petition filed alternatively and if we are convinced that the learned Judge has not exercised the jurisdiction vested in him by law, then we have to set it aside.

(2) In execution of the decree in O. S. No. 53 of 1949 in the Sub-Court, Sivaganga, three items of properties were attached before judgment and they were proclaimed for sale to be held on 17-6-1952. The order of the Court to the officer conducting the sale was to the effect that he should sell in auction sufficient portions of the properties attached before judgment on 17-6-1952 and that he should certify the manner in which the auction was held and if none was held, the reason for the same and return the warrant on or before 23-6-1952. The sale warrant is therefore clear that the sale was to be held on 17-6-1952 and the warrant has to be returned to the Court on or before 23-6-1952. According to the details contained in the sale list it is found that the sale commenced on 17-6-1952. From 16-6-1952, the Subordinate Judge was on casual leave and he rejoined duty only on 25-6-1952. During that period of casual leave there were three holidays, viz., 21st, 22nd and 24th June 1952. The sale list shows that the sale was commenced on 17-6-1952, was continued on 18-6-1952, 19-6-1952, 20-6-1952 and 23-6-1952 and on 25-6-1952 there were two bidders for items 1 and 2 and the same were sold to one Unnamalai Achi represented by her advocate

Mr. A. Sreenivasa Iyengar for a sum of Rs. 7500. For the third item also there were only two bidders and that item was also purchased by Unnamalai Achi represented by her advocate for a sum of Rs. 750.

(3) On 25-6-1952 representation was made before the Judge by the decree-holder that the sale was a nullity as it was being continued while the Subordinate Judge was on casual leave and under the directions of the Court the decree-holder filed a memo of objections on 30-6-1952. Though in the memo it was stated that actually no sale or bidding took place on any day prior to 25th June, the finding of the learned Judge now is that the sale was cried on the days on which it is said to have been continued according to the sale list and that it was only on 25-6-1952 that the two bidders bid for the property which was finally knocked down for the highest bidder. The decree-holder stated before the learned Judge that he and his counsel were misled by representation made to the effect that because the Judge was on casual leave the sale would not take place and such being the case there was no one to bid on his behalf on those days. His further contention was that actually there was no sale and that the sale list submitted to the Court containing representations to the effect that on the previous days the sale was continued was a faked up affair. But that need not be gone into now in view of the fact that no evidence has been let in to show that the contents of the bidders' list are incorrect. We have therefore to proceed on the basis that the contents of the bidders' list cannot be disputed. There is the further fact that the E. P. which had been adjourned to 23-6-1952 was further put off to 28-6-1952 by the Chief Ministerial Officer as the Judge was on casual leave.

(4) The learned Judge in the Court below was of opinion that when a sale is continued from day to day, no fresh proclamation is necessary as there is no question of adjournment of sale and since the selling officer cried the sale every day, the provisions of the Civil Procedure Code and the Civil Rules of Practice have been complied with and such being the case the completion of the sale on 25-6-1952 cannot be taken objection to at all. Under O. 21, R. 69, C. P. C. the Court may, in its discretion, adjourn any sale to a specified day and hour and the officer conducting such sale may, in his discretion, adjourn the sale, recording his reasons for such adjournment. Provided that where the sale is made in, or within the precincts of, the court house, no such adjournment shall be made without the leave of the Court. What is therefore contended on behalf of the decree-holder is that since the sale was to have taken place on 17-6-1952 within the precincts of the court house, any adjournment of it from that date would be 'ultra vires' and illegal if the Court had not given permission for that purpose; and when the sale is completed, the person appointed to sell the property shall file in Court his report of the same in form No. 71 contained in the Civil Rules of Practice. As stated already, the learned Judge held that when the sale is cried every day and was continued from day to day, there was no adjournment of the sale as contemplated in the proviso to O. 21, R. 69, C. P. C. and therefore the sale is valid.

(5) Mr. Gopalaswami Aiyangar for the appellant disputed the correctness of the decision of the learned Judge and he reaffirmed the objection taken in the Court below that during the intervening days there was in fact no sale or crying. It is difficult for the learned counsel to substantiate this argument. We have to take it that judicial and official acts are properly done and therefore when the bidders' list and the sale list show that on all these days the Judge was on casual leave and the sale was continued and would continue the next day, these statements should be taken as correct. On the facts as found, what happened is that the sale was cried on 17th, 18th, 19th, 20th and 23rd June, but there were no bidders on those days. 21st, 22nd and 24th were holidays and the final bidding was only on 25-6-1952, when only two persons bid. How far the sale held in this manner is correct is the point to be decided.

(6) Mr. A. Sundaram Aiyar for the respondents invited our attention to a number of cases to the effect that the practice of continuing the sale is not prohibited if the continuation is 'de die in diem'. The sale conducted 'de die in diem' for a period longer than seven days is neither illegal nor irregular; and to keep open the sale for a long time is a very common practice and having regard to the local conditions, it cannot be said to be not a beneficial one; to this effect is the decision in — 'Pir Mohamed Rowther v. Mayandi Chettiar,' 1910 Mad WN 684 (A). Learned counsel also relied upon — 'Subbanna v. Satyanarayanamurti', AIR 1943 Mad 739 (B) and — 'Venkataramana Aiyar v. Natesa Pillai', 1944-2 Mad LJ 352 (PC) (C). In the former case the learned Judges observed that if a sale is continued from day to day, it is not a case of an adjourned sale at all and in such a case the sale might be continued for any length of time if the circumstances of the case warrant it. In the latter case, their Lordships of the Judicial Committee had to consider the case of continuance of the sale, but on the facts of the case the Privy Council came to the conclusion that on account of the agreement between the parties and the order of the Court there was no material irregularity in the proceedings. This is not a case where there was any continuance of the sale with the Court's permission. But the difficulty in the present case arises from the fact that the sale warrant directs the officer conducting the sale to hold it on 17-6-1952. Therefore ordinarily he would have had no right to adjourn the sale without the leave of the Court under the proviso to O. 21, R. 69, C. P. C. But in the circumstances of the case, as laid down in the decisions already referred to, there was no adjournment but a continuation of the sale. It might reasonably be said that such a continuation is not tantamount to any adjournment. But the sale warrant contains a positive direction that the same should be returned on or before 23-6-1952. Granting that the continuation of the sale on 18th, 19th and 20th would not amount to adjournment, still it was incumbent upon the selling officer to return the warrant on or before 23-6-1952. On the evening of 22-6-1952 the selling officer becomes 'functus officio' so far as the sale proceedings are concerned and if the sale is not complete on the evening of 22nd he has to give his reasons and make a statement that the same has not been finished and return the warrant on the 23rd. A proper interpretation of the sale warrant is that it is not open to the selling officer to hold the sale on any day subsequent to 22-6-1952. His power to sell the same gets terminated by efflux of

time on 22-6-1952. In such circumstances the sale held on 25-6-1952 is without jurisdiction.

(7) But it is contended by the respondents' counsel that the Court should be deemed to have impliedly extended the period from 23rd June by not objecting to it when the attention of the learned Judge was invited to the fact on 25-6-1952. Order 21, R. 65, C. P. C. lays down that the sale shall be held by the person appointed by public auction in the manner prescribed. For finding out what the prescribed manner is we have to refer to the Civil Rules of Practice. Nowhere is it stated that when the sale warrant prescribes a period for the return, the selling officer can continue the sale without the extension being granted by the Court. The manner prescribed in this case is that the sale has to be held on 17th June and the warrant returned with the necessary particulars on or before 23rd June. This condition not having been complied with, it is difficult to hold that the sale has been held in the prescribed manner.

(8) How far there had been ratification in this case by the Court has next to be considered. The learned Judge nowhere says that on 25th June before the sale was completed any permission was taken from him to conduct the sale. We have therefore to take it that since 24th June was a holiday, on 25th June, as on previous occasions, the sale was cried and when two bidders bid, the sale was completed and it was knocked down to the highest bidder. There is nothing to show that the Judge authorised the selling officer to conduct the sale on 25th June. Relying upon S. 196, Contract Act which lays down that where an act is done by one person on behalf of another, but without his knowledge or authority of that person, he may elect to ratify or to disown such acts, and if he ratifies them, the same effects will follow as if they had been performed by his authority, the learned counsel contends that in this case since subsequent to 25th June there was no repudiation by the learned Judge about the action of the selling officer, it must be deemed that he has ratified the sale. For one thing S. 196, Contract Act cannot have any application to a matter like this. A selling officer is not an agent of the Court as is contemplated in the Contract Act. He is at best a delegate of the Court and a delegate can function only within the four corners of the power conferred upon him. Any action of an officer of Court empowered to act under an authority from the Court which is in excess of such authority is illegal and 'ultra vires' and if his act is illegal and 'ultra vires' it cannot subsequently be ratified. Our attention was drawn to two decisions, viz., —'Rajagopalacharyulu v. Secy. of State', AIR 1914 Mad 174 (D) and — 'Garapati Narasimudu v. B. Sankaram', AIR 1925 Mad 249 (E). But both these cases have no application to the question now under consideration. Where in the absence of an order by the Court in Insolvency vesting the property of an insolvent in the Official Receiver, the property was sold by the Official Receiver, but subsequently the Court, on being appraised of the fact passed a vesting order, such an order is sufficient ratification of the Receiver's act so as to pass good title to the alienee. This is the principle decided in AIR 1925 Mad 249 (E). We find it difficult to apply the observations in that case to the controversy now before us. The Courts there have proceeded on the basis that the Official Receiver is an agent and therefore subsequent ratification of the Official Receiver's act would be sufficient to make the transaction valid. Observations at pages 189 and 190 of AIR 1914 Mad 174 (D) have also been referred to by learned counsel. Even here the question was one of principal and agent.

(9) We are not satisfied that the selling officer who is the Deputy Nazir of the Court is an agent of the Court so as to bring his actions within the confines of the principles laid down in the Contract Act. The learned Judge has not stated anywhere that the conduct of the sale on 25th June has in any way been ratified by him. In fact the mandatory provision of the sale warrant to the effect that the same should be returned on or before 23rd June has been practically ignored in the discussion by the Court below. As we are of opinion that the act of selling the property, when the selling officer has no power to do so, is one without jurisdiction, the sale is null and void. The order of the lower Court is therefore set aside and the sale will be ordered to be held afresh. The petitioner in the civil revision petition will have her costs in this Court.

B/D.R.R. Petition allowed.

A. I. R. 1953 MADRAS 862 (Vol. 40, C. N. 337)

RAMASWAMI J.

Public Prosecutor, Appellant v. K. V. R. Annamalai Chettiar, Respondent.

Criminal Appeal No. 379 of 1952, D/- 15-1-53.

(a) Madras Prevention of Adulteration Act (3 of 1918), S. 5 — Sale.

Sanitary Inspector purchasing some butter for purpose of analysis — Transaction amounts to sale. AIR 1938 Mad 541 and AIR 1942 Mad 609, Not followed. AIR 1948 Mad 329, Rel. on. (Para 5)

(b) Madras Prevention of Adulteration Act (3 of 1918), Ss. 6 (3) and 5 (1) (d)—Employer's liability.

Employer purchasing butter with letter of warranty — Butter to be washed and water drained on return of seller — Butter till then kept in employer's shop but not for sale — In absence of employer, employee selling butter to Sanitary Inspector — Butter found adulterated — Employer who had used due diligence to enforce execution of Act, held not guilty — Employee held properly convicted. AIR 1953 Mad 156, Ref. (Para 7)

Public Prosecutor, for Appellant; N. S. Mani, for Respondent.

CASES CITED:

(A) ('38) AIR 1938 Mad 541: 39 Cri LJ 735
(B) ('42) AIR 1942 Mad 609: (1942) 2 Mad LJ 172: 43 Cri LJ 863
(C) ('44) AIR 1944 Mad 236: 1944 Mad WN Cr 131: 45 Cri LJ 724
(D) ('48) AIR 1948 Mad 329: 1948-1 Mad LJ 117: 49 Cri LJ 395
(E) ('53) AIR 1953 Mad 241: 1952-2 Mad LJ 565: 1953 Cri LJ 479
(F) ('53) AIR 1953 Mad 156: 1952 Mad WN Cr 277 (2): 1953 Cri LJ 369

JUDGMENT: This is an appeal preferred by the State against the order of acquittal made by the Additional First Class Magistrate, Coimbatore in C. C. No. 445 of 1951.

(2) The facts are: On 11-6-1951 Sanitary Inspectors Natarajan and Hussain Khan went to the shop of K. V. R. Annamalai Chettiar in Rajah Street, Coimbatore. This proprietor was absent and in fact he is stated to be alive at Perundurai. The employee in the shop S. Shanmugham was present. In the show case in front of the shop there was a tin of butter. Sanitary Inspector Natarajan purchased for the purpose of analysis half a pound of butter from that tin and paid for it. The butter was divided into three parts and the formalities prescribed under the Madras Prevention of Adulteration Act were followed. The butter sent to the Government Analyse, Guindy, was found by the latter to be adulterated with 8.1 per cent. of excess water. Thereupon the proprietor of the shop Annamalai Chettiar and the employee Shanmugham have been separately charge-sheeted for an offence under S. 5 (1) (d) of the Prevention of Adulteration Act.

(2a) The defence of the accused was that he was not present at the time of the sale and that the butter from which this ½ lb. was purchased was not butter purchased by him but which had been brought there by Marappan of Vellankurichi for being sold and that this Marappan had executed a letter of warranty and that the sample had been taken before Marappan could return after his leaving this butter in the shop, and wash, clean and drain water from the butter and hand over the same to the accused's shop for sale and that this fact was represented to the Sanitary Inspector by Shanmugham.

(3) In support of this plea this Annamalai Chettiar examined this Marappan as D.W. 1 and an attestor of the Mahazar at the time of the purchase of the butter as D.W. 2.

(4) The learned Additional First Class Magistrate acquitted this Annamalai Chettiar on the ground that it was not proved beyond reasonable doubt that the accused sold the butter or offered the same for being sold and purported to give him the benefit of the doubt. Hence this appeal.

(5) There can be no doubt that the accused was rightly acquitted but on a wrong construction of the law. In — 'Public Prosecutor v. Srinivasa Rao', AIR 1938 Mad 541 (A), Lakshmana Rao J. held that a secretary and an accountant of a Co-operative Society supplying butter to the Sanitary Inspector under S. 14 cannot be convicted under S. 5 (1) (d) and Rules 24, 28 and 29 framed under S. 20 (2) as supply of sample to the Sanitary Inspector under S. 14 is not a sale nor can the Secretary or the accountant be said to offer the butter for sale. This short judgment does not give any reason for this conclusion. Subsequently, Horwill J. dealt with this matter at some greater length in — 'In re Kanakayya', AIR 1942 Mad 609 (B) as follows:

"The charge against the petitioner was of offering ghee for sale; but it was argued that he would be guilty of selling the ghee. A sale is a voluntary transaction, even when it is preceded by an agreement to sell. When a person exhibits articles in his shop he is making a general offer to sell them, and any person who comes into the shop and offers the price accepts his offers but the intending purchaser cannot use physical force or threats to compel the owner to part with the goods. If he does, the transaction is not a sale. If the Sanitary Inspector had not exercised his powers under S. 14, but had merely tendered the money and the petitioner had voluntarily handed over the goods, then there would have been a sale; and the fact that it was subsequently found that the goods were required not for consumption but for analysis, would make no difference to the nature of the transaction that had been entered into. In this case, the petitioner would presumably not have parted with the goods voluntarily when he knew that they would be used for the purpose of bringing a case against him and his master. The petitioner was not therefore guilty of selling ghee. Lakshmana Rao J in a similar case held that the parting with a commodity when it is demanded by the Sanitary Inspector in the exercise of his power under S. 14 of the Act did not amount to a sale."

These rulings have been considered by Kuppuswami Aiyar J. in — 'Public Prosecutor v. Narayana Sing', AIR 1944 Mad 236 (C), by Govinda Menon J. in — 'Public Prosecutor v. Ramachandrayya', AIR 1948 Mad 329 (D) and by me in — 'Public Prosecutor v. Dada Haji Ibrahim Helari', AIR 1953 Mad 241 (E). It is enough for the purpose of this case that the reasoning upon which these three decisions dissented from the two prior decisions, set out by Govinda Menon J. in — 'Public Prosecutor v. Ramachandrayya', AIR 1948 Mad 329 (D), is as follows:

"In — 'AIR 1944 Mad 236 (C)', Kuppuswami Aiyar J. has held that when a Sanitary Inspector purchased milk from the accused, tested it and found that it was adulterated, the transaction amounted to a purchase and therefore the accused was guilty under R. 29 (b) of the rules and S. 5 (1) (b) read with R. 27 of the Madras Prevention of Adulteration Act. Moreover, in this case, Ex. P. 2, the receipt contains an admission by the second accused that he was selling buffalo milk to the Maruti Vilas Coffee hotel and the transaction by which P.W. 1 got the sample is also admitted to be a sale. Apart from the admission contained in Ex. P. 2 when Mr. Venkatasubbiah exchanged money consideration for the milk, he was acting as a purchaser and the society, a separate legal entity, was performing a contract of sale in delivering milk. Therefore it may even be unnecessary to decide whether the transaction with P.W. 1 was a sale at all, even though I am convinced that it is also a sale."

Therefore, the lower Court went wrong in holding that the butter was not sold or offered for being sold.

(6) The matter does not rest there because under S. 6 (3) of the Act, where an employer is charged with an offence under the Act, he shall be entitled on application duly made by him to have any other person whom he charges as the actual offender brought before the Court at the time appointed for the hearing, and if, after the commission of the offence has been proved, the employer proves to the satisfaction of the Court that he used due diligence to enforce the execution of this Act and that the said other person committed the offence without his knowledge, consent or connivance, the said other person shall be convicted and the employer shall be acquitted. In this case no doubt the procedure prescribed in terms of this clause had not been followed. The substance of it has been complied with. The prosecution itself charged both the master as well as the servant. The plea of the master was that he lives at Perundurai and that he had taken all reasonable precautions like getting letters of warranty for the purchase of butter and that at no time he had consented or connived at with the sale of adulterated butter. Therefore, though the mere absence of the proprietor from the shop would not in any way exonerate him, because if that were the case every master would take care to keep away from

the shop to get rid of his liability and the entire case law on the subject has been discussed by me in — 'Kasi Rajah v. State', AIR 1953 Mad 156 (F).

(7) But if the master is able to show that he had used due diligence to enforce execution of the Act and what was done was without his knowledge, consent, or connivance, the employer has got to be acquitted. In the instant case this has been shown and therefore the employer is entitled to be acquitted and in the connected case the employee has got to be convicted and is being convicted.

(8) In the result, the acquittal by the Additional First Class Magistrate is sustained though for an entirely different reason and this appeal is dismissed.

B/R.G.D. Appeal dismissed.

A. I. R. 1953 MADRAS 864 (Vol. 40, C. N. 338)

SATYANARAYANA RAO J.

The Masulipatam Municipal Council represented by the Commissioner, having its office at Masulipatam, Appellant v. The Brundavan Talkies Ltd., Masulipatam, having its office at Masulipatam, Respondent.

Second Appeal No. 993 of 1949, D/- 4-2-1953.

(a) Municipalities — Madras District Municipalities Act (5 of 1920), S. 131, Explanation — Domestic consumption and use — Test.

The language of the section indicates that the essential test is the user and the nature of the consumption of the water to determine whether or not it is a domestic consumption and use. The nature of the user and consumption is the deciding factor. In order to make the user a non-domestic use for purposes of trade or business, the water must be used as a raw material for the purpose of trade or business. 1914 AC 118 and (1939) 2 KB 769, Foll. (Para 6)

(b) Municipalities — Madras District Municipalities Act (5 of 1920), S. 131, Explanation — Domestic consumption and use.

When water is used and consumed by the servants of a cinema, by the visitors and utilised also for the coffee hotel and latrines and flush outs, all these uses are undoubtedly domestic uses and water is not utilised as part of the stock-in-trade of the business of running the cinema. (Para 12)

K. Kuttikrishna Menon, for Appellant; D. Narasaraju and K. B. Krishnamurthy, for Respondent.

CASES CITED:

(A) (1912) 81 LJ KB 126: 1912 AC 24
(B) (1914) 83 LJ KB 178: 1914 AC 118
(C) (1939) 160 LT 448: (1939) 2 KB 769
(D) (1911) 80 LJ KB 929: (1911) 2 KB 38
(E) (1914) 1914-1 KB 221
(F) (1902) 71 LJ KB 61: (1902) 1 KB 310
(G) (1913) 1913-2 KB 257
(H) ('50) 54 Cal WN 42

JUDGMENT: The second appeal raises an interesting question of law under the Madras District Municipalities Act. The appeal is by the Masulipatam Municipal Council represented by the Commissioner. The respondent, the Brundavan Talkies Ltd., instituted the suit, out of which this second appeal arises, in the District Munsif's Court for a declaration that it was entitled to the supply of water to its building bearing municipal No. 325/12 in ward No. 12 of the appellant Municipality from its water system on the basis of supply for a domestic use and for refund of an amount of Rs. 1096-7-8 with interest thereon which, it was claimed was unauthorisedly collected in excess by the appellant on the basis that the supply of water was for a non-domestic purpose. The respondent succeeded in both the Courts and it was held that he was liable to pay the tax only on the basis of supply for a domestic purpose and not on the basis of a non-domestic purpose.

(2) There is no oral evidence adduced in the case but the facts were practically admitted. The Brundavan Talkies Ltd., the respondent, owns a building of its own in which a cinema show is usually run. Electricity is utilised for running the cinema and not water power. The cinema hall is occasionally let for dramatic performances also. In the premises, besides the cinema hall there are other buildings such as quarters for servants, waiting halls for visitors to cinema shows, quarters for the representatives of film distributors and structures like urinals and latrines for the use of persons attending the shows, as well as the servants and visitors. A coffee hotel is also run within the premises. There are several watertaps, which are used by the visitors, servants and representatives of film distributors when occasionally staying in the quarter provided for them. Water is also utilised for cleaning or flushing the urinals and latrines. The coffee hotel also consumes some water for its purposes.

There is also a fountain and a garden within the premises but it is common ground that Municipal water is not utilised for them. The respondent stated that the fountain is filled and the garden is watered with water from a well which is in the premises. For some years, the Municipality, which undertook to supply water levied water rate only on the basis of user for a domestic purpose but the trouble arose when the Assistant Examiner of Local Fund Accounts took an audit objection in September 1941 and asked the Municipality to charge the respondent for water on the basis of a non-domestic use. Thereupon, the Municipality required the respondent to pay the excess on the basis of supply for a non-domestic use. Notwithstanding the protest of the respondent the Municipality paid no heed to it and the appeal preferred by the respondent to the Municipal council was also unsuccessful. The present suit was thereafter instituted after giving due notice to the Municipality for the reliefs stated above.

(3) The only question which, therefore, arises for consideration in this second appeal is whether the view taken by the Courts below that the supply of water for the aforesaid purposes was for domestic use and consumption and not for a non-domestic purpose is correct.

(4) Chapter VII of Part IV of the Madras District Municipalities Act contains provisions for the regulation of water supply by a Municipality. Under S. 129, the Municipal Council, so far as funds permit, is entitled to provide sufficient supply of water fit for the domestic use of the inhabitants. Section 131 empowers a Municipality to supply water for domestic consumption and use in accordance with the bye-laws to an owner or occupier of any building on an application made by him. Section 131(1) states that in Municipalities in which there is a pipe supply of water, the executive authority may at his discretion, on application by the owner or occupier of any building, arrange in accordance with the bye-laws, to supply water thereto for domestic consumption and use, provided that the executive authority shall not, without the sanction of the council, agree to supply

water to any building assessed at an annual value of less than Rs. 120. Sub-clauses (2) and (3) of this section may be omitted as they are not relevant. There is an explanation at the end of the section, which states what shall not be deemed to be a supply of water for domestic consumption and use and what shall be deemed to include such a supply.

'Explanation': Supply of water for domestic consumption and use shall not be deemed to include a supply

(a) for any trade, manufacture or business,

(b) for gardens or for purposes of irrigation,

(c) for building purposes,

(d) for fountains, swimming baths, public baths within the Municipality or for any ornamental or mechanical purpose;

(e) for animals, or for washing vehicles, where such animals or vehicles are kept for sale or hire;

but shall be deemed to include a supply

(a) for flushing latrines;

(b) for all baths other than swimming baths or public baths;

(c) for the consumption and use of inmates of hotels, boarding houses and the like and for baths used by such inmates.

(5) Under S. 132, the executive authority is vested with discretion to supply water also for purposes other than domestic consumption and use. Of course, the rate levied in such a case is higher than the rate charged for domestic consumption and use.

(6) The short question for consideration is whether on the facts above stated the consumption and user of water by the respondent can aptly be described as domestic consumption and use. There are not many Indian decisions throwing light on the question. But the point arose for consideration in England under the Metropolitan Water Board (Charges) Act, 1907, and the Kingston-upon-Hull Corporation Act, 1897, which incorporates the Water Works Clauses Act, 1847. The Acts are in 'pari materia' except that the expression used is "domestic purpose" in those Acts, whereas in the Madras Act, it is "domestic consumption and use." The difference in language is of no consequence. Section 25 of the Metropolitan Water-Board Charges Act, 1907 is more or less the same as S. 131 of the District Municipalities Act.

It also enumerates the purposes included in 'domestic purposes" and also purposes excluded from them. "Trade, manufacture or business" is excluded from domestic purpose. Water closets and baths constructed or fitted so as not to be capable of containing when filled or filled up to the overflow or waste pipe (if any) more than 80 gallons are included. It may not be necessary to deal with all the cases that arose under the two Acts in England as the principles have been settled by two decisions of the House of Lords, — 'Colley's Patents Ltd. v. Metropolitan Water Board', (1912) AC 24 (A), and — 'Metropolitan Water Board v. Avery', (1914) AC 118 (B). These principles were recently examined by the Court of Appeal in — 'Kingston Upon Hull Corporation v. Yuille', (1939) 2-K B 769 (C).

Under S. 131 of the District Municipalities Act, the owner or occupier 'of any building' is entitled to supply of water for domestic consumption and use which indicate that the character of the premises, where the water is used or consumed, is not very material and does not even regard the personal convenience of the people employed and remaining on the premises as a material consideration for the purpose of deciding the basis of the charge for water, i.e., whether it was domestic consumption and use or not. The language of the section indicates that the essential test is the user and the nature of the consumption of the water to determine whether or not it is a domestic consumption and use. The nature of the user and consumption is the deciding factor. In order to make the user a non-domestic use for purposes of trade or business, the water must be used as a raw material for the purpose of trade or business as in the case of persons carrying on dyeing business or running a laundry and so on.

(7) The learned Advocate for the appellant fastens himself on the dictionary meaning of the adjective "domestic" and contends that the user must pertain to a home or a house in which a person is residing with his family and any user outside it must be treated as a non-domestic user. In the alternative, it was contended in the lower Courts that it was utilised for the purpose of running the business of the cinema and therefore it is a non-domestic user. None of these contentions however can be accepted. The dictionary meaning of the adjective "domestic" was not adopted by the legislature and it does not purport to give in S. 131 of the Act an exhaustive definition of what is domestic consumption and use and what is not. The criticism levelled against the corresponding section in the Metropolitan Water Board (Charges) Act in England that it was drafted most slovenly and is an example of an ill-drafted provisions would equally apply to S. 131 of the District Municipalities Act. A definition of "domestic purpose" was given by Lord Atkinson in — '1914 AC 118 at p. 126 (B)' in these terms:

> "According to the ordinary meaning of language, I take it that water supplied for domestic purpose would mean water supplied to satisfy or help to satisfy the needs or perform or help in performing the services, which according to the ordinary habits of civilised life are commonly satisfied and performed in people's homes as distinguished from those needs and services which are satisfied or performed outside those homes and are not connected with, nor incident to, the occupation of them."

(8) In — '1912 AC 24 (A)', the defendants were the occupiers of a factory in which they manufactured railway tickets and paper. The Metropolitan Water Board supplied water to the factory and it was utilised for drinking and washing purposes by the work people and for cleaning utensils and water closets. No one resided in the premises. The Metropolitan Water Board claimed that they were entitled to charge for the water on the basis that it was supplied for trade purposes. Affirming the decision of the Court of Appeal in — 'Metropolitan Water Board v. Colley's Patents Ltd.', (1911) 2-K B 38 (D), the House of Lords held that the Board was entitled to charge for the water supplied only as for water supplied for "domestic purposes". Earl Loreburn pointed out that the definition of "domestic purposes" was not exhaustive and that it was couched in slovenly and inaccurate language. The supply of water in such a case could not be treated as supply for the use in trade within the meaning to be attached to the language of the section. Water used for personal convenience of men employed in a factory cannot be said to be water used for the purpose of trade carried on in the factory.

In — 'Avery's case (B)', there is a more elaborate discussion in the judgment of the Court of Appeal in — 'Metropolitan Water Board v. Avery', (1914) 1-K B 221 (E). The defendant in the action was the occupier and licensee of a public house. It was supplied with water by the Metropolitan Water Board in the ordinary way by supply pipes for

which the defendant was charged as a supply for domestic purposes upon the rateable value of the house. In addition to the ordinary business of a public house, the defendant also carried on a catering business for persons who came there to lunch but who did not reside there. This involved an increased use of water for such purposes as cooking and washing of plates and dishes.

The Water Board claimed that they were entitled to an extra charge for the water so utilised upon the ground that the water was used for other than "domestic purposes". The Court of Appeal held that the character of the business that necessitated an increased supply for domestic purposes did not make it a supply for the purposes of the business and that, therefore, the Water Board was not entitled to make the extra charge and this was affirmed by the House of Lords in — '1914 AC 118 (B)'. Lord Dunedin considered the two possible alternative uses at page 124 where he observed:

"Either the criterion is to see whether the purpose in connection with the trade is domestic or non-domestic in itself, the criterion adopted by the Courts below and very clearly expressed in the judgments of Bray J. and Buckley L. J. or to say, as the appellants contend, that every use of water, however, domestic in its nature that appears as a step, however insignificant, in a trade operation is use of water for a trade and therefore non-domestic.

The great objection to this latter view is that it goes so far and leads to such astounding results as to make it flagrantly in conflict with what I venture to call the common sense view of the Act. The appellants themselves seem to have felt this, inasmuch as they admit that they are not in use to exact from public houses, anything more than a domestic rate. Yet unless all liquors are consumed neat and the glasses and mugs never washed, it is clear that the water used in public houses is, according to their method of definition, a trade use. Nor does the matter stop here. Not only does all water in hotels and boarding houses for the cooking of provisions (a severe narrowing down of — 'Pidgeon v. Great Yarmouth Water Works Co.', (1902) 1-KB 310 (F)), follow the same fate, but no retail shop keeper could use a damp sponge to clean dusty goods without becoming liable to a trade rate for the water so used.

On the other hand, the test of the quality of the use in itself — so tersely put by Buckley L. J.. "The test is not whether the water is consumed or used in the course of the trade, but whether the user of the water is in its nature domestic," — is not only easy for application but is automatic in checking abuse. For, purposes truly domestic cannot be amplified, and when the consumption on such heads is large, it is invariably attended by an increase in the rating value of the premises which brings with it an increased water rate."

(9) Lord Shaw pointed out that residence in the premises supplied was not the test as to whether water was supplied for a domestic purpose or not. The circumstance that the persons who use the premises go there for the purpose of trade does not make the user a trade use and — '(1902) 1 KB 310 (F)', is authority for this view and has been approved by the House of Lords.

(10) An examination of the two decisions leads one to the conclusion that the mere fact that for purposes of trade or business people go there or reside in the premises and utilise the water would not make the user a user for trade or business. It may be user incidental to the business or trade and might even increase the trade profits indirectly but to make the user a trade use or a business use, the water must be directly utilised for its purpose as a raw material, as in the case of a mineral water manufacturer who actually sells the water after treating it and converting it into soda water or other mineral water or the water must be stock-in-trade of the business as in the case of a bath proprietor or it must be an implement or instrument used in the business as water for a steam engine or for hydraulic machinery or probably for a laundry or for a dyer's and cleaner's business. See the judgment of Channell J. in — 'Avery's case (B)'. before the Division Bench, — 'Metropolitan Water Board v. Aveny', (1913) 2 KB 257 (G). The test, therefore, is to see whether the user is a domestic user or not without reference to the premises to which the water is supplied and without reference to the persons who use it.

(11) An interesting case arose in — '(1939) 2 KB 769 (C)', which related to a medical practitioner, who utilised the water of the premises for the purpose of cleaning and disinfecting his surgical instruments and diluting medicines. The Corporation, which supplied the water, claimed a charge on the basis that it was not a domestic purpose within the meaning of the Kingston-upon Hill Corporation Act, 1897, which also contained a similar provision like S. 25 of the Metropolitan Water Board (Charges) Act. The Court of appeal considered the two decisions of the House of Lords. Scott L. J. at p. 777 after referring to — 'Colley's case (D)', treats it as an authority for the view that the fact that the user

"takes place in the course of business or trade operations does not prevent that use from being domestic. So here the mere fact that the doctor was using the water in his surgery and in the general course of his professional work does not of itself dispose of the question we have to decide, inasmuch as the actual use of the water itself, which is the criterion, may have been in spite of its professional aspect, either domestic or non-domestic."

He then refers to — 'Avery's case (B)', and concludes at page 779:

"In my view where water is added to medicine as a diluent for the purpose of drinking the medicine diluted with water, the purpose is necessarily a domestic purpose. I can imagine no more domestic purpose to which water can be applied than that of internal administration. If one drinks a glass of water in a house, he drinks it for domestic purposes and if there is some medicines in it, he no less drinks it for domestic purposes within the meaning of the sections of these Acts. In some case it may be relevant to consider whether the purpose is immediate or ultimate, but where the water is used for drinking, whether pure or with something else in it, be it medicine or be it whisky, it seems to me quite plainly to come within the category of water used for domestic purposes. That conclusion in my view involves the dismissal of the appeal so far as the water was used by the doctor for his dispensary. I may add that to my mind no question of degree can enter in here, since the amount of water used by a doctor in a dispensary cannot in any case be very large.

The other purpose for which the water was used here by the doctor was merely for washing his surgical instruments. Washing or cleaning anything is 'prima facie' a domestic purpose. To keep things clean is one of the most important

objects in domestic life. I can see no ground for saying that, because some of the things, which the doctor kept clean, happened to be surgical instruments when he kept them clean he ceased to be using the water for a domestic purpose. The use of the water in cleaning the instruments was still domestic, even though the instruments were going to be used ultimately in the course of the doctor's professional practice."

(12) In the light of these decisions, the answer to the question raised in this second appeal does not admit of any serious doubt. The water is used and consumed by the servants, by the visitors and utilised also for the coffee hotel and latrines and flush outs. All these uses are undoubtedly domestic uses and water was not utilised as part of the stock-in-trade of the business of running the cinema. In — 're Nanilal v. Satyendra Nath', 54 Cal WN 42 (H), the Calcutta High Court followed the two decisions of the House of Lords though the observations in that case were 'obiter' as the petition was ultimately dismissed.

(13) For the foregoing reasons, I have no doubt in affirming the decisions of the Courts below, which have taken the view that the charge levied by the Municipality was illegal. The second appeal is dismissed with costs.

(14) No leave.

B/V.R.B. Appeal dismissed.

A. I. R. 1953 MADRAS 867 (Vol. 40, C. N. 339)

GOVINDA MENON AND BASHEER AHMED SAYEED JJ.

District Collector of Krishna, Appellant v. Pulavarthi Viswanadam and others, Respondents.

A. A. O. No. 102 of 1948, D/- 5-11-1952.

(a) Defence of India Act (1939), S. 19 — Powers of arbitrator under — Land Acquisition Act (1894), S. 23(1) and (2).

When S. 19(e)(i), Defence of India Act lays down specifically that in making the award, the Arbitrator shall have regard to the provisions of sub-s. (1) of S. 23, Land Acquisition Act, the provisions of sub-s. (2) of S. 23 cannot be attracted. The specific mention of sub-s. (1) impliedly excludes the application of sub-s. (2), with the result that it is not open to the arbitrator to award any solatium on the value of the site fixed by him according to S. 23(1), Land Acquisition Act. AIR 1951 Bom 72, Rel. on. (Para 5)

(b) Defence of India Act (1939), S. 19 — Acquisition under — Awarding of interest.

When land is acquired under the Defence of India Act the arbitrator can award interest to the person whose land has been acquired on the price of the land. The moment the property is taken away from the party, he is entitled to get its value as 'quid pro quo.' Where the full value has not been offered by the Collector and on the difference between what was offered by the Collector and what is now fixed by the arbitrator, the owner of the land is entitled to be paid the interest. AIR 1950 Cal 498 and AIR 1928 PC 287, Rel. on; AIR 1948 Mad 256, Distinguished. (Para 6)

Govt. Pleader, for Appellant; V. V. Sastry, P. Somasundaram and P. Suryanarayana, for Respondents.

CASES CITED:

(A) ('51) AIR 1951 Bom 72: 53 Bom LR 229
(B) ('48) AIR 1948 Mad 256: ILR (1948) Mad 567
(C) ('50) AIR 1950 Cal 498: 54 Cal WN 801
(D) ('28) AIR 1928 PC 287: 1928 AC 492 (PC)

GOVINDA MENON J.: Under S. 19, Defence of India Act, where there is a compulsory acquisition of property, the question of compensation has, in the first instance, to be fixed by agreement between the officers of Government and the owner of the property. Where no agreement is reached, the Central Government shall appoint an arbitrator who is qualified for appointment as a High Court Judge for deciding the compensation. Such an arbitrator, in making the award, shall have regard to the provisions of sub-s. 1 of S. 23, Land Acquisition Act, 1894, so far as the same can be applicable and cl. (f) of S. 19, Defence of India Act lays down that an appeal shall lie to the High Court against the award of an arbitrator except in cases where the amount thereof does not exceed an amount prescribed on that behalf by rules made by the Central Government.

(2) An area of 71 cents of land situated on the main Cantonment Road by the side of the Andhra Scientific Co. in Masulipatam town, belonging to the respondents was acquired by the Government for constructing a fire station. The District Collector of Krishna, fixed the compensation at Rs. 12,101-13-4 being the value of the land, Rs. 129-6-0 being the value of the barbed wire fencing, and Rs. 2-8-0 being the value of the trees, aggregating in all to Rs. 12,233-11-4. He also offered a 15 per cent. solatium in the sum of Rs. 1835-0-11. The grand total therefore offered by the District Collector was Rs. 14,068-12-3. The owner of the land was not willing to accept this amount and therefore the District Judge of West Godavari was appointed as arbitrator. The learned Judge, after considering the oral and documentary evidence let in before him, came to the conclusion that the value of the site should be fixed at Rs. 6 per sq. yard whereas the offer was at the rate of Rs. 3-8-0 per sq. yard. Computing the amount on this basis, the land value will be Rs. 20,746. He also increased the price of the barbed wire fencing and reinforced concrete poles from Rs. 129-6-0 to Rs. 600. The solatium was proportionately increased to Rs. 3,202-4-5 and the grand total came to Rs. 24,550-12-5. The learned Judge also allowed interest at 6 per cent. per annum on the excess amount allowed by him. The State has preferred an appeal against the excess amount and the interest allowed and the claimant has preferred a memorandum of cross-objections.

(3) The first question for consideration is whether the learned Judge was justified in increasing the site value from Rs. 3-8-0 to Rs. 6 per sq. yard. In this connection we have also to decide whether the respondent in the memorandum of cross-objections is entitled to claim the rate of Rs. 15 per sq. yard. Ex. D-14 is a plan, not drawn to scale, of the proposed site as well as the surrounding areas. We may at once say that it is a very unsatisfactory delineation of the land sought to be acquired and its neighbourhood. Therefore the lower Court made a local inspection of the site, the result of which is stated in para 6 of the judgment. After giving a description of the locality and the various buildings around the site, the

learned Judge comes to the conclusion that the locality was both residential and commercial in character. Then the documents filed on behalf of the Government showing the value of the sites in the neighbourhood were considered. Under Ex. D-2 it was found that the price works out at Rs. 2-1-6 per sq. yard. The land is situated not far away from the site in question. Under Ex. D-3 the rate comes to Rs. 1-8-0 per sq. yard. Ex. D-1, which relates to a site a little far away, shows that the rate is Rs. 0-13-6 per sq. yard. Under Ex. D-8 the rate works out at Re. 0-5-10 per sq. yard. Like this the learned Judge has discussed various other documents and pointed out what the price per square yard in that locality is. From these documents it is clear that sites in the locality had been sold at much lower rates. But most of these transactions were prior to the acquisition in question. In the present case the notification for acquiring the property was made on 21-9-1943 and the acquisition itself was on 9-10-1944. We have therefore to find out what the value would be at or about the time of the notification.

(4) Exs. D-2 and D-3 are of September 1937; Ex. D-5 is of December 1938; Ex. D-6 of January 1943; and so on. The transaction which is nearest in point of time to the one in question and also relating to a plot which is part of the same survey number is Ex. D-4 dated 24-6-1943. Under that the rate comes to Rs. 2-12-0 per sq. yard. This was in June 1943. After considering all these documents the learned Judge was of opinion that during the year 1943 there was a progressive rise in the site values and the site had acquired a potential value as a building site. Therefore the learned Judge fixed Rs. 6 per sq. yard as the proper value. The learned Government Pleader contends that the lower Court was not justified in fixing such a high figure when the documentary evidence showed that lands adjacent and nearby to the site in question were sold at prices below Rs. 3 per sq. yard. In such circumstances the value of Rs. 3-8-0 per sq. yard fixed by the Collector, according to the learned counsel, is the proper value. Considering the circumstance that the learned Judge had the benefit of a personal inspection of the locality and was satisfied that the lands were increasing in value during those years, and the fact that the potential value of the site should also be taken into consideration, leaving aside the question of what adjacent lands fetched at sales sometime anterior to the notification, we are of opinion that it cannot be said that the learned Judge has exercised his discretion in a wrong manner. One thing is clear and that is that during the years 1943-44 the price of lands in urban areas shot up like a rocket and the increase was phenomenally high. The factor which weighed with the learned Judge was that the price would have been much more than Rs. 3-8-0 per sq. yard in 1944. We do not therefore feel justified in reducing the value of Rs. 5 per sq. yard fixed by the learned Judge. The respondents' claim of Rs. 15 per sq. yard is, to say the least, highly exaggerated and fanciful. Since the learned Judge has fixed the site value taking into consideration not only the value on the date of the notification but also the potential value of the site during the year 1944, we cannot say that the respondents are entitled to anything more than Rs. 6 per sq. yard. As we are definitely of opinion that no increase in the site value can be allowed, we confirm the value of Rs. 6 per sq. yard and dismiss the memorandum of cross-objections with costs.

(5) Two legal questions have been raised by the learned Government Pleader. Firstly he contended that since S. 19(e)(f), Defence of India Act lays down that the arbitrator, in making his award, shall have regard to the provisions of sub-s. (1) of S. 23, Land Acquisition Act, the application of sub-s. (2) of S. 23, Land Acquisition Act, whereby 15 per cent. solatium is allowed, cannot be justified. Under sub-s. (2) of S. 23 of the Act, in addition to the market value of the land as fixed under sub-s. (1) of S. 23, the Court shall in every case, award a sum of 15 per cent. of such market value as solatium in consideration of the compulsory nature of the acquisition. We are of opinion that this argument is well founded. When S. 19(e)(i), Defence of India Act lays down specifically that in making the award, the Arbitrator shall have regard to the provisions of sub-s. (1) of S. 23, Land Acquisition Act, it is impossible to contend that the provisions of sub-s. (2) of S. 23 have been attracted. The specific mention of sub-s. (1) impliedly excludes the application of sub-s. (2). If authority for this position is needed we may cite — 'Dinbai Lady Dinshaw Petit v. Dominion of India', AIR 1951 Bom 72 at p. 79 (A) where a Bench of the Bombay High Court holds that the very purpose of the Defence of India Rules was that property which was required for the war should be acquired for a smaller amount than property which is ordinarily acquired under the Land Acquisition Act. But it is contended by Mr. Somasundaram for the respondent that the Collector himself has offered a solatium of 15 per cent. on the site value and therefore we should not interfere with the order of the Arbitrator allowing the solatium. It might be that the Collector was not fully alive to the implications of his action or that he did not comprehend the scope of the compensation offered. But whatever that might be, since the Collector had thought fit to award a solatium of 15 per cent. we do not think that we need interfere with his offer. Under cl. (a) of S. 19, Defence of India Act, the amount of the compensation can be fixed by agreement and if the parties did not agree the Arbitrator has to decide only on the disputed points. Here, so far as the solatium is concerned, it is an amount which the Collector was prepared to pay. There is no disagreement on the percentage of solatium. It might therefore be said that the amount of solatium was not the subject-matter of disagreement between the parties, so far as the Collector's offer was concerned. But the same cannot be said with regard to the solatium allowed by the Arbitrator on the increased value of the compensation. As the law does not allow him to go beyond the provisions of sub-s. (1) of S. 23, Land Acquisition Act, it is not open to the Arbitrator to award any solatium on the value of the site fixed according to the principles laid down in sub-s. 1 of S. 23, Land Acquisition Act. We therefore disallow the 15 per cent. solatium allowed by the Arbitrator on the excess amount awarded by him as the value of the site. While retaining the solatium of Rs. 1835-0-11 offered by the Collector, we disallow the excess solatium granted by the Arbitrator, viz., Rs. 1367-3-6.

(6) The other question is whether the claimant is entitled to interest on the increased amount. The learned Judge has allowed interest at 6 per cent. on the sum of Rs. 10,482-0-2.

The argument of the Government Pleader is that S. 34, Land Acquisition Act is the statutory provision which allows interest and since that Section is not made applicable to the acquisition under the Defence of India Act no interest can be allowed. For this purpose he relies upon the observations in — 'Associated Oil Mills Ltd. v. Provincial Government, Madras', AIR 1948 Mad 256 at p. 257 (B). That was a case where land was requisitioned under the Defence of India Act and it was not a case of a permanent acquisition. For the damages consequent upon such requisition, the learned Judges have held that interest is not payable. At p. 257 the learned Judges observe as follows:

> "As to the first point, we do not see how interest can be awarded on an amount which is in the nature of damages."

The distinction between that case and the present one is that here we are concerned with a permanent acquisition of property and the conversion of land into money. It is not a case of damages arising out of temporary requisition. If it had been one in which a party is entitled to damages for requisitioning his property it may be that no interest is allowable. The moment the property is taken away from the party, he is entitled to get its value as 'quid pro quo'. The full value has not been offered by the Collector and therefore on the difference between what was offered by the Collector and what is now fixed by the Arbitrator, the owner of the land is entitled to be paid the interest. If authority for this position is needed there is a recent decision of the Calcutta High Court in — 'Province of Bengal v. Pawn Kissen Law & Co.', AIR 1950 Cal 498 (C), where the learned Judges say that when land is acquired under the Defence of India Act the arbitrator can award interest to the person whose land has been acquired on the price of the land and the interest will run from the date when the land is taken possession of till the date on which the land acquisition Collector draws up the award and makes an offer to the person. The learned Judges discuss the Privy Council case reported in — 'Inglewood Pulp and Paper Co. Ltd. v. New Brunswick Electric Power Commission', AIR 1928 PC 287 at p. 290 (D) and they quote the observations of their Lordships in that case which are to the following effect:

> "It is now well established that on a contract for sale and purchase of land it is the practice to require the purchaser to pay interest on his purchase money from the date when he took possession..... It is true that the expropriation under the Act in question is not effected for private gain, but for the good of the public at large, but for all that, the owner is deprived of his property in his case as much as in the other and the rule has long been accepted in the interpretation of statutes that they are not to be held to deprive individuals of property without compensation unless the intention to do so is made quite clear. The statute in the present case contains nothing which indicates such an intention. The right to receive interest takes the place of the right to retain possession and is within the rule."

The learned Judges differed from the observations at p. 257 in — 'AIR 1948 Mad 256' (B). We do not think that it is necessary to hold that the Madras case is incorrectly decided on this point. Where it is damages no interest can be awarded. But where it is the equivalent of the property, then interest can be awarded. We are therefore of opinion that interest can be awarded on the excess amount of the site value. The decree of the lower Court is modified accordingly. The parties will pay and receive proportionate costs in the appeal.

B/D.R.R. Decree modified.

A. I. R. 1953 MADRAS 869 (Vol. 40, C. N. 340)

KRISHNASWAMI NAYUDU J.

A. G. Ramiah Pillai and others, Appellants v. Adikesavalu, Respondent.

A. A. O. No. 101 of 1952, D/- 27-2-1953.

Civil P. C. (1908), O. 22, R. 3 — Legal representative — Representative suit.

In order to entitle a person to bring himself on record as the legal representative or as co-plaintiff to continue the suit, what he has primarily to establish is that the right to sue has survived to him, even though he may not be strictly the legal representative in the sense that he represents the estate of the deceased person.

A suit for possession was based on a will under which the widow of the testator claimed certain rights. The widow was entitled to possession during her lifetime, and after her death, the testator's sister's son was entitled to possession. Pending the suit, the widow died and the sister's son who was entitled to the vested remainder, applied under O. 22, R. 3, C. P. C. to bring himself on record as the legal representative of the deceased widow.

Held that the suit by the widow was instituted in a representative character, that the right to sue had survived to the remainderman and that, therefore, he was entitled to be brought on record under O. 22, R. 3. AIR 1916 Mad 611; 23 Cal 636; AIR 1917 Mad 979 (2); AIR 1915 PC 124; AIR 1929 Mad 524, Ref. (Para 7)

Anno: Civil P. C., O. 22, R. 3 N. 10 Pt. 29.

T. R. Srinivasa Ayyangar; K. S. Desikan and K. Raman, for Appellants; T. S. Kuppuswami Ayyar, for Respondent.

CASES CITED:

(A) ('16) AIR 1916 Mad 611: 39 Mad 382
(B) ('96) 23 Cal 636
(C) ('17) AIR 1917 Mad 979(2): 31 Mad LJ 222
(D) ('15) AIR 1915 PC 124: 38 Mad 406 (PC)
(E) ('29) AIR 1929 Mad 524: 115 Ind Cas 831

JUDGMENT: This appeal is against the order of the District Judge of East Tanjore allowing the application of the respondent to bring himself on record as the legal representative of the deceased plaintiff and remanding the suit for disposal according to law. The plaintiff was the widow of one Veerasami Pillai, who died leaving his last Will and testament dated 10-8-1938. Under the said will he directed his widow the plaintiff to take and enjoy absolutely all the moveable properties including the jewels and cash. As regards the immoveable properties, she was after his lifetime to enjoy the same without any power of disposal and only receive the income therefrom. The further direction in the will is that the immoveable properties and any moveable property left out of the properties given absolutely to the plaintiff shall be taken absolutely after her lifetime by Audikesavalu Pillai, the respondent, who is the son of the sister of the deceased. After the death of the testator, the plaintiff instituted

O. S. No. 255 of 1950 on the file of the District Munsif's Court of Negapatam, the defendants in that suit being persons who have got into possession of one of the houses that were dealt with under the Will, for a decree for possession of the house and for mesne profits. The plaint is based on the said will dated 10-8-1938 whereby the plaintiff claimed to be entitled to enjoy the properties during her lifetime, which were afterwards to be taken by the respondent. The defendants claimed that they were entitled to the property under a later will of Veeraswami of 1942 and the question therefore that was really to be decided in the suit was whether the later will was true and valid. Pending the suit, the plaintiff died and Audikesavalu Pillai, who is entitled to the vested remainder, applied in I. A. No. 297 of 1951 under O. 22, R. 3, C. P. C. to bring himself on record as the legal representative of the deceased plaintiff. The first Court rejected his application. But, in appeal, the learned District Judge of East Tanjore reversed the decision of the first Court and directed that he be brought on record as the legal representative. The present appeal is by the defendants respondents to that I. A.

(2) The question that arises for determination in this appeal is whether in the circumstances Audikesavalu Pillai, the respondent, could be said to be the legal representative of the deceased plaintiff Manickathammal and whether the right to sue has survived to him so as to entitle him to be brought on record as the legal representative and continue the suit. The term "legal representative" is defined in S. 2 (11) as meaning a person who in law represents the estate of a deceased person, and includes any person who intermeddles with the estate of the deceased and where a party sues or is sued in a representative character the person on whom the estate devolves on the death of the party so suing or sued. Here, the deceased person's estate was only a life estate under the Will, which ceased on her death and there is therefore no question of an estate of the plaintiff, which requires to be recovered possession of and in any event, the respondent being only her husband's sister's son cannot represent the estate of Manickathammal. He does not, therefore, come within the earlier part of the definition. But, there can be no doubt that under the terms of the Will, the estate which was sought to be recovered in the suit, devolved on the respondent after the death of the plaintiff. Even though he is a person on whom the estate in which Manickathammal claimed a life interest had devolved yet unless the suit was instituted by the plaintiff in a representative character, the respondent cannot be held to be her legal representative. It is well established that a suit instituted by a Hindu widow or other limited owner seeking to recover the estate of the husband or the deceased male holder is a representative suit and such suit could be continued by the presumptive reversioner who can bring himself on record, since the estate after the death of the widow or the limited owner devolved on the reversioner as the nearest heir of the deceased: vide — 'Ramaswami v. Pedamunayya', AIR 1916 Mad 611 (A). That a reversioner is a legal representative, within the meaning of S. 365, old Civil P. C. of a Hindu heiress who instituted a suit for recovery of property belonging to her deceased husband and died during the pendency of the suit, has been held in — 'Premmovi Choudrani v. Peronath Dhur', 23 Cal 636 (B).

(3) In order to bring himself under the definition of the term "legal representative" under the Code, the respondent, not being the person in law, who represents the estate of the deceased person, namely, Manickathammal, should satisfy that the suit instituted by Manickathammal was in a representative character, since the estate under the terms of the Will devolves on the respondent after the death of Manickathammal. A suit by a Hindu widow or a female limited owner has been considered to be a suit in a representative character. A sole life estate holder's position under a Will is different from that of a Hindu widow's estate. By the terms of the will, after the death of the testator, the person who would be entitled to possession of the estate is the widow, and there being no executor appointed under the Will, the person who will be entitled to possession must be deemed to be the person that represents the estate, since during her lifetime no other person could claim to be entitled to be in possession of the estate other than herself and as such for all practical purposes she is the person that should be held to represent the estate of the deceased. Further, just as a reversioner is not a person on whom the estate of the deceased female limited owner devolves, but he succeeds to the estate as the heir of the last male holder, similarly, the vested remainderman, the respondent here, does not claim through the life estate holder but claims it under the terms of the Will from the deceased by reason of the bequest in his favour under the will. In so far as representation of the estate of a deceased person is concerned there is no difference between a widow, who succeeds to her husband's estate, or the sole life estate holder, who becomes entitled to possession of the property under the Will of the testator, here, her husband. Both the widow and the life estate holder are the only persons entitled to immediate possession and enjoyment of the estate and on both the duty of preserving the estate is cast except in the case of a widow subject to such powers of alienation as are possessed by her for any legal necessity, and in the case of a life estate holder subject to her being entitled to the absolute income of the property the benefit of which would enure ultimately to the reversioner or the remainderman. In the present case, there being no executor appointed under the Will, there can be no doubt that Manickathammal is the only person entitled to represent the estate and the suit instituted by her for recovery of possession is a suit which must be deemed to have been instituted in a representative character. In — 'Madhayarayudu v. Subbamma', AIR 1917 Mad 979 (2) (C) it was observed that under the enlarged definition of "legal representative" to be found in the Civil Procedure Code of 1908, a person in possession of the estate belonging to the deceased is competent to represent the deceased defendant. The interest of the respondent also is represented by the plaintiff in the suit as the securing of the property, which involves the establishment of the will under which she claims, is necessary for protecting the respondent's interest as well.

(4) Order 22, Rule 3 provides that where the sole plaintiff dies and the right to sue survives the Court, on an application made in that behalf, shall cause the legal representative of the deceased plaintiff to be made a party and shall proceed with the suit. To entitle one to apply under O. 22, R. 3, it is necessary that he should

first establish that he is the legal representative of the deceased plaintiff and then satisfy that the right to sue has survived over to him, when alone he could be allowed to bring himself on record and continue the suit. In this case, there is no question that the right to sue does survive to the respondent, as the suit is one for possession based on a will under which both the widow and the respondent claim certain rights, the widow being entitled to possession during her lifetime, and after her death, the person who is entitled to possession would be the respondent and none else. The right to sue for possession has certainly survived to the respondent who has become entitled to possession after the death of the widow.

(5) In — 'Venkatanarayana Pillai v. Subbammal', AIR 1915 PC 124 (D), where a suit was brought to set aside an adoption and the suit was dismissed by both Courts in India and pending appeal to His Majesty in Council the plaintiff died, in an application by his grandson, as the sole surviving member of his grandfather's family, and also on his death the next reversionary heir to the estate, for an order that his name be substituted on the record for that of the appellant, it was held that the petitioner was entitled to the order asked for under O. 1, R. 10, C. P. C. and that the contingent reversioner may be joined as plaintiff in the presumptive reversioner's suit, and, if so it follows that on his death the "next presumable reversioner" is entitled to continue the suit begun by him. Their Lordships of the Privy Council however supported the right of the appellant to be brought on record not under O. 22, R. 3, but under the provisions of O. 1, R. 10, C. P. C. which provides for the adding of the plaintiff. It was further observed:

> "The two kinds of suits which the Indian law permits to be brought in the lifetime of a female owner by reversioners for a declaration that an adoption made by her is invalid, or an alienation effected by her is not binding against the inheritance (see Arts. 118 and 125 of Sch. I, Limitation Act, 9 of 1908), although they differ in character, will be found to be the same in both instances as regards the position of the plaintiffs so far as the point for decision is concerned; and the test of res judicata is irrelevant to the inquiry whether the contingent reversioner is entitled to continue the suit commenced by the presumptive reversioner. It is the common injury to the reversioners which entitles them to sue and the question is whether the 'right' to sue survives apart from any consideration whether or not the next presumable heir is the 'legal' representative of the deceased presumptive reversioner."

It appears therefore to be sufficient if under O. 22, R. 3, it is found that the right to sue survives to the applicant who desires to bring himself on record, though he may not strictly come within the definition of "legal representative" under the Code. The question that requires to be decided in the suit is one whether the will of the deceased D/- 10-8-1938 has been superseded by the subsequent testamentary disposition of 1942. It is a question common to both the widow and the respondent and when that question was the issue in the suit, the right to sue has clearly survived to the respondent and that would be sufficient to entitle him to continue the suit.

(6) That a person may be held to be a legal representative of a deceased plaintiff only for the purpose of continuing the suit and not for the purpose of representing the interest of the deceased plaintiff is the view of Ramesam J. in — 'Subramania v. Venkatachalam', AIR 1929 Mad 524 (E). In that case the two plaintiffs were legatees under a Will which was refused to be registered by the Registrar. The first plaintiff alone filed the suit for registration of the will. He died. The second plaintiff, who applied to be brought on record was held entitled to continue the suit as one of the persons represented by the first plaintiff. Plaintiff 2 was therefore held to be legal representative only for the purpose of continuing the suit. But the question whether he is the legal representative of the first plaintiff in regard to his particular right was left in doubt.

(7) In order therefore to entitle a person to bring himself on record as the legal representative or as a co-plaintiff to continue the suit, what he has primarily to establish is that the right to sue has survived to him, even though he may not be strictly the legal representative in the sense that he represents the estate of the deceased person. In this case, however, as the suit has been held to be instituted in a representative character as one not alone on behalf of the widow but even on behalf of the remainderman the respondent, and the right to sue has also survived to the respondent, the order of the learned District Judge bringing the respondent on record under the provisions of O. 22, R. 3, C. P. C. is correct.

(8) In the result the appeal is dismissed with costs.

B/V.S.B. Appeal dismissed.

A. I. R. 1953 MADRAS 871 (Vol. 40, C. N. 341)

MACK J.

A. Danapal Chetti, Appellant v. K. Rajagopal Chetti, Respondent.

A. A. O. Nos. 195 to 197 and 206 of 1949, D/- 17-12-1952.

(a) Suits Valuation Act (1877), S. 11 — "Over-valuation or under-valuation" includes valuation which rests on some erroneous basis. AIR 1920 Mad 1017, Foll.; AIR 1920 Mad 843, Ref. (Para 8)

Anno: Suits Valuation Act, S. 11 N. 4.

(b) Suits Valuation Act (1877), S. 11, Proviso (b) — Objection to jurisdiction — (Civil P. C. (1908), O. 7, R. 10).

In appeal, trial Court found to lack jurisdiction due to erroneous valuation in plaint — No objection to jurisdiction taken in trial Court — Proviso (b) applies to case and the appellate Court in the absence of a finding that the valuation has affected the merits of the decision cannot order the plaint to be returned for presentation to the proper Court. AIR 1925 Lah 290 (FB) & AIR 1947 Mad 135, Rel. on. (Paras 7, 8 and 9)

Anno: Sts. Valn. Act, S. 11 N. 6, 12; Civil P. C., O. 7, R. 10 N. 4.

M. Natesan, for Appellant; V. Somasundaram, for the Govt. Pleader, for Respondent.

CASES CITED:

(A) ('74) 1 Bom 538
(B) ('84) 9 Bom 266
(C) ('47) AIR 1947 Mad 135: 1946-2 Mad LJ 282
(D) ('25) AIR 1925 Lah 290: 6 Lah 105 (FB)

(E) ('20) AIR 1920 Mad 1017: 62 Ind Cas 715
(F) ('20) AIR 1920 Mad 843: 52 Ind Cas 992

JUDGMENT: This batch of four appeals arise out of a judgment in four appeals, A. S. Nos. 85, 96, 100 and 145 of 1948 in which the learned District Judge of Chingleput on 9-2-49 remanded four suits, viz., O. S. Nos. 368, 302. 379 and 80 of 1945 disposed of by the District Munsif of Trivellore in a common judgment for fresh disposal. He held in appeal that one of the suits O. S. No. 80 of 1945 was beyond the financial jurisdiction of the District Munsif and directed the return of that plaint for presentation to the proper Court. Holding that the District Munsif had no jurisdiction to try O. S. No. 80 of 1945, he took the view that the common trial of the four suits was without jurisdiction, and that the logical consequence was to set aside the decrees and judgments even of the three suits tried by the District Munsif which he had admittedly full jurisdiction to decide. In an elaborate judgment, the learned District Judge took the view that S. 11, Suits Valuation Act would not apply to this case.

(2) The relevant facts necessary for a disposal of these appeals are these: One Kadirvelu Chetti executed five sale deeds in his lifetime in favour of three persons. After his death, his son Rajagopala Chetti executed a sale deed in favour of one Pattu Chetti of the property covered by these alienations ignoring the father's alienation as being sham and nominal. These four suits resulted. Overruling some objections raised, the learned District Munsif, as it appears to me, quite rightly tried the four suits on common evidence raising as they did the substantial issue as to whether the alienations of the father Kadirvelu Chetti were valid and for consideration or were sham and nominal. He found that the five sale deeds were true and real and decreed the four suits accordingly. There was no objection as regards jurisdiction taken before him as regards any suit.

(3) The point of jurisdiction arose in the appellate Court as regards one suit, O. S. No. 80 of 1945 in this way. This was a suit filed by Kadirvelu Chetti's son Rajagopala Chetti for the recovery of Rs. 1673-8-0 as mesne profits from the vendees from his father under two of the sale deeds, which he sought to ignore as sham and nominal. An issue as regards court-fee was framed in the suit, but the plaintiff later paid court-fee of Rs. 15 on each declaration sought as regards each sale deed.

(4) In A. S. No. 145 of 1948 filed against this decision, court-fee appears to have been paid only on the mesne profits sought. The court-fee examiner took an objection that court-fee of Rs. 15 for each declaration should have been collected in the appeal also. This court-fee objection was heard by the learned District Judge who went much further than the court-fee examiner, and upheld a point taken by his own office in their explanation on the court-fee examiner's objection, that 'ad valorem' court-fee should be paid on the consideration appearing on both these sale deeds, i.e., Rs. 2000 and Rs. 300 respectively. That took the suit, of course, out of the jurisdiction of the District Munsif. After the learned Judge had given his finding the deficit court-fee was paid. When the appeals came up for hearing, the learned Advocate for the appellants made capital out of the jurisdiction position arising out of the learned District Judge's finding as regards court-fee in this one suit and advanced arguments which prevailed with the District Judge.

(5) I am with respect quite unable to follow how he came to the conclusion that S. 11, Suits Valuation Act does not apply to this case. In my opinion, it clearly applies and the learned District Judge had jurisdiction to dispose of these four appeals. Section 11, Suits Valuation Act was specially enacted, as it appears to me, to provide for such cases where no objection as regards jurisdiction was raised in the trial Court and on mere grounds of under-valuation or over-valuation it is found in the appellate Court that strictly and technically the suit was outside the jurisdiction of the trial Court. The learned District Judge relied on two Bombay decisions reported in — 'Bai Mahkor v. Bulakhi Chaku', 1 Bom 538 (A) of the year 1874 and — 'Babaji v. Lakshmibai', 9 Bom 266 (B) of the year 1884, which took the view that an appellate Court finding that the Court of first instance had no jurisdiction should have ordered the plaint to be returned. The learned District Judge overlooked the fact that the Suits Valuation Act became law in 1887 and S. 11 appears to have been specially enacted to provide for that prevailing view. The District Judge was also inclined to accept the view placed before him that under O. 7. R. 10, C. P. C., the appellate Court was bound to do what this rule required of a Court of first instance, viz., to return the plaint as soon as it finds that it had no jurisdiction.

(6) Mr. D. Ramaswami Aiyangar for the appellant-plaintiff in A. S. 145/48 has argued that under S. 107 (2), C. P. C. the appellate Court shall have the same powers as are conferred on Courts of original jurisdiction in respect of suits instituted therein. The learned District Judge however failed to observe that S. 11, Suits Valuation Act by legislative enactment requires appellate Courts in such cases to act in a particular manner.

Proviso (b) to S. 11 directly governs cases of this kind, and I am quite unable to appreciate the argument of Mr. Ramaswami Aiyangar that it does not apply. The relevant portion of S. 11 may be reproduced here:

"Notwithstanding anything in S. 578, C. P. C. (now S. 99, C. P. C., Act 5 of 1908) an objection that by reason of the over-valuation or under-valuation of a suit or appeal a Court of first instance or lower appellate Court which had not jurisdiction with respect to the suit or appeal exercised jurisdiction with respect thereto shall not be entertained by an appellate Court unless,

(a) the objection was taken in the Court of first instance at or before the hearing at which issues were first framed and recorded or in the lower appellate Court in the memorandum of appeal to that Court, or

(b) the appellate Court is satisfied, for reasons to be recorded by it in writing, that the suit or appeal was over-valued or under-valued and that the over-valuation or under-valuation thereof has prejudicially affected the disposal of the suit or appeal on its merits."

(7) The effect of this section, as it appears to me, is quite clear. The learned Advocate is unable to cite before me a single decision in which an appellate Court has, subsequent to 1887, directed a plaint to be returned to the Court having jurisdiction when no objection to jurisdiction had been taken during the trial and when lack of jurisdiction was found to result from a mere under-valuation in the plaint. Under proviso (b), this course can only

be adopted when the under-valuation or over-valuation has in the opinion of the appellate Court, prejudicially affected the disposal of the suit on its merits. There is no such finding in the present elaborate order of remand by the learned District Judge nor does that aspect arise for consideration in view of the finding of the District Judge that S. 11 had no application at all. The facts of this case are on all fours with — 'Gangadhara Ramarao v. Province of Madras', AIR 1947 Mad 135 (C) a decision by Chandrasekhara Aiyar J. (as he then was). That was a more extreme case than the present in which an objection to pecuniary jurisdiction was taken at the earliest opportunity before the District Munsif, who held that the suit was properly valued and disposed it of on merits. On appeal, the Subordinate Judge differed from the District Munsif and held that the suit was under-valued, and without hearing the appeal directed the return of the plaint for presentation to the proper Court. It was held that S. 11 (b), Suits Valuation Act governed the case and the lower appellate Court was directed to take back the appeal on its file and dispose of it according to law. In the case before me, no objection to jurisdiction was even taken before the trial Court. The appellant in O. S. No. 80 of 1945 proceeded to judgment in a forum of his own choice, and it is clearly not open to him on the simple principles governing S. 11, Suits Valuation Act and the specific requirements of this section to capitalise an under-valuation of his plaint for the purpose of having his suit retried by another Court.

(8) A Full Bench of the Lahore High Court in — 'Sardar Khan v. Aisha Bibi', AIR 1925 Lah 290 (D) also held that S. 11, Suits Valuation Act governs all cases of erroneous valuation irrespective of the question as to whether the value of the suit is determined by rules having the force of law or in any other manner. A difficulty placed before the learned District Judge which he found to be a real one, was the argument that in this particular case there was neither over-valuation nor under-valuation but valuation on an erroneous basis. This is one of the grounds which, though the two decisions — 'AIR 1947 Mad 135' (C) and — 'AIR 1925 Lah 290' (D) were placed before him, led him to the conclusion that S. 11 would not apply. He observed that what was meant by over-valuation or under-valuation has not been specifically decided. As it appears to me over-valuation or under-valuation must rest on some erroneous basis. There is also direct authority, if authority were needed for this position, in — 'Ammalu Ammal v. Krishnan Nair', AIR 1920 Mad 1017 (E) in which a learned Bench of this Court agreeing with the opinion of Kumaraswami Sastri J. in — 'Tirumal Rao v. Subramania Gurukkal', AIR 1920 Mad 843 (F) held that the words "over-valuation and under-valuation" include erroneous valuation caused by misapplication of a section of the Court-fees Act.

(9) I find with respect to the learned District Judge that S. 11, proviso (b), Suits Valuation Act directly governs this case. The order of remand, which would result in three suits of 1945 being retried by a District Munsif and another suit of 1945 being presented in the Court of a Subordinate Judge for trial is set aside. The learned District Judge in my view clearly had jurisdiction to dispose of these appeals, which are sent back to the District Court with a direction that they be given as expeditious a disposal as possible, in view of these suits having been instituted more than seven years ago. The costs of these appeals will irrespective of the result be paid by the respective respondents. The order directing refund of the court-fees paid on the appeals to the appellant is cancelled.

(10) Leave to appeal refused.

B/M.K.S. Order accordingly.

A. I. R. 1953 MADRAS 873 (Vol. 40, C. N. 342)

KRISHNASWAMI NAYUDU J.

Soorneedi Sathiraju and others, Appellants v. Batchu Venkata Rao, Respondent.

A. A. O. Nos. 541 of 1952 and 495 of 1951, D/- 26-2-1953.

Debt Laws — Madras Agriculturists' Relief Act (4 of 1938), S. 8(2) — Payment — Nature of — Mortgagee purchasing part of equity of redemption — Discharge under S. 82, T. P. Act does not amount to payment — (Transfer of Property Act (1882), S. 82).

The payment that is contemplated under S. 8(2) must be a payment by the agriculturist and not even by a non-agriculturist debtor. The payment must be a payment in cash or in kind by an agriculturist or on his behalf.

The legal effect of the purchase by the mortgagee of the equity of redemption in a part of the mortgaged properties is to discharge that portion of the mortgage which was chargeable on the part of the mortgaged property that has been purchased and though it would operate as a partial discharge of the mortgage debt, the discharge is not the result of a payment made by the debtors.

Moreover, after the purchase of the equity of redemption by the mortgagee, the debtor ceases to have any interest in it and any reduction of the liability of the mortgage by appropriation of the rateable value fixed under S. 82, T. P. Act does not enure to the benefit of the mortgagor. The amount appropriated towards the mortgage liability under S. 82 is, therefore, not a payment within the meaning of S. 8(2) of the Madras Act 4 of 1938. AIR 1944 Mad 549, Distinguished. (Paras 3, 4)

G. Balaporamaswami Rao, for Appellants; D. Narasaraju and K. B. Krishnamurthy, for Respondent.

CASES CITED:

(A) ('44) AIR 1944 Mad 549: 1944-2 Mad LJ 140

(B) C M A No 495 of 1951 (Mad)

JUDGMENT: The appellants are the judgment-debtors in a mortgage decree passed against them and their father, defendant 1, in O. S. No. 39 of 1941 on the file of the Sub-Court of Kakinada. This appeal arises out of their application, I. A. No. 1640 of 1951 filed in the said Court under Ss. 8 and 19 of the Madras Agriculturists' Relief Act 4 of 1938 as amended by Act 23 of 1948. The mortgage is dated 18-4-1924 and the principal sum of the mortgage is Rs. 3,000. The appellants and their father were also indebted to the plaintiff decree-holder on a pro-note dated 31-1-1933. The plaintiff obtained a decree on the pro-note in O. S. No. 458 of 1938 on the file of the District

Munsif's Court, Kakinada, and brought one out of three items of properties that were mortgaged, to sale and purchased the same for Rs. 1140 subject to the mortgage in his favour. He filed E. P. No. 195 of 1946 in Sub-Court, Kakinada, for execution of the mortgage decree. The appellants contested the said execution petition by pleading complete discharge by reason of the plaintiff purchasing one of the mortgaged properties. The Subordinate Judge of Kakinada applying the provisions of Ss. 60 and 82 of the Transfer of Property Act held that the plaintiff decree-holder was bound to give credit to the sum of Rs. 3367-3-0 being the proportionate liability of item (1) of the mortgaged decree. The said order was confirmed by the High Court in C. M. A. No. 451 of 1947 on 13-12-1949.

(2) It must be mentioned here that apart from the sum of Rs. 3367-3-0 to which the appellants would be entitled to credit in the mortgage, it is common ground that they made payments to the extent of Rs. 2984-15-0 towards the mortgage debt. The result is that the mortgage decree is discharged to the extent of more than Rs. 6000 which is double the amount of the principal sum of Rs. 3000.

(3) In the present proceedings, the applicants invoke to their aid cl. (2) of S. 8 and contend they have paid to the creditor twice the amount of the principal and that therefore the debt must be deemed to have been wholly discharged. The question therefore for determination is whether apart from the sum of Rs. 2984-15-0, which represents in fact payments made by the debtors, the sum of Rs. 3367-3-0, which was directed to be given credit towards the mortgage decree in consequence of the plaintiff purchasing the equity of redemption in item (1) of the mortgaged properties, could be said to be a payment by the agriculturist coming within the scope of Cl. (2) of S. 8 of the Madras Agriculturists' Relief Act. The sum of Rs. 3367-8-0 was arrived at by applying the provisions of Ss. 60 and 82 of item (1) of the mortgaged properties to contribute to the entire mortgage debt. Section 60 of the Transfer of Property Act makes an exception in regard to a mortgagee purchasing a share in the mortgaged property and held entitled to redeem his own share by payment of a proportionate part of the amount due on the mortgage, the proportionate part of the amount to be ascertained by applying the provisions of S. 82 of the Act. Section 82 lays down that where the property subject to a mortgage belongs to two or more persons having distinct and separate rights of ownership therein, the different shares in or parts of such property owned by such persons are, in the absence of a contract to the contrary, liable to contribute rateably to the debt secured by the mortgage and for the purpose of determining the rate at which each such share or part shall contribute, the value of the property as on the date of the mortgage should be deemed to be its value. The plaintiff-decree-holder having purchased the equity of redemption for Rs. 1140 in execution of the money decree in O. S. No. 458 of 1938 on the file of the District Munsif's Court, Kakinada, has acquired whatever rights the appellants had in the property. The only right they had was the equity of redemption, which equity of redemption has vested in the plaintiff-decree-holder by reason of the purchase. The appellants therefore ceased to have any interest in item 1 which was sold, the property from thencefor-ward belonging to the plaintiff decree-holder subject to the mortgage liability in his own favour. The rights of the appellants in the said property have therefore become extinguished in consequence of the sale in favour of the plaintiff decree-holder. The payment that is contemplated under S. 8 (2) must be a payment by the agriculturist and not even by a non-agriculturist debtor. But there being no dispute that the appellants are agriculturists, if the sum of Rs. 3367-3-0, which has been given credit to, could be treated as payment, to the appellants could well claim the benefit of it. The payment must therefore be a payment in cash or in kind by an agriculturist or on his behalf. The appropriation of the sum of Rs. 3367-3-0 is obviously not a payment, nor even appropriation made on behalf of the appellants, nor out of the property in which the appellants had any interest on the date. The appropriation of the sum which went to the credit of the mortgage was in discharge of the liability of the mortgagee, that is, the plaintiff-decree-holder, which liability has become fastened on him by his having purchased the equity of redemption. It is neither a payment by the appellants, nor an appropriation on their behalf, nor a discharge of any liability of theirs, since by the sale of the said item, the appellants' liability to contribute to the mortgage debt had ceased, and the liability being attached to the property item (1), the plaintiff decree-holder alone has therefore become liable. The legal effect of the purchase by the mortgagee of the equity of redemption in a part of the mortgaged properties is to discharge that portion of the mortgage which was chargeable on the part of the mortgaged property that has been purchased and though it would operate as a partial discharge of the mortgage debt, the point that has to be considered here is not whether the mortgage has become discharged partially, but whether that discharge is as the result of a payment made by the debtors.

(4) Reliance was placed on the judgment of Patanjali Sastri J. in — 'Poovan Chettiar v. Maddan', AIR 1944 Mad 549 (A), in support of the appellants' contention. But the facts of that case are entirely different from the one which I am now considering. In that case, the plaintiff-mortgagee purchased part of the hypotheca in 'pro tanto' discharge of the debt. It was held that as a result of the sale, there is a reduction of the debt by transfer of a portion of the hypotheca to the creditor himself, and the balance remaining due is the same old debt reduced by a payment. If, even in the present case, instead of the plaintiff decree-holder purchasing the equity of redemption in a court auction for a consideration of Rs. 1140 which went in payment of the money decree in O. S. No. 458 of 1938, he directly purchased the said item of mortgaged property from the appellants, it being agreed that the sale price of such property is to be appropriated towards the mortgage debt, then, notwithstanding that an actual payment is not made by the agriculturists the property having been sold in 'pro tanto' discharge of the debt, it must be deemed to be a payment and the agriculturist can rely on such a payment as payment under S. 8 Cl. 2 of the Act. By the sale by the mortgagor to the mortgagee of a part of the hypotheca the sale proceeds being appropriated towards the mortgage debt, the mortgagor must be deemed to have made a payment towards the debt, though the payment may not be in cash but by a transfer of a portion of the mortgaged property. There-

the debtor was transferring to the creditor a property in partial discharge of the liability and as such it can be held to be a payment under S. 8, Cl. (2) of the Act. But as already pointed out, in the present case, the debtors having ceased to have any interest in the property, any reduction of the liability of the mortgage by appropriation of the rateable value fixed under S. 82 of the Transfer of Property Act would not enure to the benefit of the mortgagors as the property no longer belonged to them. I am therefore of the view that the sum of Rs. 3367-3-0 appropriated towards the mortgage liability is not a payment within the meaning of S. 8 Cl. (2) of the Act.

(5) In the result, the appeal is dismissed with costs.

(6) C. M. A. No. 495 of 1951 (Mad) (B): This is an appeal against the order dismissing an application under S. 20 of Madras Act 4 of 1938. In view of the orders passed in the application under S. 19, no orders are necessary in this appeal. This appeal also will stand dismissed. But there will be no order as to costs.

B/D.R.R. Appeals dismissed.

A. I. R. 1953 MADRAS 875 (Vol. 40, C. N. 343)

PANCHAPAKESA AYYAR J.

In re, Gaffar Khan, Accused, Petitioner.

Criminal Appln. No. 2 of 1953 D/- 2-2-1953.

Criminal P. C. (1898), S. 215 — "By the High Court only" — Quashing of commitment by presiding Judge of High Court Session — (Cr. P. C. (1898), S. 561-A).

A High Court Judge presiding over the Criminal Sessions and trying a case committed to this Sessions Court will have jurisdiction to hear and dispose of a petition for quashing that 'committal', if filed in time and if justified otherwise, though petitions for quashing committals of cases not before him for trial and disposal cannot be heard and determined by him but only by the Judge (usually on the appellate side) appointed by the Chief Justice to hear them. The 'practice' of the hearing of such cases by the Judge presiding over the 'Admission Court' is only a 'matter of convenience.' (Para 1)

Anno: Criminal P. C., S. 215 N. 7 Pt. 9; S. 561-A N. 6.

F. S. Vaz, for Petitioner.

CASES CITED:

(A) ('42) AIR 1942 Bom 212: ILR (1942) Bom 534: 43 Cri LJ 773
(B) ('09) 8 Cri LJ 221: 36 Cal 48
(C) ('53) AIR 1953 Mad 395: 1953-1 Mad LJ 142

ORDER: This is a petition by the second accused in Sessions Case No. 8 of 1953 for quashing the order of committal regarding him. He prayed to the office for posting the petition today before me, for hearing and disposal before I began to hear the Sessions Case. The office has, in view of the decision in — 'Emperor v. Huseinalli Vilayatalli', AIR 1942 Bom 212 (A), and other cases, felt a doubt whether a Judge of the High Court presiding over the High Court Criminal Sessions, having in that capacity no appellate or revisional jurisdiction, has jurisdiction to hear and dispose of such a petition for quashing a committal like this. It thinks such a petition can only be moved on the appellate side of the High Court, and has referred Mr. Vaz, learned counsel for the 2nd accused, to move it in the Admission Court. At the instance of Mr. Vaz, it has posted the petition before me for final orders.

Mr. Vaz urges that this Court has jurisdiction, and relies on the ruling in — 'Pharindra Nath Mitra v. Emperor', 36 Cal 48 (B), and the wording of S. 215 and S. 561A of the Criminal P. C. which is 'the High Court' and not 'the appellate or revisional side of the High Court' or 'the High Court in its appellate or revisional jurisdiction'. I am inclined to agree with him regarding this case, namely, that a High Court Judge presiding over the Sessions and trying a case committed to this Sessions Court will have jurisdiction to hear and dispose of a petition for quashing 'that committal', if filed in time and if justified otherwise, though petitions for quashing committals of cases not before him for trial and disposal cannot be heard and determined by him but only by the Judge (usually on the appellate side) appointed by the Chief Justice to hear them. The 'practice' of the hearing of such cases by the learned Judge presiding over the 'Admission Court' is only 'a matter of convenience'. I do not think that anything in the law or the rules prevents the Hon'ble the Chief Justice from asking any Judge of the High Court to dispose of a petition for quashing a committal. As held by a Bench of this Court in — 'In re Mathuraman Chettiar', AIR 1953 Mad 395 (C), "All the Judges constitute members of the same Court, and both are parts of one and the same institution". I agree with Mr. Vaz that the Judge, who presides over the sessions of the High Court and has to try and dispose of a case, and can, in his charge to the Jury, undoubtedly tell the Jury that no case has been made out 'in law' against the accused and 'direct them to acquit him, as a matter of law', has undoubtedly jurisdiction to hear and dispose of a petition for quashing the committal 'of a case before him', under S. 215, Criminal P. C., 'on a point of law', especially as, under S. 298, Criminal P. C., it is the duty of the Judge to decide 'all questions of law'.

The objection that my view may result in both the Admission Court (on the appellate side) and the Judge presiding over the High Court sessions (on the original side) having 'concurrent jurisdiction', under S. 215, Criminal P. C., to quash committals regarding cases actually coming up for hearing before the Judge presiding over the High Court Sessions does not oppress me. I have already held in a recent case that such concurrent jurisdiction does exist in some cases and that while a 'writ of mandamus' is usually to be filed on the appellate side, under Art. 226 of the Constitution of India, a writ in the nature of 'mandamus' will also lie to the Original Side Judge, in Chambers, under S. 45 of the Specific Relief Act, in matters within its jurisdiction. So, I hold that this petition can be heard and disposed of by me.

(2) But, after hearing Mr. Vaz, I am not satisfied that there is any patent 'error of law' warranting the quashing of the committal. The many grounds relied on by him, like substituting a new and false charge-sheet, in the place of the original one, making this petitioner, a 'bete noire' of the police, the principal culprit in the place of one Ali Baksh, the man originally named as the principal culprit, the arrest of the petitioner two days before the date given 'now' by the police, his being kept in illegal police detention for two days, and the evidence being totally inadequate for convicting the petitioner, are matters of 'fact',

and 'hotly disputed fact'. I am, therefore, of opinion that this is not a case for quashing the committal, on this belated and eleventh-hour application, but a case only fit for trial and disposal in the usual course. The case is ready for hearing today. The whole evidence can be heard today itself and the case disposed of tomorrow. So I dismiss this petition. Mr. Vaz will, of course, be free to urge every argument, in law and in fact, at the end of the trial which will now go on.

B/R.G.D. Order accordingly.

A. I. R. 1953 MADRAS 876 (Vol. 40, C. N. 344)

MACK J.

Rangaswami Naicker, Appellant v. Janakiammal, Respondent.

A. A. O. No. 275 of 1950, D/- 5-2-1953.

(a) Civil P. C. (1908), O. 34, R. 15 — Maintenance decree charging certain properties — Execution — Effect of 'mala fide' collusion (Decree — Execution — Maintenance decree) — (Hindu Law — Maintenance — Decree).

It is settled law that a widow cannot be confined to property charged with her maintenance and that she need not exhaust it all before she can proceed against other property belonging to her husband's joint family. AIR 1933 Mad 33 (1), Rel. on. (Para 2)

In the case of a decree which gives concurrent remedies, such as maintenance decrees, if a judgment-debtor can satisfy the executing Court that the decree-holder is acting in "mala fide" collusion with one of the other judgment-debtors in execution against him only, the executing Court would be perfectly entitled to refuse execution, until the charged property has been exhausted. (Para 3)

What constitutes active"mala fide" collusion is a difficult matter to define and must depend on the facts of each case. When such a serious allegation is made it should be resolved as a finding of fact on the material placed before the executing Court. (Para 3)

Anno: Civil P. C., O. 34, R. 15 N. 10a.

(b) Civil P. C. (1908), O. 21, R. 26 — Stay of execution after application to appellate Court is dismissed — (Practice).

As a general practice when a stay petition arising out of a C. M. A. or C. R. P. is dismissed, there should be no need whatsoever for a stay in fact to operate during the pendency of the main matter. The lower Courts should retain sufficient papers in their possession to proceed further with execution or any other matter, stay as regards which has been dismissed by the High Court pending the disposal of the main appeal or petition. (Para 4)

Anno: Civil P. C., O. 21, R. 26 N. 1.

M. Krishna Bharathi, for Appellant; S. T. Srinivasagopalachari and S. L. Venkatasubramanian, for Respondent.

CASE CITED:

(A) ('33) AIR 1933 Mad 33(1): 1932 Mad WN 1200

JUDGMENT: The appellant is the first judgment-debtor in execution proceedings taken out by the plaintiff in execution of a maintenance decree she obtained. The decree was against the deceased husband's joint family, represented by defendant 1, his brother, defendant 2 and other family members including the legal representatives of another brother Rudrappa, who died prior to suit.

(2) The decree charged two lots of property, one for maintenance subsequent to suit and the second, B schedule items, for arrears of maintenance and provision for pilgrimage etc. The plaintiff sought in execution to attach some uncharged property in the possession of the first judgment-debtor. The learned Subordinate Judge rejected one of the contentions that the widow should exhaust the charged property first, before reserving to further execution. The view taken by the learned Subordinate Judge is quite correct. It is settled law that a widow cannot be confined to property charged with her maintenance and that she need not exhaust it all before she can proceed against other property belonging to her husband's joint family. This has been decided in — 'Srinivasa Iyer v. Lakshmi Ammal', AIR 1933 Mad 33 (1) (A), on which the learned Subordinate Judge has relied.

(3) The contention raised before me, however, is that the learned Subordinate Judge has not gone into the main allegation in the first judgment-debtor's counter that the decree-holder in collusion with and under the instigation of his brother, defendant 2, was vindictively proceeding against the first judgment-debtor's property only. My attention has been drawn to the lower Court judgment in which the learned Subordinate Judge referred to a partition deed, Ex. D. 1, of the year 1945 as between the three brothers from which he selected lands allotted to each brother and charged them with maintenance of this widow subsequent to suit. He made the following observations in his judgment:

> "I have chosen the S. Nos. so that all the defendants may be equally liable to pay the plaintiff's maintenance."

It is also urged before me that there are observations in the appellate judgment of this Court, that there was some basis for a suggestion that the widow's brother was instigated by defendant 2 to file the maintenance suit. Mr. Srinivasagopalachari for the respondent-widow is unable to say whether she has even proceeded against B schedule in execution for the arrears of her maintenance. I do not desire to say anything about the merits of the contention that the widow and defendant 2 are acting in collusion, as I think this is a case which should be remitted to the executing Court for a finding on the allegation contained in para. 4 of the judgment-debtor's counter which the learned Subordinate Judge has not considered at all. There is I consider one ground on which a decree-holder can be deprived in any decree which gives concurrent remedies, as in the case of these maintenance decrees of option as to whom he or she should proceed against. If a judgment-debtor can satisfy the executing Court that the decree-holder is acting in "mala fide" collusion with one of the other judgment-debtors in execution against him only, the executing Court would be perfectly entitled to refuse execution, in a case such as this, until the charged property has been exhausted. No doubt defendant 1 would, if execution proceedings against him resulted in the sale of uncharged property which fell to his share at partition have the right to sue his brothers for reimbursement. But the existence of this right will not justify abuse of execution. What constitutes active "mala fide" collusion is a difficult matter to define and must depend on the facts of each case. When a serious allegation is made as in the present case, it should be resolved as a finding of fact on the material placed before the executing court. The

Execution petition is remitted to the executing Court for disposal according to law after a finding on the collusion alleged in the counter.

(4) Mr. Srinivasagopalachari has brought to my notice a practice which must be deprecated. He complains that execution was stayed in the lower Court although a stay petition, C. M. P. No. 4641 of 1950 was dismissed on 24-7-1950 because all the papers in the execution proceedings had to be sent up to this Court for disposal of this appeal. It is regrettable that this appeal has been pending in this Court for so long but in the present case I am not prepared to say that any injustice has been occasioned by the sale being deferred until the execution petition has been disposed of in the light of these observations. As a general practice, however, when a stay petition arising out of a C. M. A. or C. R. P. is dismissed, there should be no need whatsoever for a stay in fact to operate during the pendency of the main matter. The lower Courts should retain sufficient papers in their possession to proceed further with execution or any other matter, stay as regards which has been dismissed by this Court pending the disposal of the main appeal or petition. On this appeal I make no order as to costs.

(5) Mr. Srinivasagopalachari finally brings to my notice that E. P. No. 426 of 1949, out of which this appeal arises has been struck off for statistical purposes. He cannot say why. He also says that a fresh E. P. No. 421 of 1950 is now pending on the file of the lower Court. It may also have been struck off by this time. If these facts are correct, the learned Subordinate Judge will proceed to dispose of any pending E. P. with the same prayer as that contained in E. P. No. 426 of 1949, in the light of the observations made above.

B/D.R.R. Order accordingly.

A. I. R. 1953 MADRAS 877 (Vol. 40, C. N. 345)

PANCHAPAKESA AIYAR J.

In re, Kunda Papanna and others, Accused.

Criminal Revn. Nos. 1078 to 1090 of 1952; (Case Referred Nos. 54 to 66 of 1952), D/- 14-11-1952.

(a) Criminal P. C. (1898), S. 562(1) — Difference between doctors' opinions as to whether accused were really intoxicated — Court entertaining reasonable doubt regarding their guilt — S. 562(1) cannot be applied — (Madras Prohibition Act (10 of 1937), S. 4A). (Para 2)

Anno: Cr. P. C., S. 562 N. 4.

(b) Criminal P. C. (1898), S. 32 — Sentence in case of doubt regarding commission of offence.

Every Court must award the sentence suited to the offence and the offender, and not make the sentence smaller because of any doubt regarding the commission of the offence itself. Of course, the case is different where there is a doubt whether a graver offence or a smaller offence had been committed. (Para 2)

Anno: Cr. P. C., S. 32 N. 3.

(c) Criminal P. C. (1898), S. 562(1) — Applicability — (Madras Prohibition Act (10 of 1937), S. 4A).

Section 562(1) should not be applied to first offences of drunkenness under the Prohibition Act, though there may be exceptional cases. (Para 3)

Anno: Cr. P. C., S. 562 No. 3.

(d) Madras Prohibition Act (10 of 1937), S. 4A — Sentence.

Backward classes should not be treated on a more lenient footing than forward classes regarding offences under the Act in the matter of sentence. (Para 4)

(e) Criminal P. C. (1898), S. 562(1) — First offenders.

To presume, on no evidence, that a man committing an offence must have committed several offences before which went undetected is not allowable under the law. Such a man is, therefore, a first offender. (Para 5)

Anno: Cr. P. C., S. 562 N. 13.

(f) Madras Prohibition Act (10 of 1937), S. 4A — Sentence — (Criminal P. C. (1898), S. 32).

It cannot be said that because the accused belongs to that class of society in which drink was common in pre-prohibition days, he deserves a far more deterrent punishment than if he had belonged to non-drinking class in pre-prohibition days. (Para 6)

Anno: Cr. P. C., S. 32 N. 3.

Public Prosecutor, for the State.

ORDER: These are thirteen cases referred by the District Magistrate (Judicial), Nandyal, for setting aside the orders of the Stationary Sub-Magistrate, Jammalmadugu, in C. C. Nos. 120 to 132 of 1952, releasing 13 persons convicted under S. 4A of Act 10 of 1937, the Prohibition Act, under S. 562(1), Cr. P. C. on their entering into bonds for Rs. 200 each to appear and receive sentence whenever called upon to do so, and for inflicting substantial punishment on them. The learned Stationary Sub-Magistrate considered that, as these accused persons belonged to primitive backward tribes, like Dommara, Salai, Thogata etc., and as these were their first offences they should be released under S. 562(1), Cr. P. C. instead of awarding substantive sentences of imprisonment or fine. He also relied on the fact that two doctors differed regarding the question of these accused persons being really intoxicated by taking any illicit liquor.

(2) The learned District Magistrate rightly attacks these orders on three grounds. Firstly, he says that any difference between doctors' opinions regarding the factum of the offence would only be a matter for acquitting the accused, if the Court entertained any reasonable doubt regarding their guilt, and would not be a reason for applying S. 562(1), Cr. P. C. I agree. Indeed, small or lenient sentences in cases of doubt are highly objectionable, because they might allow illegal or unsustainable sentences to stand by making the party fear that if he appeals he might get a more severe sentence. Every Court must award the sentence suited to the offence and the offender, and not make the sentence smaller because of any doubt regarding the commission of the offence itself. Of course, the case is different where there is a doubt whether a graver offence or a smaller offence has been committed.

(3) The second reason given by the learned District Magistrate is that S. 562(1), Cr. P. C. should not be applied to cases like these. I agree that this section should not be applied to cases like these normally. To apply S. 562(1), Cr. P. C. to all first offences of drunken-

ness is neither the intention of the law, nor will it be consistent with sense or common sense. Nor can all first offenders claim action under S. 562. Thus, a man committing murder for the first time cannot invoke the aid of S. 562(1), Cr. P. C., nor can, normally, offences under Prohibition Act be properly dealt with under S. 562(1), Cr. P. C. There will, of course, be exceptional cases, as, for instance, when a father or a mother makes a son or daughter, just past 14 or even 18, drunk. But in all such cases, the antecedents of the offenders and the circumstances of the offence must be considered individually, and not in a kind of omnibus fashion, as here.

(4) The third reason given by the District Magistrate is that backward classes should not be treated on a more lenient footing than forward classes regarding such offences. I agree. The Prohibition Act is largely intended to help the backward classes to save themselves from the drink evil, and to let off members of the backward classes committing such offences on the ground of backwardness, giving them the same preference as under the Constitution for appointments etc. will not be proper.

(5) But I cannot agree with the learned District Magistrate regarding two other reasons relied on by him. The first was that these accused persons could not be deemed to be first offenders, as they must have committed, or must be presumed to have committed, several offences like these which went undetected. It is no part of a Court's function to speculate regarding such undetected offences and cause an undeserved slur on the accused and the police or other detecting authority. Courts in our Indian Union are only to act on proved facts and ought not to say anything not warranted by evidence admissible under the Indian Evidence Act. To presume, on no evidence, that a man committing an offence must have committed several offences before which went undetected is not allowable under our law. So, I consider that all these accused are really first offenders.

(6) The next reason relied on by the learned District Magistrate is that the offenders belong to that class of society in which drink was common in pre-prohibition days and, so, deserve a far more deterrent punishment than if they had belonged to non-drinking class in pre-prohibition days. It is 'prima facie' ridiculous to say that the spread of drink to classes not addicted to it before is to be treated more indulgently than the continuance of drink among the classes addicted to it before.

(7) After perusing the records, and hearing the learned Public Prosecutor, who did not want notices to issue to the accused in the peculiar circumstances, I have no doubt whatever that the conviction of everyone of the accused was fully supported by the evidence on record and need not be interfered with. But, I am of opinion that, in the peculiar circumstances, where only small fines would have been imposed by me had I tried these cases in the first instance, it will be against all justice, equity and good conscience to issue notices to these accused-petitioners, after a delay of several months, to appear in this Court, causing to them enormous waste of time, energy and money in coming from distant Kurnool to this place to answer notices for enhancement of punishment.

(8) The learned Public Prosecutor agrees.

(9) In the end, therefore, I see no reason to interfere with the orders passed under S. 562 (1), Cr. P. C. even though they were not strictly warranted. The references are answered accordingly.

B/V.R.B. Answer accordingly.

*** A. I. R. 1953 MADRAS 878 (Vol. 40, C. N. 346)**
(FULL BENCH)

RAJAMANNAR C. J., CHANDRA REDDY AND VENKATARAMA AYYAR JJ.

Gundapuneedi Veeranna and others, Petitioners v. Gundapuneedi China Venkanna and others, Respondents.

Civil Misc. Petn. No. 2556 of 1952, D/- 7-11-52.

*** (a) Civil P. C. (1908), Ss. 109, 110 — Constitution of India, Arts. 133 (1), 135 — Doctrine of vested right of appeal — Extent of — Federal Court (Enlargement of Jurisdiction) Act (1947), S. 3 — (Abolition of Privy Council Jurisdiction Act (1949), S. 5).**

It is well established that the institution of a suit carries with it the implication that all appeals then in force are preserved to the parties thereto till the rest of the career of that suit. But there are exceptions to the application of this rule. One exception is where by competent enactment such right of appeal is expressly or impliedly taken away with retrospective effect. Another exception is that a right of appeal is lost if the Court to which an appeal lay at the time of the institution of the suit, is subsequently abolished. AIR 1921 PC 219, Rel. on (Para 8)

Thus in the case of a suit instituted in 1945, the right vested in the parties to the suit on the date of its institution was a right to finally appeal to the Privy Council. But from 1-2-1948 such a right was expressly abolished. There was, no doubt, no abolition of a Court as such, but substantially that was the result as from that day the Privy Council ceased to be a Court of Appeal from the Indian High Courts. Such right as was vested in the parties to the suit to appeal to the Privy Council, therefore, came to an end on that day. Instead the parties may be said to have obtained an alternative right of appeal to the Federal Court. But this is not because the parties had a vested right, but because S. 3 of the Federal Court (Enlargement of Jurisdiction) Act specially provided for the substitution of the final appellate forum. (Para 8)

After the abolition of the Federal Court by coming into force of the Constitution, no right was substituted for the right to appeal to the Federal Court which existed immediately before the commencement of the Constitution in respect of such suits. There is no provision in the Constitution, similar to Art. 374 (2), as regards proceedings by way of appeal or otherwise not pending in the Federal Court at the commencement of the Constitution which might have been taken in the Federal Court or in the High Court in respect of an appeal to the Federal Court. (Para 8)

Article 135, which confers on the Supreme Court all the powers and jurisdiction of the Federal Court only in matters to which Art. 133 or Art. 134 does not apply, is not such a provision. (Para 20)

Anno: Civil P. C., S. 109 N. 2; S. 110 N. 2.

*** (b) Constitution of India, Arts. 133 (1), 135 — Suit instituted before Constitution — Judgment after commencement of Constitution — Second appeal — Applicability of Arts. 133 (1) and 135 — (Civil P. C. (1908), Ss. 109, 110).**

If a judgment is delivered or a decree or final order is made in a civil proceeding of a High Court after the commencement of the Constitution, then the provisions of Art. 133 (1) would directly apply even though the suit from which it originated was instituted before the commencement of the Constitution. There is no justification for construing the words "any judgment, decree or final order" in Art. 133 as meaning "any judgment, decree or final order in a suit or other proceeding instituted after the coming into force of the Constitution." Such construction will practically render Art. 133 (1) a dead letter for many years to come. (Para 18)

Further, it is a wrong construction of that expression to say that Art. 133 does not apply to a case when what is meant is that the case does not fulfil the requirements of the Article because the valuation is less than Rs. 20,000. Hence it cannot be held that this is a matter to which the provisions of Art. 133 do not apply and therefore Art. 135 will apply. (Para 19)

There would also be no question of the application of the rule which enunciates a presumption against retrospective operation because the Article (Art. 133) is not sought to be applied to a judgment, decree or order before the date on which the Article came into force. (Para 19)

Held that Art. 133 (1) applied to the case and the requirement as to valuation must be determined by the provisions of clause (a). AIR 1951 Mad 251; AIR 1952 Mad 81 (FB); AIR 1950 Nag 222; AIR 1951 Pat 612; AIR 1951 Orissa 141 and AIR 1952 Bom 303, Distinguished. (Para 23)

Anno: Civil P. C., S. 109 N. 2; S. 110 N. 2.

(c) Constitution of India, Art. 135 — "Matters in relation to which jurisdiction and power were exercisable by Federal Court" — Meaning.

Unless an appeal to the Federal Court had been admitted the proceedings must be deemed to be pending before the High Court in respect of which the Federal Court could not exercise jurisdiction. It cannot, therefore, be said that a case in which the decree was passed after the commencement of the Constitution is a matter in relation to which jurisdiction and powers were exercisable by the Federal Court immediately before the commencement of the Constitution. It is at least necessary that the judgment should have been delivered or the decree or final order passed before the Constitution to say that the Federal Court had any exercisable jurisdiction and powers in relation to a case: AIR 1941 FC 5, Rel. on. (Para 21)

K. Bhimasankaran, for Petitioners; P. Somasundaram and C. V. Dikshitalu, for Respondents.

CASES CITED:

(A) (1905) 74 LJPC 77: 1905 AC 369
(B) ('29) AIR 1929 Mad 381: 52 Mad 361 (FB)
(C) ('21) AIR 1921 PC 219: (1922) 1 AC 249
(D) ('51) AIR 1951 Mad 251: ILR (1951) Mad 125
(E) ('49) C. M. P. No. 3990 of 1949 (Mad)
(F) ('51) AIR 1951 Mad 723: 1951-1 Mad LJ 210
(G) ('52) AIR 1952 Mad 81: ILR (1952) Mad 1 (FB)
(H) ('50) AIR 1950 Nag 222: ILR (1950) Nag 830
(I) ('51) AIR 1951 Pat 612: 30 Pat 438
(J) ('51) AIR 1951 Orissa 141: ILR (1951) Cut 663
(K) ('28) AIR 1928 Cal 640: 56 Cal 512 (SB)
(L) ('52) AIR 1952 Bom 303: ILR (1952) Bom 606
(M) ('41) AIR 1941 FC 5: 1940 FCR 84 (FC)

RAJAMANNAR C. J.: This is an application for leave to appeal to the Supreme Court of India against the decree and judgment of this Court in A. S. No. 2 of 1947 dated 24-8-1951. The petitioners are defendants 1 to 4 in O. S. No. 47 of 1945 on the file of the Court of the Subordinate Judge of Kakinada. The suit was instituted by respondent 8 for partition of certain items of immoveable property and for delivery of possession to him of a fourth share in the first item and a half share in the second and third items. The petitioners supported the plaintiff's claim. Petitioner 1 claimed for himself a fourth share in item 1 and a half share in items 2 and 3, while petitioners 2 to 4 claimed a 12th share in the first item alone. The contesting defendants were defendants 5 to 11. The Subordinate Judge passed a preliminary decree for partition, but on appeal by defendants 5 to 11 this Court reversed the decision of the Court below and dismissed the suit in toto.

(2) When this application originally came on before Satyanarayana Rao and Chandra Reddi JJ. who had disposed of the appeal it was found that the value of the subject-matter of the suit was over Rs. 10,000 but less than Rs. 20,000. The value of the subject-matter of the proposed appeal was above Rs. 20,000 according to petitioners and below Rs. 20000 according to the respondents, though presumably it was above Rs. 10000. The respondents raised the objection that the petitioners were not entitled to leave, because the case did not fulfil the pecuniary requirements of Art. 133 of the Constitution. The petitioners, on the other hand, contended that by reason of Art. 135 of the Constitution they had a right of appeal though the value was below Rs. 20000, because the value was over Rs. 10000 and they would have had a right of appeal under Ss. 109 and 110, Civil P. C., as they stood before the Constitution. The learned Judges thought that as the question was of some importance the matter should be considered by a Full Bench.

(3) Before dealing with the contentions on either side it is useful to refer to the statutory provisions governing the rights of appeal against decrees, judgments and final orders of a High Court to a higher Court. Under Cl. 39, Letters Patent an appeal lay to the Privy Council from any final judgment, decree or order of the High Court in any matter not being of criminal jurisdiction, provided 'inter alia' that the sum or matter at issue was of the amount or value of not less than Rs. 10000. The corresponding provision is found in Ss. 109 and 110, Civil P. C. A new Court was created in India, called the Federal Court, by the Government of India Act, 1935, on which was conferred a limited appellate jurisdiction in respect of judgments, decrees and final orders of a High Court. Under S. 205, sub-s. (1) an appeal lay to the Federal Court from any judgment, decree or other final order of a High Court if the High Court certified that the case involved a substantial question of law as to the interpretation of the Government of India Act, 1935 or any Order in-Council made thereunder. This provision did not in any

way affect the appellate jurisdiction of the Privy Council. The appellate jurisdiction of the Federal Court was enlarged by Act 1 of 1948 passed by the Dominion Legislature. This Act, called the Federal Court (Enlargement of Jurisdiction) Act, 1947, came into force on 1-2-1948. From that day an appeal lay to the Federal Court from any judgment, decree or final order of a High Court in a civil case from which a direct appeal could have been brought to His Majesty in Council either with or without special leave if that Act had not been passed. From that day no direct appeal lay to His Majesty in Council either with or without special leave from any such judgment, decree, or final order. If an appeal could have been brought to His Majesty in Council without special leave under the provisions of the Civil Procedure Code, 1908, in any case, then an appeal lay to the Federal Court without special leave of the Federal Court. But in other cases an appeal lay with the special leave of the Federal Court. Under S. 6 of the Act it was enacted that the provisions of the Civil Procedure Code, 1908, shall from that day have effect in relation to an appeal from a judgment to which that Act applied as if in the said provisions, for all references to His Majesty in Council there had been substituted references to the Federal Court.

In 1949 the Constituent Assembly passed an Act called the Abolition of Privy Council Jurisdiction Act which came into force on 10-10-1949. The jurisdiction of His Majesty in Council to entertain and dispose of appeals and petitions from or in respect of any judgment, decree or order of any Court or Tribunal (other than the Federal Court) within the territory of India including appeals and petitions in respect of criminal matters ceased. From that day, on the Federal Court was conferred in addition to the jurisdiction conferred on it by the Government of India Act, 1935 and the Federal Court (Enlargement of Jurisdiction) Act, 1947 the jurisdiction to entertain and dispose of appeals and petitions which His Majesty in Council had, by virtue of His Majesty's prerogative or otherwise immediately before the appointed day. It was provided that for all references to His Majesty in Council there should be substituted references to the Federal Court. The Federal Court ceased to exist on the coming into force of the Constitution, and the Supreme Court came into being. On the same day on which it came ino force, namely, 26-1-1950, the President made an order under cl. (2) of Art. 372 of the Constitution called the Adaptation of Laws Order, 1950. Section 3 of this Order runs thus:

"As from the appointed day the existing Central laws mentioned in the schedules to this order shall, until repealed or amended by a competent legislature or other competent authority, have effect subject to the adaptations and modifications directed by those schedules or if it is so directed shall stand repealed."

(4) In the portion of the schedule relating to the Code of Civil Procedure for Rs. 10000 in S. 110 of the Code, Rs. 20000 was substituted. This was evidently to bring the Code into conformity with Art. 133(1) of the Constitution, the material part of which runs as follows:

"An appeal shall lie to the Supreme Court from any judgment, decree or final order in a civil proceeding of a High Court in the territory of India if the High Court certifies——

(a) that the amount or value of the subject matter of the dispute in the Court of first instance and still in dispute on appeal was and is not less than twenty thousand rupees or such other sum as may be specified in that behalf by Parliament by law."

(5) Article 395 of the Constitution repealed the Government of India Act, 1935, together with all enactments amending or supplementing that Act, but the repeal did not include the repeal of the Abolition of Privy Council Jurisdiction Act.

(6) The argument of Mr. Bhimasankaran learned counsel for the petitioners, is this: Parties to a suit instituted before the Constitution have a vested right to appeal to the Supreme Court as they had a vested right of appeal to His Majesty in Council when the suit was instituted and for that right must be deemed to have been substituted the right to appeal first to the Federal Court and then to the Supreme Court. It is this right among other rights which is embodied in Art. 135 of the Constitution which runs tnus:

"Until Parliament by law otherwise provides, the Supreme Court shall also have jurisdiction and powers with respect to any matter to which the provisions of Art. 133 or Art. 134 do not apply if jurisdiction and powers in relation to that matter were exercisable by the Federal Court immediately before the commencement of this Constitution under any existing law."

(7) To an application for leave to appeal to the Supreme Court in cases in which the suit was instituted before the coming into force of the Constitution, Art. 133 of the Constitution will not apply and such a case would be a matter in respect of which jurisdiction was exercisable by the Federal Court immediately before the commencement of the Constitution under an existing law. "Existing law" would include the Code of Civil Procedure and the Abolition of Privy Council Jurisdiction Act and the Federal Court (Enlargement of Jurisdiction) Act. As, immediately before the commencement of the Constitution, the Federal Court could have entertained an appeal in a case where the amount or value of the subject-matter of the dispute was more than Rs. 10000 and less than Rs. 20000, an appeal would lie to the Supreme Court in such a case. In support of his argument learned counsel for the petitioners relied on the well known principle laid down in — 'Colonial Sugar Refining Co. v. Irving', 1905 A. C. 369 (A), and to the decision of the Full Bench of this Court in — 'Vasudeva Samiar', In re, AIR 1929 Mad 381 (B), namely, that when a party institutes a suit he has a right of appeal and further appeals as they existed at the time of the institution and such rights are vested rights which can only be taken away by express enactment or necessary intendment.

(8) It must now be taken as well established that the institution of a suit carried with it the implication that all appeals then in force are preserved to the parties thereto till the rest of the career of that suit. But there are exceptions to the application of this rule. One exception is where by competent enactment such right of appeal is expressly or impliedly taken away with retrospective effect. Another exception is that a right of appeal is lost if the Court to which an appeal then lay, that is, at the time of the institution of the suit, is subsequently abolished. Such a position arose in — 'Canada Cement Co. v. East Montreal Corporation', AIR 1921 P. C. 219 (C). An excellent summary of the effect of this decision is given by Coutts-Trotter C. J. in — 'AIR 1929 Mad 381 (B)', as follows:

"In that case what was taken away was not the right of appeal but the very Court to which the appeal lay, namely, the superior Court of Montreal sitting in review. By 10 George V, Chap. 79 (Quebec), the right of appeal was transferred from the abolished Court to the Appellate Side

of the Court of King's Bench in Quebec, but no provision was made for the transference of appeals which would have lain to the abolished Court to the newly constituted Appellate Court. In these circumstances their Lordships of the Privy Council held that an appeal from the Circuit Court to the Court of the King's Bench did not lie."

(9) Now, the suit in the present case was instituted in 1945. On that date the final Court of Appeal was the Privy Council. Strictly speaking, if any right was vested in the parties to the suit on the date of its institution, it was a right to finally appeal to the Privy Council. But from 1-2-1948 such a right was expressly abolished. There was no doubt no abolition of a Court as such, but substantially that was the result. From that day the Privy Council ceased to be a Court of Appeal from the Indian High Courts. Such right as was vested in the parties to the suit to appeal to the Privy Council, therefore came to an end on that day. Instead the parties may be said to have obtained an alternative right of appeal to the Federal Court. But what must not be overlooked is that this is not because the parties had a vested right, but because the Federal Court (Enlargement of Jurisdiction) Act specially provided for the substitution of the final appellate forum, (vide S. 3 of that Act). Care was taken to save proceedings pending both in the High Courts and in the Privy Council on the date of the coming into force of that Act, as otherwise such proceedings would have lapsed. Under S. 4 of that Act all proceedings and steps taken in, and orders made and certificates granted by a High Court in connection with an appeal to His Majesty in Council shall be deemed to be proceedings and steps taken, orders made and certificates granted in connection with an appeal from that judgment to the Federal Court. Likewise, under S. 5 every application to His Majesty in Council for special leave stood transferred to the Federal Court to be disposed of by that Court as if it had been an application duly made to that Court. Similar provisions are to be found in the Abolition of Privy Council Jurisdiction Act, 1949 (Ss. 6, 7 and 8). But for such provisions even pending proceedings before the Privy Council or in the High Courts in respect of appeals to Privy Council would have terminated. It follows, therefore, that the utmost that can be said in favour of the petitioners is that immediately before the coming into force of the Constitution the existing law conferred a right on the parties in this case to appeal to the Federal Court. When this Court was abolished by the coming into force of the Constitution the question is, were any rights substituted for the rights which existed at the time? Article 374(2) specially provides for all suits, appeals and proceedings, civil or criminal, pending in the Federal Court at the commencement of the Constitution. These shall stand removed to the Supreme Court and the Supreme Court shall have jurisdiction to hear and determine the same. But we find no provision made as regards proceedings by way of appeal or otherwise not pending in the Federal Court at the commencement of the Constitution which might have been taken in the Federal Court or in the High Court in respect of an appeal to the Federal Court. There is no indication as to what is to happen to such proceedings which had not commenced by the date of the Constitution.

(10) Mr. Bhimasankaran contended that Art. 135 was intended to apply to such cases. A case in which an appeal would have been competent to the Federal Court under S. 110, Civil P. C., as it then stood, namely, where the value of the subject matter in dispute was more than Rs. 10000, even though less than Rs. 20,000 would be a matter to which the provisions of Art. 133 would not apply, but a matter in relation to which jurisdiction and power were exercisable by the Federal Court immediately before the commencement of the Constitution. The expression "any matter to which the provisions of Art. 133 or Art. 134 do not apply" should be construed widely so as to include a case which did not fulfil the requirements, pecuniary or otherwise, of Art. 133(1).

(11) Learned counsel for the petitioner relied upon several decisions of this Court as well as other High Courts. In — 'Ramaswami v. Ramanathan', AIR 1951 Mad 251 (D), a Division Bench consisting of Subba Rao and Panchapakesa Ayyar JJ. held that an appeal lies against the judgment and decree of the High Court delivered prior to the commencement of the Constitution if an appeal lay to the Federal Court when such judgment was delivered. They observed:

> " 'Matter' in Art. 135 is a word of wide connotation. I may include subject matter not dealt with by Arts. 133 and 134 but governed by specific Acts in regard to which appeals lay to the Federal Court immediately before the commencement of the Constitution. But there is no reason to exclude from its operation subject-matter below the pecuniary limits prescribed under Art. 133 of the Constitution if the jurisdiction and powers in relation to that matter were exercisable by the Federal Court immediately before the commencement of the Constitution. It would certainly be a subject matter in regard to which the provisions of Art. 133 or Art. 134 do not apply."

It was urged before them that the Federal Court could not have exercised jurisdiction till this Court gave leave and that as no leave had been obtained before the commencement of the Constitution the jurisdiction and powers of the Federal Court were not exercisable in regard to the matter. But on a perusal of the relevant provisions the learned Judges held that the jurisdiction of the Federal Court did not depend upon the certificate but on a compliance of the conditions laid down in the relevant sections. This decision was followed by another Division Bench to which I was a party — 'Palani Gounder v. Rama Goundan', C. M. P. No. 3990 of 1949 (E). After referring to the decision in — 'AIR 1951 Mad 251 (D)', we said:

> "It may be that there is an arguable case for a contrary view, but we propose to follow the decision of the Division Bench as this point is bound to be decided sooner or later by the Supreme Court itself."

(12) The decision in — 'Venkataswami v. Manikyam', AIR 1951 Mad 723 (F) does not carry us further. In — 'Saraswathi v. Rajagopal', AIR 1952 Mad 81 (G), the point was not specially argued as the question referred to the Full Bench was whether one single appeal was maintainable to the Supreme Court when there were two appeals to this Court arising out of the same suit. In the course of my judgment I said, referring to the two earlier decisions

> "as the appeals in this Court were disposed of and the application for leave to appeal was filed before the coming into force of the Constitution, the provisions of Ss. 109 and 110, Civil P. C. as they stood on the date of the application, would apply to the case: vide — 'AIR 1951 Mad 251 (D) & — 'C. M. P. No. 3990 of 1949 (E)'."

The Full Bench certainly did not consider the question.

(13) I shall now refer to the decision of other High Courts on which Mr. Bhimasankaram placed reliance. One important difference between the cases in which these decisions were given and the case before us is that in all those cases the judgments of the respective High Courts were delivered before the Constitution came into force and the applications for leave also appear to have been filed before that date, whereas in the present case both the judgment of this Court and the application for leave are after the Constitution. In — 'Nandlal v. Hiralalsao', AIR 1950 Nag 222 (H), the valuation was over Rs. 10000 but less than Rs. 20000. But the learned Judges held that a certificate should issue permitting an appeal to the Supreme Court. The reasoning of the learned Judges was that the application for leave pending on the date the Constitution was brought into force, that a vested right existed in the applicants to file an appeal as of right before the Federal Court and that right could only be taken away by express provision of law or by necessary intendment, that Art. 133 is not retrospective and therefore must be taken not to apply to the case and the jurisdiction must be held to be preserved by virtue of Art. 135. The only authority cited in the judgment is — '(1905) A. C. 369 (A)'. It is not clear whether the learned Judges based their decision on the fact that the application for leave was pending on the date the Constitution came into force. If that is a material fact, then it is absent in the present case.

(14) In — 'Netlal v. Ucheshwar', AIR 1951 Pat 612 (I), the case did not satisfy the requirement as to valuation under Art. 133(1), though it fulfilled the requirements under S. 110, Civil P. C., as it stood before the Adaptation of Laws Order. The learned Chief Justice and Chatterji J. held that Art. 133 did not apply, but under Art. 135 an appeal could be filed to the Supreme Court. The learned Judges appear to have attached importance to the fact that the decree sought to be appealed from was passed and the application for leave to appeal was filed before the Constitution. The learned Judges based their decision on Art. 135 of the Constitution because Art. 133 would not apply where the right to appeal acquired before the Constitution came into force. The learned Judges 'inter alia' observed:

"As soon as the judgment was pronounced and the decree made, the petitioner as an aggrieved party, had a right to prefer a direct appeal to His Majesty in Council under the provisions of Ss. 109 and 110, Civil P. C..... Under this Act (The Federal Court Enlargement of Jurisdiction Act) ..... appeals in all civil cases from which a direct appeal could have been carried to His Majesty in Council either with or without special leave could lie to the Federal Court under the provisions of the Civil Procedure Code, 1908. The present application was filed for leave to appeal to the Federal Court. Now under the Constitution jurisdiction and powers exercisable by the Federal Court immediately before the commencement of the Constitution have vested in the Supreme Court under Art. 135 and it is by virtue of this Article that the jurisdiction in respect of the present case now vests in the Supreme Court."

(15) The learned Judges relied upon an earlier unreported judgment of their Court. In that case Reuben J. adopted a similar reasoning. He said:

"The decree which is sought to be appealed against was passed before the commencement of the Constitution of India and jurisdiction to entertain an appeal against it was exercisable by the Federal Court immediately before the commencement of the Constitution. By Art. 135 the jurisdiction has been transferred to the Supreme Court."

(16) Ray C. J. and Narasimham J. of the Orissa High Court held in — 'Kamal Nayan v. Bira Naik', AIR 1951 Orissa 141 (J), that where an application for leave to appeal had been filed long before the Constitution came into force and the decree involved a claim with respect to property of the value of Rs. 10000 or upwards, Art. 135 applied and certificate for leave to appeal to the Supreme Court should be granted. The learned Judges appear to have based their decision on the doctrine of vested rights, and they refer to the decision of the Special Bench of the Calcutta High Court in — 'Sadar Ali v. Dalimuddin', AIR 1928 Cal 640 (K), which is exactly similar to the Full Bench decision of our Court in — 'AIR 1929 Mad 381 (B). The following passage in their judgment makes it clear that they approached the question from this angle:

"On very high authorities it has been held that the right to appeal is a vested right which vests in the litigant at the time the suit is instituted. By subsequent alteration of the law, either relating to the form or to the other limitations to the right of appeal, it cannot be taken away unless the law purporting to take it away is, either expressly, or by necessary intendment, given a retrospective operation. We have no doubt that Art. 133 has no retrospective operation."

(17) The latest of the decisions in which there is a discussion both of principles & case law is that of the Bombay High Court in — 'Daji Saheb v. Shankarrao', AIR 1952 Bom 303. (L). There too the decree of the High Court had been passed before the Constitution came into force. It appears that an application for leave to appeal to the Federal Court was made before that date, but after the Constitution came into force another application was made for leave to appeal to the Supreme Court. The finding was that the value of the subject matter was between Rs. 11000 and Rs. 13000 on both the material dates. It was held that the applicant was entitled to leave. The learned Chief Justice who delivered the judgment of the Bench starts with a reference to the doctrine of vested right of appeal. When the suit was filed it was not disputed, the petitioner had a right to appeal either to the Privy Council or to the Federal Court. I am unable to exactly follow how at any particular time, say for instance when the suit was filed, there could be a right of appeal either to the Privy Council or to the Federal Court. The learned Chief Justice then had to deal with the contention on behalf of the respondent that the principle of right of appeal being a vested right, could not apply when a new Court is created by the Constitution and a right of appeal is for the first time granted to that Court and as both the Privy Council and the Federal Court had been abolished there is no surviving right and a litigant was not entitled to say that because he had a right to appeal to a Court which no longer existed he therefore had also a right to appeal to a new Court which has been set up with a definite jurisdiction. The learned Chief Justice thought at first blush that this was a very attractive argument. But he finally rejected it on the ground that in many respects it was clear that the Supreme Court was intended to take the place of the Privy Council and the Federal Court. After referring to the Adaptation of Laws Order, 1950 and to the provisions of S. 27 of that Order which provided that nothing in the Order

shall affect the right already acquired under any existing law, the learned Chief Justice observed as follows:

"Now, the right that the petitioner had acquired under S. 110 was to appeal to the Privy Council if the amount or value of the subject matter in dispute was Rs. 10000 or more, and that right which was a vested right was expressly not taken away by the provisions of S. 27 of the Order. Therefore, although after the constitution came into force, the jurisdiction of the Supreme Court in Civil matters is restricted and the power of the High Court to give a certificate under S. 110 has also been modified, these provisions cannot affect the right which a litigant had already acquired prior to the coming into force of the Constitution and which right has been expressly saved."

He added that although the Supreme Court under Art. 133 could not exercise jurisdiction in respect of that matter, in so far as the Federal Court could have exercised the jurisdiction by reason of Art. 135 it has been given the same jurisdiction as the Federal Court. In the concluding portion of his judgment the learned Chief Justice made certain observations which are much wider than was necessary for the purposes of the case, namely,

".....in all matters where there was a right of appeal under S. 110, Civil P. C., that right continues in respect of all suits filed prior to the coming into force of the Constitution."

(18) In all these decisions it was apparently assumed that the expression "any matter to which the provisions of Art. 133 or Art. 134 do not apply" would comprise a case which did not fulfil the requirements of Art. 133 because the valuation was less than Rs. 20000 and not in the limited sense of proceedings which were not in the nature of a judgment, decree or final order in a civil proceeding of a High Court. We shall assume for the present that this wide construction is permissible. But the important question which then arises is, can it be said that a judgment delivered or a decree passed by a High Court after the coming into force of the Constitution is not governed by Art. 133(1)? In my opinion, if a judgment is delivered or a decree or final order is made in a civil proceeding of a High Court after the commencement of the Constitution then the provisions of Art. 133(1) would directly apply. What evidently Mr. Bhimashankaram wants us to do, though he did not say so in so many terms, is to read the words "any judgment, decree or final order" as meaning "any judgment, decree or final order in a suit or other proceeding instituted after the coming into force of the Constitution"—a construction which will practically render Art. 133(1) a dead letter for many years to come. I see no justification to read into the article the qualification suggested by his argument.

(19) Moreover I think it is a wrong construction of that expression to say that Art. 133 does not apply to a case when what is meant is that the case does not fulfil the requirements of the Article. Whether a particular article or provision of law applies to case is one thing; it is quite another thing applying that Article to determine if a party is entitled or not entitled to the relief he claims. To give an instance, if a suit is for breach of a contract not registered, the article of the Limitation Act applicable to it would be Art. 115. But the question whether applying that Article, the particular claim in the suit is or is not barred is quite another matter. Any number of such instances can be given. It appears clear to me that Art. 133 would certainly apply to any judgment, decree or final order in a civil proceeding of a High Court in the territory of India delivered or passed after the commencement of the Constitution. The decree now ought to be appealed is one such. It therefore cannot be held that this is a matter to which the provisions of Art. 133 do not apply and therefore Art. 135 will apply. Indeed, Mr. Bhimashankaram rightly conceded that if it be held by us that Art. 133 will apply to the case, then he cannot rely on Art. 135. There would be no question of the application of the rule which enunciates a presumption against retrospective operation because the Article (Art. 133) is not sought to be applied to a judgment, decree or order before the date on which Art. 133 came into force. In none of the cases decided by the other Courts to which reference was made earlier was there necessity to deal with the case of a decree passed after the Constitution.

(20) There are undoubtedly observations in the decision of the Bombay High Court which appear to support the contention based on vested rights accruing on the institution of a suit. With great respect to the learned Judges I must say that the proper approach in this case is not from that aspect. In the present case, if the material date is taken to be the date of the institution of the suit, then the vested right which accrued to the petitioner must be a right to finally appeal to the Privy Council. Now that right cannot possibly be exercised. The Privy Council as an appellate forum has ceased to exist. Therefore, in strictness, the vested right cannot be enforced as such. No doubt a new Court has been substituted for the Privy Council. But then, the party's right should be founded on the provisions relating to the jurisdiction and powers of the new Court and not on an extension of the vested right already existing. If, say, a new Court was established but no provision was made for filing appeals to the new Court, in cases where appeals could have been filed to the Court which ceased to exist, then obviously there would be no right of appeal to the new Court in spite of the doctrine of vested rights. This is the principle laid down in — 'AIR 1921 P. C. 219 (B). There is no provision so far as I am aware which confers in all matters in which an appeal could have been preferred to the Federal Court before the Constitution a right to appeal to the Supreme Court. I do not read Art. 135 as such a provision. Art. 135 confers on the Supreme Court all the powers and jurisdiction of the Federal Court only in matters to which Art. 133 or Art. 134 does not apply.

(21) There is another aspect of the question to which I shall briefly refer. It was held in — 'Lachmeswar v. Keshwarlal', AIR 1941 F. C. 5 (M), that unless an appeal to the Federal Court had been admitted the proceedings must be deemed to be pending before the High Court in respect of which the Federal Court could not exercise jurisdiction. If that be so, how can it be said that a case in which the decree was passed after the commencement of the Constitution is a matter in relation to which jurisdiction and powers were exercisable by the Federal Court immediately before the commencement of the Constitution? In my opinion it is at least necessary that the judgment should have been delivered or the decree or final order passed before the Constitution to say that the Federal Court had any exercisable jurisdiction and powers in relation to a case. Whether it is also necessary that an application for leave should have been filed or granted before that date, it is unnecessary to discuss now, as in the present case neither event has happened before the Constitution.

(22) Mr. Somasundaram for the respondents contended that one cannot speak of the vested right of appeal being taken away if all that had happened is a change in the conditions and requirements to be fulfilled before the right of appeal can be enforced. The argument is no doubt attractive, but I am afraid it is not open after the ruling of the Full Bench in — 'AIR 1929 Mad 381 (B)', for there too it could have been argued on the same analogy that the right of filing an appeal under Cl. 15, Letters Patent was not taken away but only a condition imposed, namely, that leave should be obtained.

(23) My conclusion is that Art. 133(1) of the Constitution applied to this case and therefore the requirements as to valuation must be determined by the provisions of Cl. (a), viz., that the amount or value of the subject matter of the dispute in the Court of first instance and still in dispute on appeal was and is not less than Rs. 20,000.

(24) With this expression of opinion the petition will go before the learned Judges who referred the matter to the Full Bench.

A/D.R.R. Reference answered.

A. I. R. 1953 MADRAS 884 (Vol. 40, C. N. 347)

RAJAMANNAR C. J. AND
VENKATARAMA AIYAR J.

Kodali Bapayya and others, Appellants v. Yadavalli Venkataratnam and others, Respondents.

Second Appeal Nos. 910 to 920 of 1947 and A. A. O. No. 197 of 1947, D/- 21-9-1951.

(a) Grant — Construction — Grant styled as Bhoodhana Dharma Sasana Patram, held passed both Kudiwaram and Melwaram to the grantee. AIR 1949 PC 278 and AIR 1929 PC 115, Distinguished; AIR 1919 PC 111, Relied on. **(Paras 2, 3, 6)**

(b) T. P. Act (1882), S. 106 — Notice under, sent by registered post and returned with postal endorsement "refused" — Letter correctly addressed — Postal endorsement is admissible in evidence even though the postman is not examined and unless rebutted it is sufficient notice under S. 106 — (Evidence Act (1872), S. 16). AIR 1935 Bom 247, Dissented from. Case law reviewed. **(Para 13)**

Anno: T. P. Act, S. 106 N. 45; Evidence Act, S. 16 N. 1.

(c) T. P. Act (1882), Ss. 106, 116 — Terms as to notice cannot be imported under S. 116 when tenant holds over. Case law referred. **(Para 15)**

Anno: T. P. Act, S. 106 N. 32; S. 116 N. 12.

(d) T. P. Act (1882), Ss. 106 and 117 — Agricultural lease — Provisions as to notice are applicable on grounds of justice, equity and good conscience — But it is enough if the notice is in fact reasonable. Case law referred. **(Para 18)**

Anno: T. P. Act, S. 106 N. 49; S. 117 N. 2.

P. Somasundaram and U. Sethumadhawa Rao, for Appellants; M. S. Ramachandra Rao and A. L. Narayana Rao, for Respondents.

CASES CITED:

(A) ('44) AIR 1944 Mad 365: 1944-1 Mad L J 160
(B) ('49) AIR 1949 PC 278, ILR (1950) Mad 567 (PC)
(C) ('29) AIR 1929 PC 115: 52 Mad 453 (PC)
(D) ('33) AIR 1933 Mad 194: 145 Ind Cas 588
(E) ('45) AIR 1945 Mad 114. 1944-2 Mad LJ 387
(F) ('19) AIR 1919 PC 111: 43 Mad 166 (PC)
(G) ('88) 15 Cal 681
(H) ('71) 16 WR 223
(I) (1860) 157 ER 1285: 5 H & N 518
(J) ('13) 20 Ind Cas 363: 17 Cal W N 1073
(K) ('15) AIR 1915 Cal 313: 19 Cal WN 489
(L) ('20) AIR 1920 Cal 287 (2): 54 Ind Cas 5
(M) ('35) 39 Cal WN 934
(N) ('48) 52 Cal WN 659
(O) ('26) AIR 1926 Lah 520: 94 Ind Cas 103
(P) ('38) AIR 1938 All 388: 176 Ind Cas 393
(Q) ('35) AIR 1935 Bom 247: 156 Ind Cas 1020
(R) ('34) AIR 1934 Cal 135: 37 Cal WN 971
(S) ('05) 8 Cal WN 901: 32 Cal 123
(T) ('34) AIR 1934 Mad 458: 58 Mad 75
(U) ('46) S. A. Nos. 2124 and 2125 of 1945 and C. R. P. Nos. 138 to 140 of 1946 (Mad)
(V) ('28) AIR 1928 Mad 687: 110 Ind Cas 398
(W) ('10) 8 Ind Cas 362: 1910 Mad WN 794
(X) ('38) AIR 1938 All 649: 178 Ind Cas 986
(Y) ('19) AIR 1919 Mad 12: 42 Mad 654
(Z) ('25) AIR 1925 Mad 346: 20 Mad LW 941
(Z1) ('49) AIR 1949 Mad 127: 1947-2 Mad LJ 559
(Z2) ('09) 2 Ind Cas 656: 36 Cal 927
(Z3) ('21) AIR 1921 Cal 126: 33 Cal LJ 299
(Z4) ('33) AIR 1933 Cal 745: 60 Cal 771

VENKATARAMA AIYAR J.: This batch of second appeals arises out of suits instituted by the respondent for ejecting certain tenants. The properties are situated in a village called Yanikepadu. In 1754 one Venkatarayanim Garu who is stated to have been the then Zamindar of Bezwada granted them as inam to one Chandrasekhara Sastri, Ex. P. 1 and the inam was confirmed in 1865 during the enfranchisement proceedings. The plaintiff is the successor-in-interest of the inamdar. The defendants are the tenants in possession of various parcels of land comprised in this inam.

(2) The plaintiff sued to eject them and to recover mesne profits. The defendants resisted the suits on the ground that they had occupancy rights in the land and that therefore, they could not be evicted. They also pleaded that there was no notice to quit as required by law and that, therefore, the suits were not maintainable. The learned District Munsif held that the defendants had not established occupancy rights and that, therefore, they were liable to be ejected. He also held that the plaintiff had sent registered notices to the defendants calling upon them to surrender possession and that the defendants had refused to receive them and that was sufficient notice. In the result the suits were decreed.

On appeal the learned Subordinate Judge held that under the grant Ex. P. 1 both kudiwaram and melwaram passed to the inamdar; that the defendant had not established any occupancy right and that, therefore, they were liable to be ejected. On the question of notice he held that there was no notice because the postal endorsement was not sufficient to establish refusal thereof by the defendants. But he held that as the lease deeds executed by the defendants contained a provision that they would surrender possession without notice they must be deemed to hold on the same terms when they continued in possession after the expiry of the lease period and that therefore no notice was necessary. In the result he confirmed the decrees of the first Court.

Against that decision the defendants have preferred these second appeals. On the first question as to the right of the plaintiff to eject the defen-

dants, it was contended by Mr. P. Somasundaram the learned advocate for the appellants that the findings of the Court below were substantially based on the decision in — 'Venkateswariu v. Lakshmanna', AIR 1944 Mad 365 (A), and as that had been reversed in — 'Lakshmanna v. Venkateswarlu', AIR 1949 PC 278 (B), the lower Court should be directed to rehear the appeals and send revised findings in the light of the decision of the Privy Council. We do not consider it necessary to do so because we have the original grant before us and all the relevant materials necessary to come to a correct conclusion have been placed before us.

Exhibit P. 1 is the original grant of the year 1754 by K. Venkatarayanim Garu to Sri Chandrasekhara Sastri. It runs as follows:

> "Fasli 1164: For the purpose of your maintenance, I have as manyam given for you free in the name of Sitharama Jonnapalam (land) of the extent of one Khatti Kesarapalli Khathi.... in Venikipedu of Bezwada. So you may, getting the said land cultivated every year, enjoy the whole produce thereof from your son to grandson in succession and live happily blessing us."

This document is styled as Bhoodhana Dharma Sasana Patram and the word "Bhoodhana" is more consistent with the grant of the land than melwaram. The words "that the grantee is to get the land cultivated and enjoy the whole produce" clearly show that what is granted is both the warams. Ex. P. 4 is the confirmatory grant made by the succeeding Zamindar, Thirupathirayanim Garu. It sets out the prior grant and adds:

> "So, you shall cultivate the said land and raise crops, therein every year and pay to the Diwanam madas per year and happily enjoy the remaining produce from your son to the grandson and so in succession."

Exhibit P. 5 is the extract from the inam register. It refers to the original grant of 1754 and the confirmatory grant of 1795 and the inam is confirmed. In column 21 it is mentioned "since fasli 1210 the whole extent was left uncultivated for the last about 60 years". This is a very important circumstance showing that there could not have been occupancy tenants on the land. We have then Ex. P. 12 series which are lease deeds executed by various tenants in respect of several holdings. They cover the period of 1874 to 1936. They are for a period of three years and are renewed from time to time.

(3) From 1890 they contain a provision that the tenants should surrender possession at the expiry of the stipulated period. The lease deeds executed in the year 1919 and thereafter also contain recitals that the tenants would not raise disputes, that they possessed no other right and that they would relinquish possession without further notice. Exhibit P. 3 series are dambalas directing the karnam and the kapu of the village to allow the grantee to harvest and take the produce. These are the material documents bearing on the question and on them it is impossible, in our opinion, to come to any other conclusion than that the grant was of both the warams and not merely melwaram. That is the conclusion to which the Courts below have come and we are in agreement with it.

(4) Mr. P. Somasundaram the learned advocate for the appellants contends that on the facts above stated the plaintiff could not be held to be entitled to both the warams and he relied on the decisions in — 'AIR 1949 PC 278 (B) and — 'Seethayya v. Subramania Somayajulu', AIR 1929 PC 115 (C). In — 'AIR 1949 PC 278 (B)', the original grant was not available. The question then arose as to whether the burden was on the plaintiff landlord to prove that he was the grantee of both the warams or on the tenants to show that they had occupancy rights. Then holding that the burden was on the landlord, the Privy Council observed that the facts established in that case did not shift the burden. On the other hand three facts were mentioned as supporting the case of the defendant, namely, (1) that the grant was to a non-resident Brahmin; (2) none but the members of the two families who constituted the entire body of the cultivating tenants had been in possession of such lands and (3) various partitions and consequent divisions of the property that had taken place had been recognised by the inamdar.

(5) As already observed if we had not the original grant it might be a question as to whether the facts in this case are sufficient to shift the burden which the law casts on the plaintiff. But as it is Ex. P. 1 and P. 4 clearly show that the grant was of both the warams and the terms of the dambalas and the fact that there was no cultivation of the lands for a period of 60 years lend further support to this conclusion. In — 'AIR 1929 PC 115 (C), a copy of the original grant was available. It was a grant of shrotriam made by the Deshpandyas who were revenue officers under the paramount authority. The grantees were the residents of another village and the grant itself was of Moujee which was conceded to be a village in which there were peasant proprietors. On these features the Privy Council came to the conclusion that the grant was only of the melwaram. In this case it does not appear that the grantee was not a resident of the place. It is also found by the Courts below that the lease deeds are some of them in favour of the members of the Kamma families and others in favour of a Vaisya family; and that sometimes they are in favour of strangers, even Mohammadans. The grant again was made not by a farmer of revenue but by the Zamindar and the language of the grant clearly and unmistakably shows that both the warams were granted. Some argument was sought to be addressed on the basis of a letter which is said to be "ma" occurring in Ex. P. 1 it being contended that it means Mouza. It was stated in — 'AIR 1929 PC 115 (C)', that the use of the word Mouza was evidence of the existence of peasant proprietors. In — 'Kondapa Naidu v. Mahalakshmamma', AIR 1933 Mad 194 (D), in answer to a similar contention it was observed that the significance of the letter "ma" as meaning existence of peasant proprietors was a matter of agreement in the Privy Council case; and that in the absence of such agreement no inference could be drawn from the use of the letter. A similar conclusion was reached by Lakshmana Rao and Horwill JJ. in — 'Ramulu v. Venkata Suryanarayana Raju', AIR 1945 Mad 114 (E).

(6) Mr. Somasundaram contended that the language of Ex. P. 10 being that the grantee is to get the lands cultivated, that is evidence that there were tenants on the land. He also referred to the fact that the dambalas were addressed to the karnam and kapus and he says that kapu here means the tenant on the land. In this context, kapu naturally would refer to village headman. The words that the grantee should get the land cultivated is an indication that the grantee can make his own arrangements for cultivation which is rather inconsistent with the existence of tenants having occupancy rights on the land. Words similar to those used in Ex. P. 1 have been construed in this Court as conferring

on the grantee full rights over the land. In — 'AIR 1945 Mad 114 (E)', the grantee was exhorted to make the land bear fruit and enjoy the fruits thereof and it was held by Lakshmana Rao and Horwill JJ. that these words are inconsistent with only melwaram having been granted. They observe:

"The fact that the grantee was to make the land bear fruit and to enjoy the fruits thereof, suggests that he was to cultivate the lands himself or get them cultivated by others."

In — 'AIR 1933 Mad 194 (D)', the words of the grant were:

"You shall get the lands cultivated extensively year after year and make them yield, pay as aforesaid, the circar beriz year after year and enjoy the entire produce realised therefrom as long as the Sun and the Moon last from son to grandson and so on in succession and be happy."

It was held by Madhavan Nair J. as he then was, that the grant comprised both the warams. He also observed:

"The expression 'you shall get the lands cultivated' does not necessarily show that the lands were already in the possession of the tenants and the grantee is to get them cultivated by them as contended for by Mr. Somayya. It is quite consistent with the meaning that it was the entire village that was granted under the deed. The grantee being a Brahmin, who does not generally cultivate lands, the grantor may well say he should get the lands cultivated by them."

A case which is near the present one is the decision reported in — 'Venkatasastrulu v. Seetharamulu', AIR 1919 PC 111 (F). There, the grantee was to take the village as Sarva Agraharam and cultivate the lands and enjoy the produce. The dambalas also stated that the grantee was to reap and enjoy the produce. It was held on these facts that the grantee was entitled to both the warams. We accordingly agree with the Courts below that the grant comprised both the warams, that the defendants had not established any occupancy rights and that the plaintiff is entitled to eject them.

(7) The next question that has to be determined is whether there was valid notice to quit under S. 106, T. P. Act. In May 1936 the defendant had executed lease deeds in favour of the plaintiff, Ex. P. 6 series and one of the terms was that at the expiry of the stipulated period the tenants should surrender possession to the landlord without the necessity of notice. The plaintiff issued registered notices to the tenants, Ex. P. 9 series on 1-1-1939. They were all refused. These notices were sent before the expiry of the period of three years mentioned in Ex. P. 6 series. The tenants continued in possession after the expiry of the period in May 1939. The plaintiff then sent a second set of notices by registered post on various dates in December 1940 and January 1941, Ex. P. 10 series. By these notices the plaintiff required the tenants to vacate the lands by 31-3-1941. These notices were served on some of the defendants and refused by others but all of them gave a common reply to the plaintiff, Ex. P. 11 dated 6-1-1941 disputing the rights of the plaintiff and the validity of the notice. It may be mentioned that the leases are from fasli to fasli and the fasli would end by the 30th of June whereas under Ex. P. 10 series the defendants were called upon to surrender possession by 31-3-1941. Apprehending that Ex. P. 10 series might be held not to conform to the requirements of S. 106, T. P. Act, the plaintiff caused a fresh set of notices to be issued by his vakil and they are Ex. P. 7 series dated 24-12-1942. Two of the tenants were actually served but the notices issued to the other tenants came back with the postal endorsement that they had been refused. On these facts a contention has been raised that no valid notice to quit had been given and that the suits were accordingly not maintainable. Though the defendants pleaded in the written statements that they did not refuse the notice, in the box some of them admitted that they received notice; others did not give any evidence on the matter, while a few of them denied receipt. The learned District Munsif referred to the fact that two of the tenants were actually served in different places and found that on the probabilities notices must have been tendered to the other tenants and refused by them. He accordingly held that there was proper notice. On appeal the learned Subordinate Judge held that the postal endorsements were not evidence of refusal in the absence of evidence by postman and as the defendants had denied receipt of notice the plaintiff had not discharged the burden of proving notice under S. 106, T. P. Act.

(8) Mr. M. S. Ramachandra Rao, the learned advocate for the respondents, contended that the postal endorsement was admissible as evidence of refusal by the tenants and as there was no reliable evidence on the side of the defendants that the endorsement was untrue it must be held that there was proper notice, and he cited a number of authorities in support of this position.

(9) In — 'Jogendro Chunder v. Dwaraka Nath', 15 Cal 681 (G), a notice to quit was sent by registered letter and was returned with the postal endorsement of refusal. In holding that this was sufficient the learned Judges observed:

"Upon the case cited before us — 'Lootf Ali v. Pearee Mohan', 16 WR 223 (H) and — 'Papillon v. Brunton', (1860) 5 H & N 518 (I), and having regard also to S. 16, Ill. (b), Evidence Act, we think that only a captious doubt could lead us to regard that service as insufficient."

In — 'Durganath v. Rajendra Nath', 17 Cal WN 1073 (J), another Bench of the Calcutta High Court followed the decision in — '15 Cal 681 (G), and held that service was sufficiently proved by the production of the postal endorsement. In — 'Gobinda Chandra v. Dwarakanath', AIR 1915 Cal 313 (K), yet another Bench of the Calcutta High Court expressed the opinion that the endorsement was not admissible to prove the tender to or refusal by the defendants.

(10) The decision in — '17 Cal WN 1073 (J)', does not appear to have been brought to the notice of that Court. In — 'Girish Chandra v. Kishore Mohan', AIR 1920 Cal 287 (2) (L), the decision in — 'AIR 1915 Cal 313 (K)', was treated as one on the facts of that case and it was held that the production of the postal endorsement would be sufficient proof.

(11) The learned Judges observed:

"It is trifling with the facts of this case to come to the conclusion that proper service of the notice through the post office has not been made. Each case must stand on its own facts."

In — 'Hari Pada v. Joy Gopal', 39 Cal WN 934 (M), it was held that if the registered letter was returned as refused that in itself, until explained is 'prima facie' good evidence that the addressee had an opportunity of accepting it. All these authorities were reviewed in a case reported in — 'Nirmala Bala v. Provot Kumar', 52 Cal WN 659 (N). The observations in -- 'AIR 1915 Cal 313 (K)', were regarded as opposed to the weight of authority and it was held that the postal endorsement would be evidence of tender and refusal though it was open to the defendant to rebut it.

— 'Sheir Afsal v. Mohanlal', AIR 1926 Lah 520 (O), is another authority for the position that the endorsement would be admissible evidence.

(12) In — 'Bachchalal v. Lachman', AIR 1938 All 388 (P), it was pointed out that by reason of the amendment of Transfer of Property Act by Act 20 of 1929 it was sufficient if the landlord sent a notice by post to the party, that under S. 27, General Clauses Act service should be deemed to have been effected if it was sent by registered post properly addressed and that accordingly even if there was no evidence to show who wrote the word "refused" there was sufficient proof in law of service of notice.

(13) Mr. P. Somasundaram, the learned advocate for the appellants relies on the following observations occurring in — 'Vaman v. Khanderao', AIR 1935 Bom 247 at p. 251 (Q):

"In the case of defendants 4 and 5 a registered letter containing the notice was sent to them duly addressed and service is alleged to have been refused. In fact the refusal was not proved, as the postman who took the letter and brought it back was not called."

Then the learned Judge goes on to observe that even if it was proved that the letter was tendered and refused that would not be notice of the contents of the letter. With great respect we are unable to agree with these observations. We think that the postal endorsement is admissible evidence even if the postman is not examined and that unless rebutted it would be sufficient notice under S. 106, T. P. Act. Turning to the facts of this case the addresses of the tenants were admitted to be correct; two of the addressees were actually served and some of the defendants did not in their evidence even deny the tender of notice to them.

(14) The learned District Munsif did not believe the evidence on the side of the defendants about the non-tender of notice and the judgment of the Court below does not proceed on the footing that this evidence is reliable. It only holds as a matter of law that without the evidence of the postman the endorsement should not be treated as evidence. We are accordingly of opinion that there has been proper notice to the defendants and that, therefore, their contention that the suit is not maintainable for want of notice should be rejected.

(15) These findings are sufficient to dispose of these appeals but certain points arising out of the judgment of the Court below have been fully argued before us and we shall express our opinion thereon. The Subordinate Judge having held that there was no notice to the defendants terminating the tenancy as required under S. 106 of the Transfer of Property Act decided in favour of the plaintiff on the ground that no notice to quit was necessary. The ground of this decision was that in the lease deeds executed by the tenants, Ex. P. 6 series, there was a term that they should surrender possession at the end of the period without notice, that when the defendants continued in possession after the termination of the period they must be deemed to be tenants under S. 116, T. P. Act holding over on the same terms and that therefore, no notice terminating the leases was necessary. Mr. P. Somasundaram the learned advocate for the appellants argues that S. 116 will apply only to terms such as rate of rent but not to stipulations about notice in relation to termination of the tenancy. He relies on the decision in — 'Dasarathi Kumar v. Sarat Chandra', AIR 1934 Cal 135 (R), in support of this position. That case in turn follows the principles laid down in — 'Troilokyanath v. Sarat-chandra', 32 Cal 123 (S), and holds that the agreement to the contrary in S. 116 "must mean an agreement as to the terms of the holding over", and not to the terms of notice. In — 'Gnana Desika Pillai v. Bhoopalarayar', AIR 1934 Mad 458 (T), Sundaram Chetty and Pandrang Row JJ. approved of the decision in — 'AIR 1934 Cal 135 (R)', and observed as follows:

"On the other hand the true test is whether, this clause can really be deemed to be any part of the terms which constituted the transaction of the lease itself. In a recent decision reported in — 'AIR 1934 Cal 135 (R)', it was held that a stipulation in the original lease that, at the expiration of the term, the lessee should give up possession without notice, could not be imported into the new tenancy created by holding over and the acceptance of rent. The principle of that decision is in consonance with the view we have expressed."

In — 'S. A. No. 2124 of 1945' and '2125 of 1945' and 'C. R. P. Nos. 133 to 140 of 1946 (U)', Horwill J. had to deal with this very question as to whether the terms contained in the expired lease could be imported under S. 116 when the tenant holds over. He observed:

"It is argued that a tenant holding over continues to hold the land under the same terms as in the original lease, and that therefore, for subsequent years, as well as for the year of the lease, no notice was necessary. This agreement, however, is not properly speaking a term of the lease; and so does not dispense with the necessity of giving notice if the tenant is allowed to hold over."

There is thus ample authority in support of the position contended for by the appellants. As against this Mr. M. S. Ramachandra Rao the learned advocate for the respondents relied on the decisions in — 'Moosa Kutty v. Kovilakath Thekke', AIR 1928 Mad 687 (V); — 'Kelu v. Ammal Kutti', 1910 Mad WN 794 (W) and — 'Badal v. Ram Barosa', AIR 1938 All 649 (X). In — 'AIR 1928 Mad 687 (V)', the facts were that there was an oral lease for a term and one of the conditions was that the land demised should be surrendered whenever required. It was held that where a tenancy was for a period and it expired by efflux of time there was no need to give notice and that S. 106, T. P. Act applied only to tenants from year to year or tenants at will. This decision is no authority that in the case of a tenant holding over stipulations as to notice in the original lease become applicable under S. 116, T. P. Act. The decision in — '1910 Mad WN 794 (W)', is again not one under S. 116, T. P. Act. The judgment is very brief and is contained in one sentence.

"Seeing that in Ex. A there is an express provision to surrender on demand we think there is a contract to the contrary within the meaning of S. 106, T. P. Act."

We do not consider that this can be taken to be as authority for the position contended for by the respondents. Reliance was also placed upon some observations in — 'AIR 1938 All 649 (X)'. In that case there was a notice to quit and the question was as to when the tenancy must be deemed to have commenced under S. 116. It was held that as the original tenancy commenced on the 24th October for purposes of S. 116 the tenancy by holding over must also be held to have commenced on 24th October. Some of the observations in that case are in wide terms but in our opinion having regard to the authorities referred to above, it must be held that terms as to notice contained in an expired lease should not be held to be

terms of the lease arising by holding over under S. 116.

(16) Mr. Ramachandra Rao argued that even if notice was necessary for ejecting a tenant holding over and even if it is to be held that service of Ex. P. 7 series on the defendants is not established, the notices, Ex. P. 10 series most of which were served on the tenants and to which all of them sent a reply Ex. P. 11 dated 6-1-1941 must be held to be sufficient. His contention is that as the defendants are tenants of agricultural lands S. 106 does not in terms apply and that the requirements of law are satisfied if in fact there is reasonable notice.

(17) Under Ex. P. 10 series the defendants were called upon to surrender possession on 31-3-1941. Though the fasli would end on the 30th of June harvesting would have been completed by 31-3-1941 and the land would lie fallow till the end of June.

(18) It is only thereafter that agricultural operations would commence. Accordingly for practical purposes it will make no difference whether the tenants were called upon to surrender possession on 31-3-1941 or 30-6-1941. It is, therefore, argued, that the notices Ex. P. 10 series were reasonable notices and that on that alone the plaintiff would be entitled to eject the defendants. Under S. 117, Transfer of Property Act the provisions as to notice contained in S. 106 are not 'proprio vigore' applicable to agricultural leases. It has been held in — 'Krishna Shetti v. Gilbert Pinto', AIR 1919 Mad 12 (Y), that though Ss. 105 to 116 are not applicable as such to agricultural leases they would be binding as rules of justice, equity and good conscience. It was held in — 'Jaru Pujari v. Somakke', AIR 1925 Mad 346 (Z), that where notice to quit with reference to agricultural leases was reasonable and in accordance with the custom of the country it was valid though the notice did not require the tenant to surrender possession exactly at the end of the year. In — 'Narayana Nayar v. Kunhan Mannadiar', AIR 1949 Mad 127 (Z1), a Bench of this Court to which one of us was a party after referring to the case in — 'AIR 1939 Mad 12 (Y), observed:

> "One of the principles which the Full Bench decision of this Court cited above laid down should have application in respect of an agricultural lease, is that the lease must be determined by some prescribed notice or at any rate, by reasonable notice; that is to say a notice giving a reasonable time to the tenant to vacate his holding."

In — 'Pratap Narain Deo v. Harihara Singh', 36 Cal 927 (Z2), Jenkins C. J. and Mookerjee J. held that in agricultural leases it was sufficient that the notice was a reasonable one, that it need not determine the tenancy at the end of the year and that whether it is reasonable or not must be determined with reference to all the circumstances. This statement of law was adopted and followed in — 'Ratneswar Das v. Sree Kamal Deb Adikar', AIR 1921 Cal 126 (Z3). In — Nabinchandra v. Ramesh Chandra', AIR 1933 Cal 745 (Z4), it was again held on a review of the authorities that in case of agricultural tenancies it was sufficient if there was reasonable notice. We are of opinion that in this case there was reasonable notice and that on this ground also the plaintiff is entitled to succeed. The result then is that the decisions of the lower Court are correct and these second appeals must be dismissed with costs.

(19) C. M. A. No. 197 of 1947: In this appeal the learned Subordinate Judge had remanded the case for fresh evidence being taken on the question as to whether there was tender of notice to the tenant. The defendant has preferred this appeal challenging the correctness of the finding of the learned Subordinate Judge that the plaintiff was grantee of both the warams under Ex. P. 1. On our conclusion that under Ex. P. 1 the plaintiff was entitled to both the warams, this appeal also fails and must be dismissed with costs.

B/R.G.D. Appeals dismissed.

A. I. R. 1953 MADRAS 888 (Vol. 40, C. N. 348)

BASHEER AHMED SAYEED J.

T. S. Venkatanarayana Iyer, Petitioner v. The State of Madras, through the District Collector, Madhurai, Respondent.

Civil Revn. Petn. No. 1857 of 1950, D/- 10-8-1951.

Court-fees Act (1870), S. 17 — Distinct subjects.

"Distinct subjects" mean distinct subject-matters such as those which are not only distinct but can be clubbed together in a single suit — Words do not include distinct categories of subjects. (Para 7)

Several inams under separate inam deeds resumed by single order — Single suit brought by the several persons affected for setting aside order of resumption and declaring it illegal and a nullity — All persons not interested in each of the inams and all the inams not the joint or common property of all of them — There is no single cause of action for suit and decree if passed in a suit brought by only one of them or a few of them could not enure to the benefit of all — Held suit comprised of distinct subjects and was governed by S. 17. AIR 1950 Mad 404, Distinguished; AIR 1935 Cal 573; AIR 1943 Pat 356, Rel. on. (Paras 8, 10)

Anno: Court-fees Act, S. 17, N. 2, 8, 16.

J. Sivamahalakshmi and N. Rammohan Rao, for Petitioner; Govt. Pleader, for Respondent.

CASES CITED:

(A) ('50) AIR 1950 Mad 404: 63 Mad LW 73
(B) ('50) AIR 1950 Mad 155: 1949-2 Mad LJ 565
(C) ('35) AIR 1935 Cal 573: 63 Cal 163
(D) ('43) AIR 1943 Pat 356: 22 Pat 275

JUDGMENT: This civil revision petition is against the order of the learned Subordinate Judge of Madhurai directing the plaintiffs to pay enhanced court-fee consequent upon his finding on the preliminary issue, namely, whether the court-fee paid and the valuation of the suit were proper? Plaintiff 1 is the petitioner.

(2) Fifteen plaintiffs sued for a decree setting aside the order of the Collector of Madhurai dated 17-10-1947 directing resumption of the plaint schedule lands and for declaring the order to be illegal and a nullity. According to the plaint, the cause of action in the suit arose on 17-10-1947 when the Collector of Madhurai confirmed the Order of the Revenue Divisional Officer of Usilampatti dated 4-4-1947 directing the resumption of the suit lands. In the schedule attached to the plaint, the description of the properties in respect of which the resumption order was passed sets out nine different inams with respective extents of the lands

covered by nine title deeds. The entire extent of the land is stated to be 35.67 acres and for the purpose of jurisdiction the value of the suit lands is given as Rs. 5000.

(3) It transpires that before the Revenue Divisional Officer nine separate applications were filed for resumption, each application relating to the properties covered by each one of the nine title deeds. But the Revenue Divisional Officer heard all the applications together and passed a single order directing the resumption of the lands appertaining to the said nine inam title deeds. The Collector who heard the appeals against this order also confirmed the order of the Revenue Divisional Officer by a single order of his which is now sought to be set aside.

(4) In a prior suit (O. S. No. 104 of 1948) on the file of the Sub-Court of Madhurai filed by the very same plaintiffs against the Province of Madras and also two other parties who had applied for resumption of the suit lands on the ground that the alienations by the service holders were void, the contention of the plaintiffs was that the inam title deeds disclosed the inam grant to comprise only the melwaram and not the kudiwaram, and that in so far as the service was being properly rendered, the lands having been endowed by Hindu Rajahs as manibhams for the purpose of certain service in Sri Mulanathaswami temple at Thenkarai village of Nilakottah Taluk of Madurai district, the resumption was not legal. In that suit, however, the learned Subordinate Judge had held that the total valuation of the suit properties could not be said to be Rs. 10,000 or more. But in the present suit the learned Subordinate Judge relying upon the finding in the previous suit by his predecessor accepted the valuation given in the plaint at Rs. 5,000 especially in view of the fact that it would make no difference if the value of the property was Rs. 5,000 or above but did not amount to Rs. 10,000 or more.

(5) After the filing of the plaint, the Court-fee Examiner pointed out by means of a check-slip that the court-fee of Rs. 15 paid by the plaintiffs under Art. 17(A)(1) of Sch. II, Court-fees Act (hereinafter referred to as the Act) would be Rs. 100 and not Rs. 15. From the judgment of the learned Subordinate Judge, it appears that the plaintiffs conceded that that was the correct position, namely, that instead of Rs. 15, the legitimate court-fee payable on the plaint would be Rs. 100. In the checkslip put up by the Court-fee Examiner it appears that he further pointed out that the valuation of the suit lands totalling about 35.67 acres in extent at Rs. 5000 was grossly inadequate and that each acre would be worth Rs. 1000 and that under Art. 17-A(1) of Sch. II, Court-fees Act Rs. 500 should have been paid as the court-fee as the total value would have exceeded Rs. 10,000 and more. In the written statement the defendant-respondent had pleaded that a single suit in respect of distinct subject which comprised nine different inams covered by nine inam title deeds was not competent and that different suits should have been filed in respect of each one of the inams, that in any event the court-fee paid was grossly inadequate, that each inam should have been separately valued at the market value of lands, and that the court-fee should have been paid with reference to each inam, and that a single court-fee of Rs. 15 paid by the plaintiffs was wholly insufficient in view of the provisions of the Act.

(6) The learned Subordinate Judge who tried the preliminary issue and heard arguments in respect thereof also took into consideration the check slip prepared by the Court-fee Examiner in which the question of valuation and court-fee had been raised. No evidence, however, was adduced by either of the parties with reference to the valuation, and, as already observed, the learned Subordinate Judge proceeded on the basis of the finding of his predecessor in regard to the valuation of the properties and on a consideration of the material available before him, came to the conclusion that since the valuation was under Rs. 10,000 the proper court-fee to be paid would be Rs. 100 for the suit. But on the question as to whether the suit comprised nine distinct subjects within the meaning of S. 17 of the Act or whether it was a single subject that was comprised in the plaint, the learned Subordinate Judge held, agreeing with the contention of the respondent that each one of inams covered by the title deeds was a distinct subject within the meaning of S. 17 of the Act and that the mere fact that the Collector for the sake of convenience passed a single order and the further fact that the suit was similarly, instituted as one suit instead of nine suits, would not exempt the plaintiffs from their obligation to pay court-fee on nine declarations as they were bound to pray for a declaration in respect of each of the nine inams comprised in the nine title deeds and the lands appertaining to them. Having come to this conclusion, the learned Subordinate Judge directed amendment of the plaint to incorporate separate declarations of the same kind in respect of each of the nine inams and also directed the payment of court-fee of Rs. 100 in respect of each of the nine declarations and that Rs. 15 having already been paid, a further sum of Rs. 885 was made payable, within the date stipulated by the order of the learned Subordinate Judge. It is against this order that plaintiff 1 petitioner has now preferred this revision petition.

(7) There can be no question in this case that S. 17 of the Act would govern the case and the only question then is as to what is the correct interpretation of S. 17 of the Act with reference to the facts of the present case. S. 17 of the Act is to the following effect :

> "Where a suit embraces two or more distinct subjects, the plaint or memorandum of appeal shall be chargeable with the aggregate fees to which the plaints or memoranda of appeal in suits embracing separately each of such subjects would be liable under this Act."

This section relates to court-fee payable in respect of multifarious suits. But unfortunately in the whole of the Act the word "subject" has not been defined. Whereas in Ss. 7 and 13 of the same Act which relate to computation of fees payable in certain suits and fees paid on memorandum of appeal, the words used are "subject matter of the suit", in S. 17 of the Act, the words used are "suit embraces two or more distinct subjects". It is not, therefore, clear from the language of the section as such as to whether the word "subject" here means and includes subject matter or whether it means something else. On a reading of the entire provisions of the Act as a whole I am inclined

to the view that the terminology, namely, "distinct subjects" used in S. 17 of the Act should be interpreted to mean distinct subject matters only, and it should also be understood to mean such subject matters as are distinct but which can be clubbed together in a single suit. Otherwise if the words "distinct subjects" are to be construed as including distinct categories of subjects taking the word "subject" in a very comprehensive sense, then the meaning of S. 17 would become absurd; for distinct categories of subjects could not be embraced in a single suit. Obviously, the intention underlying this S. 17 seems to be to provide for suits which involve multifariousness and which do not offend against the other provisions of the Civil Procedure Code, such as misjoinder of causes of action and so forth.

(8) The question then that arises for consideration is whether the present suit embraces different subject matters or whether it involves a single subject matter. The facts of this case disclose that there are nine inams granted to the original service holders for performing the service to the temple and each one of these nine inams has been comprised in separate inam title deed. The extent of each inam varies with the rest and the parties to whom these inams have been granted appear also to have been distinct individuals. Even so, at the time when the inam commissioner issued titles in favour of the respective service holders for the respective lands, he did so in favour of each one of the service holders for the respective lands, notwithstanding the recognition by the Collector of Madurai of the title of Kunjana Iyer who had purchased from the respective manibhamdars at some time prior to 1861. This Kunjana Abyar appears to be the ancestor of plaintiffs 2 to 4 and the predecessor-in-title of the other plaintiffs. At the time of the resumption proceedings before the Revenue Divisional Officer it also transpires that nine separate applications were filed. Only the Revenue Divisional Officer and the Collector contented themselves with passing a single order of resumption in respect of the nine separate service inams and separate title deeds. The reason why all the fifteen plaintiffs have combined in this suit is also obvious, for they want relief in respect of each of the inams comprised by a separate and distinct title deed. It is not, however, the case that each one of the plaintiffs is interested in each one of the nine inams. Nor is it the case that all the nine inams belong to all the fifteen plaintiffs jointly or in common. So that it is fairly clear that the cause of action for each one of the aggrieved parties among the plaintiffs would be only in respect of the inam or the land covered by the inam title deed in which he is interested and he could not have a cause of action in respect of the rest of the items of inams comprised in the present suit. Therefore the construction sought to be put upon the terms "distinct subjects" occurring in S. 17 of the Act by the learned counsel for the petitioner does not seem to be sound. Whether the items involved in the suit are distinct subjects or one and the same subject may also be tested by the fact as to whether, if one of the plaintiffs alone had filed a suit or if a few of the plaintiffs alone had filed the suit and a decree passed therein in favour of such plaintiffs, it would enure to the benefit of the rest of the plaintiffs who have not been parties to the suit. Unless and until the scope of the suit is made comprehensive enough to include all the nine items and unless all the parties interested in each of the subject matters of the suit are before the Court, any decree or order passed by the Court would not be of any avail to set the matters in dispute at rest, as regards the other claimants. The effect of such a procedure adopted actually is that instead of each one filing a separate suit for a declaration in respect of the inam in which he is interested, all the interested parties have combined to file a suit in respect of the nine items involved, so that in effect it means that there are nine suits in respect of nine inams by the parties who are respectively entitled to the same and who want to assert their claim in respect of it and seek a relief from the Court by way of a declaratory decree that the resumption ordered by the Revenue authorities ought not to stand. In other words, each one of the parties who is interested in the inam is claiming a relief in respect of that particular subject matter in which he is interested, and seeks a decree from the Court to nullify the effect of the resumption so far as it operates against that particular subject matter to which he has a claim. It may be convenient for all such people who claims a similar relief on a similar cause of action to combine and file a suit and such a suit would not amount to a single suit comprising a single subject matter. On the other hand, it is a suit of this type that can be called a multifarious suit and it is suits of such a type that are sought to be provided for by S. 17 of the Act. Because it is possible to avoid multiplicity of suits by combining causes of action and parties without offending against the provisions of the Civil Procedure Code, it cannot be contended that such suits ceased to be multifarious, or that they became suits for a single cause of action or they embrace a single subject or subject matter. In this view, I think, each one of the subject matters, namely, the inam comprised by a separate title deed in respect of which there has been an order of resumption should be considered to be a distinct subject and the provision contained in S. 17 of the Act would attract itself to such a suit.

(9) The learned counsel for the petitioner, however, invited my attention to the decision reported in— "Arunachala Pillai v. Ponnuswami Naidu, AIR 1950 Mad 404 (A), where it has been held that a suit filed by a landholder against the ryots of a village under S. 193, Madras Estates Land Act does not comprise "distinct subjects" within the meaning of S. 17, Court- fees Act, and that where such a suit is dismissed and the landholder appeals, the court-fee payable is on the total of the annual rents of the immoveable property to which the suit relates and not on the aggregate of the court-fees separately payable in respect of the rent of the holding of each particular ryot calculated in accordance with S. 7(xi) (b) of the Act. In this decision Ananthakrishna Aiyar J. has considered the question as to whether a suit under S. 193 of the Madras Estates Land Act embraced distinct subjects and has come to the conclusion that since the word subject has not been defined, it would not be unreasonable to hold that a suit under S. 193 did not comprise distinct subjects, and that the suit of the landholder to enhance the rent upon the particular

conditions mentioned in that section which should all exist before a suit under that section can be instituted did not embrace distinct subjects within the meaning of S. 17 of the Act. Though two other Full Bench decisions of this Court and one other Full Bench decision of the Calcutta High Court have been referred to by the learned Judge in the course of his judgment, I do not think these decisions throw much light on the question at issue in this petition. But one thing is clear, namely, the judgment of Ananthakrishna Aiyar J. is authority only for the proposition that a suit filed under S. 193, Madras Estates Land Act, by a single landholder cannot be said to comprise distinct subjects, and cannot come under the purview of S. 17 of the Act. The learned counsel for the petitioner has also invited my attention to another decision reported in "Thangasami Pillai v. Dhanabagiammal" AIR 1950 Mad 155 (B). In that suit that plaintiff had sued for possession of several properties and the prayer in the plaint was that the plaintiff should be put in possession of the "undermentioned" properties through the process of Court and free from obstruction of the defendants who came into possession under different titles from defendant 1 who in violation of a trust had alienated them. On the question as to whether what the proper court-fee payable was, Krishnaswami Nayudu J. held that on the allegations in the plaint and taking the substance of the plaint also into consideration that the suit did not embrace distinct subjects but only one subject as claimed in the prayer in the plaint and as such S. 17 of the Act was not applicable to it. I do not think that the decision in this case applies to the facts of the case under revision. A single plaintiff suing for possession of different items of land in the hands of various defendants has been rightly held to be not coming within the scope of S. 17 of the Act. But in the present case, as already stated, there are fifteen plaintiffs who are not all of them interested in every one of the items of the property but are interested in distinct items comprised in distinct inam title deeds. The only commonality which can be postulated in respect of these distinct subjects is that the Revenue Divisional Officer and the Collector passed a single order of resumption as a matter of convenience. This act of passing a single order for purposes of administrative convenience cannot be said to take away the distinctness of each one of the subjects comprised in the suit filed by the plaintiffs for a declaration that that order should not be held to be operative against each one of the items of the inam. I do not think that the decision has any bearing on the facts of the present petition.

(10) The learned Counsel for the respondent however, invited my attention to a decision in "Haru Bepari v. Kshiteeshbhooshan" AIR 1935 Cal 573 (C). The ruling in that decision in my view applies in all its bearings to the facts of the present case. There several plaintiffs joined in a suit and prayed for declarations affecting the title to their respective jotes and for the removal of cloud upon their titles occasioned by one compromise decree. It was held that proceedings of such a kind embrace as many distinct subjects as the titles affected within the meaning of S. 17 of the Act and separate court-fee must be paid for each of them. I think that the reasoning contained in this judgment of a Division Bench of the Calcutta High Court is in full accord with the facts that obtained in the present petition. This decision reviewed the decisions referred to by Ananthakrishna Aiyar J. in 'AIR 1950 Mad 404 (A)'. The learned Judges have observed:

> "The expression 'causes of action' may be capable of definition. Indeed, definitions have been formulated in the past although the terms of one definition have not always been identical with those of another, the elements varying to suit particular exigency which evoked the attempt. Be that as it may, we are of opinion that the word 'subject' in S. 17, Court-fees Act covers a muititude of matters which cannot be confined within the precise formula. We find it difficult to see how distinct causes of action can ever be one subject within the meaning of S. 17. But the converse does not necessarily hold good; for it may well be that a suit based on one cause of action alone may nevertheless embrace more than one subject within the meaning of S. 17, Court-fees Act."

In — 'Lachmi Narayan v. Bhupendra Prasad', AIR 1943 Pat 356 (D), a co-sharer landlord instituted a suit for rent and paid court-fee on his share of rent. He impleaded the remaining co-sharer as 'pro forma' defendant, but alleged that his share of rent was only due. The 'pro forma' defendant disclosed that his share of rent had also not been paid and that he be added as a plaintiff and a decree for his share of rent also be granted. This was allowed on his paying court-fee on his claim. The suit was decreed in favour of both. The tenants preferred an appeal. In the appeal it was held by Rowland J. that the claim of the added plaintiff was not on the same cause of action and was not within the same subject as the claim preferred by the original plaintiff and that his claim was a separate and distinct subject within the meaning of S. 17 of the Act. The learned Judge held further that the court-fee payable on the Memorandum of Appeal, therefore, was equal to the total of the court-fee paid by the plaintiff and the added plaintiff in the Court below. Though this decision does not refer to the earlier decision in 'AIR 1935 Cal 573 (C)' still it throws considerable light on the question as to what the word "subject" in S. 17 of the Act means and what is meant by "cause of action". Agreeing with the views expressed in the aforesaid two decisions reported in 'AIR 1935 Cal 573 (C)' and 'AIR 1943 Pat 356 (D)', I am inclined to hold that in the present form in which the suit stands, the decision of the learned Subordinate Judge that the plaintiffs should be deemed to have asked for nine separate declarations of the same kind in respect of each of the nine inams, that the suit as framed embraces distinct subjects and that the court-fee payable is governed by the provisions of S. 17 of the Act is justified. His further direction that the plaintiffs should pay court-fee of Rs. 100 in respect of each one of the nine declarations is also correct, so long as the frame of the suit remains what it is.

(11) This petition is, therefore, dismissed with costs.

B/M.K.S. Petition dismissed.

A. I. R. 1953 MADRAS 892 (Vol. 40, C. N. 349)

RAJAMANNAR C. J.

Raja Jagaveera Ramamuthu Kumara Venkateswara Etappa Naicker Ayyan Avergal, Zamindar of Ettiapuram, Appellant v. Perumal Reddi and others, Respondents.

Second Appeals Nos. 1358 and 1589 to 1671 of 1946, D/- 6-12-1951.

Tenancy Laws — Madras Estates Land Act (1 of 1908), S. 12 — Scope of.

If there is a contract or custom in respect of trees in existence on the date of the passing of the Act, the custom or contract will prevail. But such a custom or contract will not prevail in respect of trees coming into existence after the passing of the Act. Case law discussed. (Paras 2, 6)

K. S. Champakesa Iyengar and K. C. Srinivasan, for Appellant.

CASES CITED:

(A) ('05) 15 Mad LJ 292: 28 Mad 444
(B) ('98) 21 Mad 136
(C) ('26) AIR 1926 PC 22: 49 Mad 335 (PC)
(D) ('15) AIR 1915 Mad 397: 1 Mad LW 881
(E) ('25) AIR 1925 Mad 490: 21 Mad LW 134
(F) ('43) AIR 1943 Mad 367: 1943-1 Mad LJ 88
(G) ('39) C. R. P. No. 2121 of 1939 (Mad)
(H) ('42) L. P. A. No. 40 of 1942 (Mad)
(I) ('38) S. A. No. 266 of 1938 (Mad)

JUDGMENT: This batch of second appeals arises out of a batch of suits filed by the appellant-zamindar of Ettiyapuram under S. 77, Madras Estates Land Act, to recover arrears of land rent and tree tax due from the several defendants in the several suits who held the land and the trees under pattas granted to them. There was no dispute about the land cist, and the controversy was only in respect of the right of the landholder to claim tree-tax. The case of the landholder so far as the tree-tax was concerned was on a two-fold basis, viz., custom and contract. The custom pleaded was that the trees were held on lease separately & distinct from the land & they were the property of the landholders irrespective of whether they stood on the holdings of ryots or outside them and irrespective of whether they came into existence before or after 1908. This custom was denied by the ryots, but both the trial court and the learned District Judge on appeal have held that there was a valid & enforceable custom on the date of the passing of the Madras Estates Land Act in 1908 under which the landholder was entitled to collect tree-tax not only in respect of trees standing on poromboke land but also on trees standing on the holdings of the ryots. It was also in evidence that according to this custom the landholder could grant a lease of trees on the holding of one ryot to a person other than that ryot.

The courts below, however, have confined the rights of the landholder founded on this custom to the trees which were in existence at the commencement of the Madras Estates Land Act in 1908. They denied his right to levy any tax on the trees which came into existence subsequently on the holdings of ryots — trees which had either been planted by the ryots subsequent to 1908 or which grew thereafter spontaneously. The reason for so confining this custom was the provision contained in S. 12 of the Madras Estates Land Act. That section runs thus:

"(1) Subject to any rights which by custom or by contract in writing executed by the ryot before the passing of this Act are reserved to the landholder, every ryot shall have the right to use, enjoy, cut down, carry away or otherwise dispose of all trees now in his holding and in the case of trees which after the passing of this Act may be planted by the ryot or which may naturally grow upon the holding, he shall have the right to use, enjoy, cut down, carry away or otherwise dispose of them notwithstanding any contract or custom to the contrary.

(2) It shall be open to a ryot on payment to the landholder of such compensation as may be fixed by the Collector on an application made to him in that behalf, to acquire the rights reserved to a landholder by custom or by contract in writing executed as aforesaid, in any trees which were in the holding of the ryot before the passing of this Act;

Provided that nothing contained in this sub-section shall be deemed to affect the rights of any third person or to entitle a ryot to acquire compulsorily the landholder's rights to any trees included in a tree patta issued by him to a third person."

(2) The landholder who is the appellant in this batch of second appeals once more asserted before me his rights to levy a tax even on trees which were or might be planted by the ryot or which might naturally grow on the holding after the passing of the Act by virtue of this custom. I have no hesitation in holding that on the plain language of section, his contention must be rejected. Section 12(1) very clearly makes a distinction between two classes of trees, namely, (1) "all trees now in his holding" that is, trees in the holding of the ryot on the date of the passing of the Act; and (2) "trees which after the passing of this Act may be planted by the ryot or which may naturally grow on the holding", that is to say, trees which come into existence subsequent to the passing of the Act. The word "and" separates these two classes. In respect of trees falling in the first category the rights of the ryot are subject to any rights which by custom or by contract in writing executed by the ryot before the passing of the Act are reserved to the landholder whereas as regards the trees falling in the second class the rights of the ryot are absolute and not restricted by the terms of any contract or custom to the contrary. The words "notwithstanding any contract or custom to the contrary" in the second part of the first sub-section leave no room whatever for doubt. The position is, if there is a contract or custom in respect of trees in existence on the date of the passing of the Act, the custom or contract will prevail. But such a custom or contract will not prevail in respect of trees coming into existence after the passing of the Act. In respect of the latter class of trees, the ryot will have the right to use, enjoy, cut down, carry away or otherwise dispose of them. If the ryot has such absolute rights to the trees, I fail to see how nevertheless the landholder can claim to levy a tax on them. In my opinion on a reading of the plain language of the enactment, the landholder is not entitled to levy any tax on trees which come into existence on the holding of any ryot after 1908.

(3) It was said that the custom pleaded and established was a custom which would also comprise trees which were either planted or which grew upon the holding subsequent to the passing of the Act. Assuming that this is the evidence, I think the custom to this extent must be held to be invalid. Such a custom would be directly in contravention of an express statutory provision, and, therefore, cannot be upheld by courts. In — 'Arumuga Chetti v. Raja Jagaveera Rama Venkateswara Ettappa', 28 Mad 444 (A), it was held that a custom can be

upheld only so far as it is not in conflict with statute law (see also — 'Fischer v. Kamakshi Pillai', 21 Mad 136 (B)).

(4) There appears to be no reported decision directly bearing on this point. Certain observations in the leading Privy Council case in — 'Rajah of Ramnad v. Kamid Rowther', AIR 1926 P. C. 22 (C), were sought to be relied on by the appellant as supporting his contention that landholder could have a right by virtue of custom or contract to tax trees which came into existence even subsequent to the passing of Madras Act, I of 1908. It must be said at the outset that their Lordships were not called upon to decide this particular question in that case. It does not appear from the reports of the judgments of the courts below that the landholder was there laying any claim in respect of trees which came into existence after 1908. The suits themselves were filed soon after the passing of the Act, within less than ten years of it, and it is not likely that any tax claimed in respect of trees which were not even ten years old. Actually it appears that toddy was being tapped from the trees in question. At page 26 their Lordships say:

> "Their Lordships are in entire concurrence with the learned Judges as to the results in law if the trees are held on what may be called separate title. In such a case S. 12 of Madras Act does not apply, and they think that the case cited — 'Murugappa Chettiar v. Ramanathan Chettiar', AIR 1915 Mad 397 (D), was rightly decided."

I think it neither safe nor reasonable to apply this dictum to all trees on the holding of a ryot irrespective of whether they came into existence before or after the Act. The scope of this observation can be gauged by reference to the ruling in — 'AIR 1915 Mad 397 (D)', which obviously dealt with trees which were on the holding before the passing of the Estates Land Act. It was held by a Divison Bench of this court that money due as tax payable under three pattas was not rent within the definition of that term in S. 3(11) of the Madras Estates Land Act as it then stood and therefore the landholder was not entitled to sue for the recovery of such amount under S. 77 of the Act. The argument in the case was that the trees themselves constituted a holding, but that argument was not accepted. In the case before us, we are not concerned with any pattas issued merely in respect of trees. In the pattas with which we are concerned, in addition to the cist payable on the holding the tax payable in respect of the trees on the holding is also mentioned and the aggregate amount is shown as the amount due under the patta. I fail to see how advantage can be taken of the general observation of their Lordships of the Judicial Committee above cited to support a claim which runs directly counter to the provisions of S. 12(1) of the Act.

At page 26, their Lordships enumerate the three situations in which palmyra trees may be held, namely:

(1) They may simply be growing on land which is held by a ryot, though no mention of trees be made in any lease; (2) they may be growing on land held by a ryot but they may be let as a separate entity in his lease; and (3) they may be let to a person on whose land they do not grow. The dispute in these second appeals is really in respect of trees in the second situation and as regards which trees their Lordships refused to express any opinion. I am unable to derive much assistance from the decision of Devadoss J. in — 'Soundararaju Mudaliar v. Venkoba Rao', AIR 1925 Mad 490 (E). There is nothing in that judgment to indicate that the learned Judge was consciously dealing with the claim of the landholder to levy tax on trees which came into existence on a holding subsequent to the passing of the Estates Land Act. The following passage in the judgment does not really support the case of the landholder that there could be a custom even in respect of trees which came into existence after the Act;

> "The custom, therefore, that the trees are held differently from the land has been satisfactorily proved, and such being the case, when the landlord let the plaintiff into possession of the plaint land and reserved to himself the right of holding the trees, it is difficult to see how he could claim the trees as a part of the land. No doubt in ordinary cases, unless there be a custom or contract to the contrary, the occupancy tenant would be entitled to the trees in his holding; where a custom by which the trees on the land could be held apart from the land itself, the provisions of S. 12 of the Estates Land Act do not apply."

Section 12 recognises only a custom in respect of trees standing at the date of the passing of the Act and not trees coming into existence thereafter.

(5) Reference was made by learned Counsel, Mr. Champakesa Aiyangar, for the appellant to the judgment of Somayya J. in — 'Jankai Bai Ammal v. Chiniah Nadar', AIR 1943 Mad 367 (F), and to the unreported decision of Krishnaswami Aiyangar J. in — 'C. R. P. No. 2121 of 1939 (Mad) (G)'. But they have no bearing whatever on the question which now falls to be decided. In these cases the learned Judges were concerned with the question whether tree tax would be rent so as to enable the landholder to resort to summary procedure under S. 111 of the Estates Land Act. There is evidently difference between the view taken by these two learned Judges and the view taken by Leach C. J. and Lakshmana Rao J. in — 'L. P. A. No. 40 of 1942 (Mad) (H)', which was against the decision of Byers J. in a batch of second appeals, S. A. Nos. 1054 to 1065 of 1940. It is a matter of history that at one time the view was that tree tax would not be rent so as to enable the landholder even to file a suit under S. 77 to recover the same in a revenue court and S. 134 had to be amended to enable the landholder to resort to the provisions of S. 77 for the recovery of tree tax. Whether the landholder could have also the right to the summary procedure under S. 111 etc., of the Act to recover arrears of tree tax cannot be said to have been finally decided by this Court. But that point does not arise for decision in this batch.

(6) The decision, however, of Byers J. in S. A. No. 1054 to 1065 has a bearing on the question now under discussion. Having held that the tree tax is rent within the meaning of S. 3(11) of the Estates Land Act, the learned Judge went on to observe as follows:

> "This, however, does not dispose of the matter because the tenants claim that the trees were planted by themselves and that they are therefore free to enjoy them as they please under S. 12 of the Act. Whether the landholder is entitled to levy rent for the trees must depend upon whether they were in existence prior to the year 1908, a question which will have to be decided by the trial court."

No doubt there is not much of discussion or reasoning, but I agree with this view. In my opinion this view follows straight from the language of S. 12 of the Act (vide also the decision of King J. in — 'S. A. No. 266 etc. of 1938 (Mad) (I)'. I therefore agree with the learned District Judge that the defendant ryots are not liable to pay any tax for the trees on their holding which have either

been planted by them or which have grown spontaneously on the holding subsequent to the passing of Madras Act 1 of 1908.

(7) Now remain the pre-1908 trees, and I understand from learned Counsel for the appellant that a majority of the trees in these cases fall under this class. Fortunately for the landholder there appears to be reliable evidence of trees which were in existence on the several holdings in 1908 and before. There is also evidence as to the trees in respect of which the tax is now being claimed. The question with which naturally the courts below were faced was how to ascertain if the trees now in existence were all trees which were in existence on the date of the passing of the Estates Land Act of 1908. The courts therefore sought to devise a working formula having regard to the circumstances of the case and the incidents of the custom which they had found was well established. After carefully going through the judgments of the courts below, I am free to confess that the scheme which they have worked out appears to be substantially just and proper. I have, however been persuaded by the learned Counsel for the appellant to make a slight modification in one or two respects.

(8) In understanding the formula arrived at by the lower appellate court, it is necessary to state that the palmyra trees which are the subject matter of the tax are divided into six classes:

(1) Peeli (sprouts)
(2) Kuthuvadali (very young plants)
(3) Vadali (young trees)
(4) Tarisse (grown up trees)
(5) Kattu (trees fit for tapping)
and
(6) Paruvam (fruit bearing trees)

(9) It is common ground that trees in the first two classes are not taxed at all, while trees in the remaining four classes are taxed at varying rates, the highest in the scale being the trees in the sixth class. The learned District Judge, in modification of the trial court's formula, laid down his scheme as follows:

(1) In cases in which the number of trees of all classes in the year 1908 is less than the number of trees of the classes 5 and 6 in the year 1935, then only the number of the trees in 1908 were liable to be taxed. No exception can be taken to this. It is obvious that if the number of trees now in classes 5 and 6 are more than all the trees in 1908, then obviously, the remaining must have been trees which came into existence after 1908.

(2) If the number of trees existing in 1908 is equal to the number of trees in classes 5 and 6 in the year 1935, then such number would be the number of trees liable to be taxed. Here it is objected on behalf of the appellant that the test is not quite proper for this reason. It is said that the trees which fell, say, in class 1 or 2 in 1908 would remain in classes 3 and 4 in the year 1935 and might not have reached classes 5 and 6 and so it would not be equitable to exclude the trees in classes 3 and 4 in the year 1935 and it is only if in taking the trees in classes 3, 4, 5 and 6 their number is equal to the number of trees of all classes in 1908 that the same number could be adopted. I do not think that there is any force in this contention so far as trees in class 3 in the year 1935 are concerned. It is only the young trees which are grouped in class 3, trees which are probably 10 to 15 years old. Now, it cannot be said that trees of this age in 1935 could have existed in 1908. So they cannot be taken into account. I am not so certain, however, about the trees in class 4. There is evidence that the trees which would reach such maturity as to be included in class 4 would continue to remain in class 4 for several years before they could be put in class 5 or 6. I am inclined to agree with this and therefore I hold that in case the total number of trees of all classes——and whenever I say trees of all classes, I include not only trees which were taxable in 1908 but also trees in the first two classes which were not taxable but which however were in existence— is the same as the total of the trees in classes 4, 5 and 6 in the year 1935, then the number of such trees is liable to be taxed.

(3) Then, as regards the other contingency of the number of trees in 1908 being greater than the number of trees in 1935, here again, the trees in what classes should be taken into account is the question. The learned District Judge took into account only the trees in classes 5 and 6. For the reasons stated immediately above, I think here again the trees in class 4 also should be taken into account. If the number of trees in 1908 is greater than the number of trees in classes 4, 5 and 6 in 1935, then the number of the latter alone is taxable. I quite realise that there is a certain amount of arbitrariness about this division. But that is inevitable. I believe that this is the fairest solution possible without negativing to any large extent the rights of both the parties. In accordance with this formula the rights of the landholder should be worked out. The appellant shall file a separate statement in respect of each suit on the basis of this judgment.

(10) In the result these second appeals are allowed in part to the extent indicated above. The appellant will be entitled only to the Court-fee and the printing expenses incurred by him from the respondent. Leave refused.

B/D.H. Appeals partly allowed.

A. I. R. 1953 MADRAS 894 (Vol. 40, C. N. 350)

KRISHNASWAMI NAYUDU J.

Varada Pillai, Appellant v. Sriramalu Reddiar and another, Respondents.

Appeal No. 475 of 1949, D/- 13-8-1952.

Hindu Law — Alienation — Mortgage by father — Right of after-born son to question.

A member of a joint family must be content with the family estate as he finds it at his birth or at any rate he cannot complain of anything done before the period of gestation. Upon this rule, there is engrafted an exception to the effect that if the child who objects to the alienation of his property comes into existence or is conceived after the alienation, but during the life of a child born or conceived before the alienation, then that overlapping of the two lives enables the later born child to contest the validity of the father's act. AIR 1945 PC 1, Relied. AIR 1925 PC 264, Considered; AIR 1940 Mad 691 and AIR 1936 Mad 440, Referred. (Para 5)

Further, if the eldest member or the managing member has not filed a suit to set aside an alienation within the period of limitation provided by the law, the right of the other members of the coparcenary to challenge the alienations is not taken away. Each son has an independent right to question the alienations. The right to question the alienation arises in an individual member of the coparcenary not by virtue of his being a managing member

but in his character as son and that individual right cannot be controlled by anything which the eldest or the managing member has done or has failed to do. AIR 1925 PC 33, Ref. (Para 7)

M. S. Venkatarama Ayyar, for Appellant; A. Doraiswami, for Respondents.

CASES CITED :

(A) ('25) AIR 1925 PC 264: 52 Ind App 443: 47 All 795 (PC)
(B) ('13) 40 Cal 966: 40 Ind App 213 (PC)
(C) ('45) AIR 1945 PC 1: 1944-2 Mad LJ 395 (PC)
(D) ('40) AIR 1940 Mad 691: ILR (1940) Mad 913
(E) ('36) AIR 1936 Mad 440: 59 Mad 667
(F) ('25) AIR 1925 PC 33: 47 All 165 (PC)
(G) ('26) AIR 1926 PC 16: 53 IA 36: 48 All 152 (PC)

JUDGMENT: Plaintiff is the appellant. As assignee of a mortgage he instituted O. S. No. 50 of 1948 on the file of the Subordinate Judge's Court, Chingleput, against defendants 1 and 2 who are the minor sons of one Subbaraya Reddi, for a mortgage decree on a mortgage executed by Subbaraya Reddi in favour of one Munuswami Reddi on 9-7-1925 for Rs. 4000 and assigned by Munuswami Reddi in the plaintiff's favour on 15-4-1943. Subbaraya Reddi had three sons, one Dasu Reddi who is alive and who is not made a party, and defendants 1 and 2 who are minors and are represented by a guardian 'ad litem'. Subbaraya died in 1944. On 29-11-1940 his eldest son Dasu Reddi executed a release, Ex. A. 8, taking away his one-fourth share and releasing his rights in the joint family and its properties. Exhibit A. 8 makes it clear that thereafter he shall have only blood relationship and that there shall be no right as regards assets and liabilities.

(2) It may be necessary to refer to the transactions which led to the mortgage and the assignment. Subbaraya Reddi was possessed of 28 acres 47 cents nanja and punja lands which are stated to be his ancestral properties, and on 24-7-1920 by Ex. A. 3 he executed a usufructuary mortgage in favour of Munuswami Reddi the mortgage in the suit mortgage under Ex. A. 1, for Rs. 4000. On 31st July 1920 under Ex. A. 4 there was a further mortgage for Rs. 250 on 2 acres only, all the 28 acres 47 cents having been mortgaged under the usufructuary mortgage, Ex. A. 3. On 20-7-1921 Subbaraya Reddi sold 7 acres 52 cents out of the properties mortgaged under Exs. A. 3 and A. 4 to the mortgagee Munuswami Reddi for Rs. 2800. The sum of Rs. 2800 was paid by Munuswami Reddi by adjustment of a sum of Rs. 2125 towards the amount due on the mortgages, Exs. A. 3 and A. 4 and the balance of Rs. 675 was appropriated towards the debt due by Subbaraya to Munuswami Reddi on a promissory note dated 5th November 1920. The entire consideration of Rs. 2800 for the sale was thus accounted for. After the lapse of about four years, on the 9th July 1925, Subbaraya Reddi purchased from Munuswami Reddi 6 acres 34 cents out of the 7 acres 52 cents sold by him on 28-7-1921 under Ex. A. 5 for the sum of Rs. 3000 the sale deed being Ex. A. 7. On the same date Subbaraya Reddi executed a simple mortgage in favour of Munuswami Reddi, the vendor under Ex. A. 7, and the mortgagee under Exs. A. 3 and A. 4, mortgaging 25 acres 32 cents including the 6 acres 34 cents purchased by Subbaraya under Ex. A. 7 on that date. The consideration for the sale and the mortgage was provided in the following manner: Rs. 3000 was the sale price for the sale under Ex. A. 7 out of which Rs. 2038 was included as part of the consideration of Rs. 4000 in the mortgage Ex. A. 1. For the balance Munuswami adjusted a sum of Rs. 880 towards the amount due under a promissory note executed by Subbaraya in favour of Munuswami and the balance of Rs. 82 is stated to have been paid in cash by Munuswami Reddi to Subbaraya. As for the sum of Rs. 4000, which is the mortgage amount under Ex. A. 1 Rs. 2038 had been accounted for and the balance of Rs. 1962 represents the amount of principal and interest due on another promissory note executed by Subbaraya Reddi in favour of Munuswami Reddi dated 31-10-1922.

(3) The plaintiff obtained an assignment of this mortgage Ex. A. 1 on 15-4-1942, Ex. A. 2, and the suit is on that assignment and the mortgage Ex. A. 1. The defence on behalf of the minors was that their interests in the properties which are joint family and ancestral properties, are not bound by the mortgage and so far as their share is concerned no decree can be passed as the alienation is not binding on them. The lower court agreed with the contentions on behalf of the minors and passed a decree only against an undivided half of the suit properties, i.e., to the extent of the share Subbaraya was possessed of on the date of the alienation. The right of the minors to question the alienation is stated not to have been disputed seriously in the lower court. But Mr. M. S. Venkatarama Aiyar, learned counsel for the appellant, raised the question and urged that the right to dispute the alienation on behalf of the minor defendants depended on the right of the eldest son Dasu Reddi to attack the alienation, but since Dasu Reddi is stated to have impliedly consented to the mortgage, it is not open to the minors to raise the question once again. I am unable to find in the evidence as to any consent, expressed or implied, given by Dasu Reddi to the transaction of the mortgage, and as such it may be taken that there was no consent on the part of any of the sons to this alienation.

(4) The position of minor defendants 1 and 2 is different from the position of Dasu Reddi as defendants 1 and 2 were born subsequent to the alienation, while Dasu Reddi was alive even on the date of the alienation. Dasu Reddi was not a party to the mortgage and in 1940 he separated himself from the family and ceased to have any interest in the family properties and thereafter the joint family consisted alone of Subbaraya and the sons who were born subsequently. In these circumstances where an alienation is made by a father before the birth of the sons whether it will be open to the after-born sons to question the alienation, is the matter, that requires to be considered in this case.

(5) The right of the sons to the property which they acquire as coparceners by birth cannot be disputed; but they not having been born on the date of the alienation, are they precluded from questioning the binding nature of the alienation made by the father before their birth? The decision of the Privy Council in — 'Lal Bahadur v. Ambika Prasad', AIR 1925 PC 264 (A) is understood to have laid down that the right to challenge alienations of family property is confined to the coparceners born and alive on the date of the alienation and that such a right to a coparcener who was born subsequent to the alienation is denied even though on his birth he acquires a share in the family property. Mayne, 11th Edn. on Hindu Law observed at page 502 with reference to this decision, that the point was not considered and it may not be the question.

"It would be against the whole current of Indian authorities which were neither referred to nor considered and cannot therefore be deemed to

be overruled. If, however, the observation means that coparceners born in the family subsequent to an alienation before the death of the other coparceners who could challenge it have no right to the property and consequently no right to challenge the alienation, it would conflict with what was said by the Board in — 'Ramkishore v. Jainarayan', 40 Ind App 213 (PC) (B) as well as with the cardinal principle of Hindu law. The coparcenary which is interested in the property, not validly alienated, is continually enlarged by births as it is diminished by deaths. Where A makes an invalid alienation of the family property, his son B is entitled to object to it, not because he is in existence but as he is equally interested in it. The property is not effectively carried away from the family except to the extent of the father's share in the provinces in which he could alienate."

So far as Madras is concerned, it would be open to a father to alienate his share in the property; but the right of the son to question the alienation would depend (not?) on the circumstance whether he was born or not on the date of alienation, but whether he has acquired an interest, by reason of his birth, in the property. This is made clear by the observations of the commentator at page 502, that the right to challenge is only by reason of the interest in the family property and it is a right in every member of the coparcenary for the time being. As long as that right exists in the coparcenary, it would seem immaterial whether the son was alive at the date of the alienation or born subsequently. It is pointed out by Mayne that the question must be deemed to have been decided, as it appears to be, by reason of the latest decision of the Privy Council in — 'Panchaiti Akhara Udasi Nirwani v. Surajpal Singh', AIR 1945 PC 1 (C) where their Lordships observed:

"It is asserted that a member of a joint family must be content with the family estate as he finds it at his birth or at any rate he cannot complain of anything done before the period of gestation. Upon this rule, it is admitted, there is engrafted an exception to the effect that if the child who objects to the alienation of his property comes into existence or is conceived after the alienation, but during the life of a child born or conceived before the alienation, then that overlapping of the two lives enables the later born child to contest the validity of the father's act."

In this case, there is the overlapping of the two lives, the lives of defendants 1 and 2 with the life of Dasu Reddi as he was born on the date of alienation and he is still alive. In — 'Rajah Vasi Reddi v. Lakshmi Narasimham', AIR 1940 Mad 691 (D), a Bench of this court, though it did not expressly decide the question that arises for determination in this case, however, was inclined to the view taken by the commentator of Mayne's Hindu law, and this is evident from the observations of Venkataramana Rao J. at page 694 where the learned Judge says as follows: (while referring to a decision of a Bench of this Court in — 'Visweswara Rao v. Surya Rao', AIR 1936 Mad 440 (E)):

"They express an opinion that if before the afterborn son is born, the sons in existence were to die, the right is lost to the afterborn son though the right to set aside an alienation may be within the time from the date when the cause of action accrued to the sons in existence. This seems to be in conflict with the view expressed in Mayne's book, at page 513, where it is stated that it is a right in every member of the coparcenary for the time being and as long as that right in the coparcenary exists it would be immaterial whether he was alive on the date of the alienation or born subsequently. Much may be said in favour of either view and it may be that that view expressed in Mayne's book is sounder. The scope of the Privy Council decision in — 'AIR 1925 PC 264 (A)' may require reconsideration."

(6) The other question which may have to be considered in examining the rights of afterborn sons to question the alienation made by their father before their birth is whether the failure on the part of the elder son within the period of limitation would be a bar to the right of the subsequent born sons. Mayne in his book deals with this question at page 497:

"Where a suit to set aside a father's alienation by sons who were in existence at the date of alienation is barred, it is equally barred as to sons who were born subsequent to the alienation for they do not acquire a fresh cause of action."

This is based on the decisions referred to at the footnote, mainly, the Privy Council decision in — 'Ranodip Singh v. Parmeshwar', AIR 1925 PC 33 (F). The commentator proceeds to state as follows:

"Conflicting views have been expressed on the question whether when a suit to set aside an alienation by an elder son is barred, a suit by a younger son is also barred under Ss. 6 and 7 of the Limitation Act. In — 'Jawahir Singh v. Ucai Parkash', 53 IA 36 (G), the Privy Council held that though a suit to set aside an alienation by the elder of the two sons would be barred on the ground that he had attained majority more than three years of his majority to recover possession of the property would not be barred..... Where a son brings a suit to set aside an alienation of ancestral property within the meaning of Art. 126 of the Limitation Act, he brings it in his character as son and not in his character as managing member. The right of the manager to represent the coparcenary as a whole cannot extend to his representing the rights of individual coparceners to challenge alienations made by one or more members of the coparcenary. Where several coparceners are entitled to set aside an alienation, the view that if the managing member is barred from bringing the suit, the other coparceners are also barred is open to doubt."

(7) If therefore the eldest member or the managing member has not filed a suit to set aside an alienation within the period of limitation provided by the law, the right of the other members of the coparcenary to challenge the alienations is not taken away. As pointed out by the learned commentator, the right to question the alienation arises in an individual member of the coparcenary not by virtue of his being a managing member but in his character as son and that individual right cannot be controlled by anything which the eldest or the managing member has done or has failed to do. It appears to me that the correct and reasonable view to be taken in such cases consistent with the principles of Hindu law is that each son has an independent right to question the alienations irrespective of the fact or otherwise of the eldest or managing member having failed to ask the alienation to be set aside within three years on his attaining majority. In the present case, however, that question would not arise for the reason that Dasu Reddi had separated himself from the family and had ceased to be a member of the family, the only two surviving members of the joint family being defendants 1 and 2. The fact or otherwise of Dasu Reddi having taken no steps for setting aside the alienation is immaterial of the right of defendants 1 and 2 to question the suit mortgage. In that view I agree with the lower court that defendants 1 and 2 are entitled to dispute the alienations.

(8) But still the question remains to be considered whether the lower court's finding that the mortgage, Ex. A. 1 is not binding on the minor defendants as neither being for necessity or benefit is correct. The learned Judge observed that the property being ancestral property the alienation of ancestral property for purpose of new property is prima facie not a necessity. If it is a matter of benefit, it is to be alleged and proved & in this case there is no evidence let in to show that the joint family was benefited by the reconveyance, and in his opinion special facts must be alleged and proved to show that the alienation was one for necessity or was beneficial to the minors.

(9) It will be necessary to analyse what is the effect of this mortgage, whether it can be said to have been necessary, supported by legal necessity or whether it could be said to be beneficial or whether in any event the defendants have not suffered by such alienation. The entire property of the family was mortgaged to Munuswami Reddi in 1920. When the principal debt under the mortgages was Rs. 4250 in 1921, Subbaraya apparently considered it beneficial in view of the debt not having been discharged, to dispose of a portion of his property, and with that view he sold 7 acres 52 cents for Rs. 2800 out of which Rs. 2125 was paid towards earlier mortgages. What he did subsequently was to repurchase 6 acres 34 cents out of the 7 acres 52 cents for a sum of Rs. 3000 under which he got the property which was sold away except one acre and odd, and discharged the entire debt due by him on a promissory note to the extent of Rs. 800. By the mortgage Ex. A. 1 he created a liability of Rs. 4000 out of which Rs. 1962 represents the amount due on a promissory note of 1922 executed by the father which however is not alleged to be not binding on the minors since it cannot be so alleged as it appears to be an antecedent debt the balance of Rs. 2038 alone being a liability incurred afresh. This transaction of mortgage may be viewed in two ways. The family lost 7 acres 58 cents by sale in 1921 but gained to the extent of Rs. 2125, being the part payment towards the earlier mortgages, and by the purchase Ex. A. 7 the family gained 6 acres 34 cents, practically taking back the property sold by them, with a liability of Rs. 2038. What was originally a liability to the extent of Rs. 2125, which was discharged, was practically created by the simple mortgage to the extent of Rs. 2038; there has been no increase of burden on the family. Properties as originally held were retained, the debt continuing.

It may also be considered in this manner: By reason of the simple mortgage and the sale, Exs. A. 1 and A. 7, the family got 6 acres 34 cents with a liability of Rs. 4000 and out of this Rs. 4000 the minors were liable to pay the two promissory notes debts of Rs. 1962 and Rs. 880 amounting to Rs. 2842 and out of the sum of Rs. 4000 only a sum of Rs. 1158 is a new liability created under the mortgage for which the recompense is a property of 6 acres 34 cents. I am unable to see how it could be said to be a transaction by which the minors have suffered. It might be that Subbaraya considered the securing back of the family properties was for the benefit of the family not only getting back the family properties but consolidating the debts then due and making the entire property liable under a mortgage which he executed, Ex. A. 1. I am unable to agree with the learned Judge in his conclusions. This is not one of the transactions which could be put on the same category as sales of properties by managers or fathers for the purpose of purchasing other properties which are generally not cognized by courts, inasmuch as a father is not allowed to speculate by sale and purchase of joint family properties. This does not come within that category. It is a transaction which the father felt was and appears also to be one necessary in the interests of the family, to secure back to the family properties which had been lost and to consolidate the family liabilities by the execution of a fresh mortgage on the entire properties. In that view the mortgage Ex. A. 1 is binding on the minor defendants.

(10) The appeal is allowed and a decree for the amount claimed will be passed. Time for redemption 3 months. Appellant's cost is fixed at Rs. 300 including Court-fees.

B/H.G.P. Appeal allowed.

A.I.R. 1953 MADRAS 897 (Vol. 40, C. N. 351)

RAJAMANNAR C. J. AND VENKATARAMA AYYAR J.

R. P. C'Connor, Plaintiff v. P. G. Sampath Kumar, Defendant.

Appln. No. 346 of 1952 in C. S. No. 415 of 1950, D/- 29-9-1952.

Civil P. C. (1908), O. 7, R. 10, O. 49, R. 3(1) and S. 151 — Letters Patent (Madras), Cl. 1 — Constitution of India, Art. 215 — Plaint filed on Original Side — Power to return for representation — Practice of High Court — (Practice — High Court (Madras)). 28 Mad 216, AIR 1927 Mad 846 and C. S. No. 420 of 1921 (Mad.), Dissented from.

Though there is no express provision in the Code or in the rules framed by the Madras High Court for the return of a plaint filed on the Original Side of the High Court when it is found that the Court has no jurisdiction to entertain the suit, the Court has inherent power to make an order directing the return of the plaint if it is necessary for the ends of justice or to prevent abuse of the process of Court. For the purpose, however, of preserving the proceedings taken in the High Court a verified copy of the plaint should be made and filed in place of the original which is returned. 8 Bom 313 (FB) and AIR 1934 Rang 342, Rel. on. 8 Bom 380, Not foll. AIR 1916 Bom 227, Ref. (Paras 12, 13)

Ordinarily a Court would be loath to depart from a practice which has been in vogue in that Court for a long time. But when it is not clear why the practice of not returning the plaints filed on the Original Side of the High Court was followed, and when insistence on a continuation of the practice is likely to lead to great hardship and injustice, there is no reason why the practice should not be put an end to. 28 Mad 216, AIR 1927 Mad 846 and C. S. No. 420 of 1921 (Mad), Dissented from. (Para 6)

The fact that the Madras High Court is a Court of record does not necessarily imply that it has no power to return any document presented to it and especially so a plaint which it has no jurisdiction to entertain. There is nothing either in the Letters Patent or in any Statute which makes it incumbent on that Court on its Original Side to retain on its file even plaint which ought not to have been properly presented to it. (The characteristics of a Court of Record discussed). (Para 9)

Anno: C. P. C., O. 7, R. 10 N. 10.

G. A. Chellappa Nadar, for Plaintiff; A. Narasimhachari, for Defendant.

CASES CITED :
(A) ('34) AIR 1934 Rang 342: 12 Rang 432
(B) ('84) 8 Bom 313 (FB)
(C) ('05) 28 Mad 216
(D) ('21) C S No 420 of 1921 (Mad)
(E) ('27) AIR 1927 Mad 846: 50 Mad 770
(F) ('84) 8 Bom 380
(G) ('16) AIR 1916 Bom 227: 40 Bom 473

RAJAMANNAR C. J.: The applicant filed a suit on the original side of this court for the recovery of a sum of Rs. 6720 alleged to be due on a promissory note executed by the defendant in favour of his mother. The defendant pleaded 'inter alia' that the court had no jurisdiction to entertain the suit as the defendant was a permanent resident of Bangalore and the promissory note and the endorsements thereon were made outside the limits of the original jurisdiction of this court. Thereupon, the applicant took out an application praying that the plaint which he had filed should be returned to him. In the affidavit filed by him in support of the application he stated that in order to enable him to pursue his remedies it is necessary that an order should be made directing the return of the plaint to him and this court had jurisdiction to return the plaint for presentation to the proper court once it found it had no jurisdiction to entertain the suit. The application came on before Panchapakesa Ayyar J. who heard counsel on both sides and directed the papers to be placed before me for constituting a Full Bench to consider this point. I have however thought it was unnecessary to constitute a Full Bench because there was no conflict of decisions of Division Benches in our Court.

(2) The question for decision as framed by Panchapakesa Ayyar J. is as follows :

"Whether a Chartered High Court has not got inherent powers under S. 151, C. P. C. to return a plaint entertained by it in the exercise of its ordinary or extraordinary original jurisdiction for presentation to the proper court for the ends of justice despite the provisions of Order 49, R. 3, C. P. C."

(3) Order 7, R. 10(1) of the Code provides that a plaint shall at any stage of the suit be returned to be presented to the court in which the suit should have been instituted. Order 49, rule 3 of the Code declares that this rule among other rules shall not apply to any Chartered High Court in the exercise of its ordinary or extraordinary original civil jurisdiction. There is no rule similar to O. 7, rule 10 of the Code made by this Court in the exercise of its rule-making powers. The position therefore is that there is no express provision in the Code or in the rules framed by this court for the return of a plaint filed on the Original Side of this court when it is found that this court has no jurisdiction to entertain the suit. It therefore becomes necessary to consider whether S. 151 of the Code can be invoked, that is to say, whether it can be held that this court has inherent power to make an order directing the return of a plaint if it is necessary for the ends of justice or to prevent abuse of the process of court.

(4) There is very little or direct authority on this question. The only decision in which it is specifically discussed is that in — 'Bhaiyat v. L. Chong Kha', AIR 1934 Rang 342 (A) in which Leach J. as he then was, held that although Order 7, R. 10, Civil P. C. does not apply to the High Court, it may by reason of its inherent powers direct that the plaint shall be returned to the plaintiff so that he may file it in the proper court if it finds that it has no jurisdiction to entertain the suit. The learned Judge based his decision chiefly on the fact that it would be unjust to require a suitor, who has filed a suit in a court in the belief that he would obtain from it an adjudication on his claim but could not do so because the court had no jurisdiction, to pay another court-fee in the circumstances. He relied upon the observations of West J. in — 'Prabhakarbhat v. Vishwambhar', 8 Bom 313 (FB). That learned Judge said :

"Whether a court-fee on the institution of a suit has been paid in a court which cannot possibly afford the relief sought, it does not seem consistent with sound principle that the plaintiff should be condemned to lose the fee thus paid or that he should not be allowed to ask without paying a second fee for an adjudication from a court which can really give one."

With great respect to the learned Judge, I agree with him in this view.

(5) Mr. Narasimhachari who appeared for the defendant and opposed the application relied on two things, (1) the uniform practice of this court and (2) this court being a Court of Record. So far as I am aware, the practice on the Original Side of this court undoubtedly has been not to return the plaints in suits which the court finds it has no jurisdiction to entertain. The reason for this practice is not however very clear to me.

(6) In — 'Abdul Karim v. Badrudeen', 28 Mad 216 (C), Moore J. observed :

"As has already been pointed out the court has no jurisdiction to try the suit as brought. Such being the case as it does not appear to me to be advisable to permit the plaint to be amended as prayed for, the only course open to me is to dismiss this suit. I should have preferred to have returned the plaint for presentation to the proper court under S. 57, Civil P. C. but this I have no power to do (Vide S. 638)."

Ramesam J. apparently was of the same opinion, and for the same reason, C. S. No. 420 of 1921 (Mad) (D), for the learned Judge refers to Or. 49, R. 3. In — 'Maharaja of Pithapuram v. Ramarao', AIR 1927 Mad 846 (E), Wallace J. refers to the practice of this court not to return a plaint once filed on the Original Side of this Court. Ordinarily I would be loath to depart from a practice which has been in vogue in this court from a long time. It may be the practice did not result in great hardship because till recently the court-fees on the original side were much below the court-fees in the mofussal which were levied under the Court-fees Act. Then again, when a plaint is returned by a Court to be presented in the proper court, that plaint should ordinarily be presented as it is to the proper court. That obviously could not be done if this court had returned the plaint before the recent rule which made the provisions of the Court-fees Act applicable even to suits instituted on the Original Side of this Court. Be that as it may, it is not clear why this practice was followed and when insistence on a continuation of this practice is likely to lead to great hardship and injustice I see no reason why we should not put an end to the practice.

(7) The other ground pressed upon by Mr. Narasimhachari is based on the fact that this

court is a court of Record. Clause 1 of the Letters Patent says so, and Art. 215 of the Constitution runs as follows :

"Every High Court shall be a Court of Record and shall have all the powers of such a court including the powers to punish for contempt of itself."

This leads us to an enquiry as to what is a Court of Record and what are its special features and to find out if any of those features inevitably leads to the conclusion that a plaint once filed in such a court should always be retained in that court. In Halsbury's Laws of England, 2nd Edn., Vol. 8, at pages 527-528, we have the following information regarding a Court of Record :

"Another manner of division is into courts of Record and Courts not of Record. Whether a court is a Court of Record or not depends on whether it has power to fine and imprison, whether for contempt of itself or for other substantive offences. Courts of Record are such as have been expressly made so by statute or by implication of a statute, that is by having statutory power to fine and imprison, and courts of record at common law. These latter are such civil courts as have power to hear and determine, according to the course of the common law actions in which the debt, damages or value of the property claimed is forty shillings or above and such criminal courts as have power to fine or imprison. Courts not of record are those civil courts in which the proceedings are not according to the course of common law (except such as have been made courts of record by statute). All courts of record, with the exception of the courts of the counties palatine, are courts of the King, even though a subject or corporation has the benefit of the court, as in the case of borough and city courts of record. The proceedings of a court of record, preserved in its archives are called records, and are conclusive evidence of that which is recorded therein."

In the footnote (e) at page 528 we have the following further information :

"Record is a writing or Parchment, wherein are enrolled Pleas of Land or Common Pleas, Deeds, or Criminal Proceedings in any court of record; but in courts not of record as Admiralty Courts, Christian Courts, Baron etc., their Registry of proceedings are not properly called Records. But courts of law held by the King's Grant are courts of Record." ('Termes de la ley, sub voce record.) See also Jacobs' Law Dictionary, Sub Voce, Record. Records are no longer kept on parchment."

(8) The learned Advocate-General referred us to passages in Holdsworth's History of English law dealing with the History of the concept of a Court of Record. The learned author points out that the technical conception of a Court of Record was not ready made but was of slow growth. He cites from Maitland who says :

"The distinctions that we still draw between courts of Record and courts that are not of record take us back to very early times when the King asserts that his own word as to all that has taken place in his presence is incontestable. This privilege he communicates to his own special court; his testimony as to all that is done before him is conclusive."

The essential point of difference appears to be that the formal records of the King's court cannot be disputed, whereas this is not so with inferior courts which keep no formal records.

"It is the infallibility of its formal record which is the earliest mark of a Court of Record. But gradually the Court of Record developed other characteristics. Its record was kept upon a parchment roll ..... It alone could fine and imprison. And this characteristic which was perhaps one of the latest to be developed is its most important characteristic at the present day." (Holdsworth, Vol. V, p. 158).

One aspect of the doctrine of estoppel is estoppel by matter of record, and the principle upon which this class of estoppel depends is that matters solemnly recorded by the King's court must be accepted as proof, so that no averment to contradict them can be received. The record of the King's Court could not be denied, though the judgments of other courts could be. This distinction is the foundation both of the contract between courts of record and courts not of record and of this branch of the doctrine of estoppel. All matters recorded by the King's court, and authenticated by its seal—not only judgments but also other transactions enrolled thereon — were records and were accorded the same conclusive effect (Holdsworth, Vol. IX, pages 147-148). But it was always understood that statements in pleadings on which no judgment had been given would not estop (Vol. IX, page 150).

(9) It appears clear to me from the authorities above cited that the fact that this court is a court of record does not necessarily imply that it has no power to return any document presented to it and especially so a plaint which it has no jurisdiction to entertain. There might have been an impression that as a court of Record this Court should keep on its file all the proceedings before it. But there is nothing either in the Letters Patent or in any Statute which makes it incumbent on this court on its Original Side to retain on its file even plaints which ought not to have been properly presented to this court.

(10) Mr. Narasimhachari, learned counsel for the defendant, referred us to certain observations of Bayley J. in — 'In re Bai Amrit', 8 Bom 380 (F). The decision in that case is of very little interest to us after the Full Bench decision in — '8 Bom 313 (FB)' (B) and in view of the language of O. 7, R. 10, Civil P. C. Though the case related to a second appeal filed in the High Court of Bombay, that is, on its appellate side, the learned Judge adverted to the practice obtaining on the Original Side of the Court. According to him, the practice on the Original Side had been not to return plaints except on presentation. He referred to the provisions of the Civil Procedure Codes of 1877 and 1882 corresponding to Order 7, R. 10 and Order 49, R. 3 (1) of the present Code and also to certain earlier rulings of the Bombay High Court. The learned Judge expressed the view that the practice followed in the court was based on good grounds. One of these grounds was that the Court was a Court of Record. The learned Judge's conclusion, in so far as it related to the matter before him, namely, a memorandum of second appeal, is no longer good law, having regard to the provision in Order 7, R. 10 of the Code of 1908. But with great respect to the learned Judge, I do not agree with him that it follows from the circumstance that the Char-

tered High Courts are Courts of Record that plaints filed in such courts should be retained in the said courts, even when they cannot be the subject-matter of a trial in those courts.

(11) Assuming that it is necessary to preserve carefully the proceedings taken in a Court of Record, we see no reason why the suitor should lose the benefit of the Court-fee stamps which he had affixed to the plaint filed by him in a wrong court. A memorandum of appeal filed in this court can certainly be returned if it is found that this court has no jurisdiction to entertain the appeal. Such a memorandum is never retained on the file of this court, in spite of the fact that this court is a court of record. Logically there should not be any difference between a Memorandum of appeal filed on the Appellate Side of this Court and a plaint filed on the Original Side of this Court. Apparently the practice on the Original Side of the Bombay High Court had changed since the days of — '8 Bom 380' (F), because we find in — 'Sewaran Gokaldas v. Bajrangdat Hardwar', AIR 1916 Bom 227 (G), Macleod J., sitting on the Original Side directing a plaint to be returned to the plaintiffs for presentation in the proper court after holding that the High Court had no jurisdiction.

(12) After giving my full consideration to the matter, I am of opinion that it is open to this court to direct the plaint to be returned to the plaintiff for presentation to the proper court when this Court finds that it has no jurisdiction to entertain it.

(13) For the purpose, however, of preserving the proceedings taken in this court a verified copy of the plaint can be made and filed in place of the original which is returned. I accordingly direct the plaint in this case to be returned after a copy of the plaint has been made and filed in place of the original.

(14) The applicant shall pay a sum of Rs. 100 to the defendant towards costs of the present application as well as the costs of prior applications on which the Court made an order that the costs therein should be costs in the cause.

(15) VENKATARAMA AYYAR J.: I agree.

Order accordingly.

A/D.R.R.

A.I.R. 1953 MADRAS 900 (Vol. 40, C. N. 352)

FULL BENCH

SATYANARAYANA RAO, RAJAGOPALAN AND BALAKRISHNA AYYAR JJ.

K. T. M. T. M. Abdul Kayoom and another, Applicants v. Commr. of Income-tax, Madras, Respondent.

Case Referred No. 57 of 1950, D/- 2-4-1953.

Income Tax Act (1922), S. 10 (2) (xv) — Capital and Revenue expenditure.

The assessee, a registered firm carrying on business in chanks, for the purpose of its business, had to engage divers to collect chanks from sea, which are sold after sorting. There was an agreement between the Director of Industries and Commerce, Madras, and the assessee, the material portions of which were as follows: "The lessor hereby grant unto the lessees the full free and exclusive right, libery and authority to fish for, take and carry away all the chank shells in the sea off the coast line for a period of three years ending 30th June 1947, paying therefor the yearly rent of Rs. 6111 (Rs. Six thousand one hundred and eleven only) to be paid yearly in advance." During the accounting year the assessee paid a sum of Rs. 6111/- as the annual rent to the Government under the said deed and claimed deduction of the same: (Para 3)

Held that the item of expenditure was a revenue and not capital expenditure and that the assessee was therefore entitled to deduct the same. AIR 1949 PC 311, Applied; 1939-7 ITR 652 (FB) (Mad), AIR 1934 Mad 617 (2), AIR 1937 Mad 300, Considered. Case law Ref. (Para 16)

Tests to determine capital and revenue expenditure indicated. Case law Ref. (Paras 5, 6 and 7)

Anno: Income-tax Act, S. 10 N. 13, 16.

M. Subbaraya Ayyar, for Applicants; C. S. Rama Rao Sahib, for Respondent.

CASES CITED:

(A) ('39) 1939-7 ITR 652 (FB) (Mad)
(B) ('49) AIR 1949 PC 311: 1949-17 ITR 473: 1949 AC 521 (PC)
(C) ('50) AIR 1950 Mad 718: 1950-18 ITR 357
(D) ('34) AIR 1934 Mad 617 (2): 1934-2 ITR 395: 58 Mad 1 (SB)
(E) ('37) AIR 1937 Mad 300: 1937-5 ITR 70: ILR (1937) Mad 792 (SB)
(F) (1926) 95 LJKB 336: 1926 AC 205
(G) (1903) 5 Tax Cas 529
(H) (1932) 100 LJKB 504: (1932) 1 KB 124
(I) (1928) 97 LJKB 475: (1928) 2 KB 405
(J) (1927) 1927 SC 705: 13 Tax Cas 1
(K) (1921) 90 LJPC 149: (1921) 2 AC 13
(L) (1934) 103 LJKB 619: (1934) 1 KB 548
(M) (1904) 1904-2 KB 666
(N) (1905) 1905-1 KB 184
(O) (1906) 75 LJKB 44: 1906 AC 18
(P) (1913) 83 LJPC 6: 1913 AC 771
(Q) ('45) 1945-13 ITR 157 (Lah)
(R) ('46) 1946-14 ITR 277 (Lah)
(S) ('47) AIR 1947 Lah 162: 1947-15 ITR 185 (FB)
(T) ('49) AIR 1949 Mad 568: 1949-17 ITR 15

ORDER OF REFERENCE PER SATYANARAYANA RAO J.: To answer the reference it is necessary that the decision of the three Judges of this Court in — 'Abdul Kayum v. Commr. of Income-tax', 1939-7 ITR 652 (Mad) (A), should be reconsidered in the light of the later decision of the Judicial Committee in — 'Mohanlal Hargovind v. Commr. of Income-tax', C. P. & Berar, Nagpur', AIR 1949 P. C. 311 (B). It may be observed that the decision of the Special Bench in — '1939-7 I. T. R. 652 (Mad) (A)', has reference to this very assessee, who carried on the same business as he is now carrying on. A Division Bench of this court observed on an earlier occasion in — 'Devarajulu Chetti and Co. v. Commr. of Income-tax', AIR 1950 Mad 718 at p. 724 (C), that the decision in — Commr. of Income-tax v. Chengalvaraya Mudaliar', AIR 1934 Mad 617 (2) (D), and in — 'Chengalaroya Chettiar v. Commr. of Income-tax (Mad)', AIR 1937 Mad 300 (E), require reconsideration in the light of the decision of the Judicial Committee in — 'AIR 1949 PC 311 (B)'. We, therefore, direct that this matter be placed before the Hon'ble the Chief Justice for constituting a Full Bench to dispose of this reference.

ORDER OF THE FULL BENCH:

(2) Under S. 66(1) of the Indian Income-tax Act the following question was referred to the High Court for decision:

"Whether on the facts and circumstances of the case, the payment of the sum of Rs. 6111 made by the assessee under the terms of the agreement entered into with the Director of Industries and Commerce, Madras, on 9-11-1945 was not an item of revenue expenditure incurred in the course of carrying on the business of the assessee and, therefore, allowable under the provisions of S. 10 of the Indian Income-tax Act."

In view of the decision of the Judicial Committee in — 'AIR 1949 P. C. 311 (B)', and the decision relating to the same assessee, which covers the present dispute in — '1939-7 ITR 652 (Mad) (A)', which followed the earlier decisions of this Court in — AIR 1934 Mad 617 (2) (D)', and — 'Chengalvaraya Chettiar v. Commr. of Income Tax', AIR 1937 Mad 309 (E), it was thought necessary when the matter came before a Division Bench, to place it before a Full Bench. The case was, therefore, posted before us for decision.

(3) The relevant facts appear from the statement of the case by the Appellate Tribunal. The assessee is a registered firm carrying on business in chanks. For the purpose of his business, the assesseee had to engage divers to collect chanks from the sea, which are sold after sorting. On 9-11-1945, there was an agreement between the Director of Industries and Commerce, Madras, and the assessee, the material portions of which are as follows:

"The lessor hereby grant unto the lessees the full free and exclusive right, liberty and authority to fish for, take and carry away all the chank shells in the sea off the coast line of the South Arcot district including the French Kuppams of Pondicherry more particularly described in the schedule here to hold the premises to the lessees from the 1st day of July 1944, for a period of three years ending 30th June 1947, paying therefor the yearly rent of Rs. 6111 (Rs. six thousand one hundred and eleven only) to be paid yearly in advance, the first payment to be made within 15 days from the date of intimation of acceptance and the second & third payments to be made on or before the 15th June 1945 and 1946 respectively, at the Government Treasury at Tuticorin or Madras."

During the accounting year ending with 30-6-1945, the assessee paid a sum of Rs. 6111 as the annual rent to the Government under the said deed and claimed deduction of the same. The Income-tax officer, treating it as capital expenditure, disallowed it and, in doing so, he followed the decision, which relates to the same assessee and reported in — '1939-7 ITR 652 (Mad) (A)'. The appeal to the Assistant Commissioner was unsuccessful. On further appeal, the Tribunal thought that the matter was covered by the decision of the Judicial Committee in — 'AIR 1949 P. C. 311 (B)', but as there was an earlier decision of a Full Bench of this Court relating to the same assessee they felt that they were bound by it. In the result, the appeal was dismissed and, at the instance of the assessee, the aforesaid question was referred to this court.

(4) On behalf of the assessee, Mr. Subbaraya Aiyar, the learned advocate, contended that in view of the decision of the Judicial Committee in — 'AIR 1949 PC 311 (B)', the decision of the Full Bench in — '1939-7 ITR 652 (Mad) (A)', must be taken as overruled, including the earlier decision of this court, which were followed by the Full Bench.

(5) Under S. 10(2)(XV) of the Incometax Act, "Any expenditure (not being in the nature of capital expenditure or personal expenses of the assessee) laid out or expended wholly and exclusively for the purpose of such business, profession or vocation",

is deductible.

If it is a capital expenditure, the deduction cannot be allowed. So, the question is whether the deduction claimed by the assessee is capital expenditure or revenue expenditure. The expression "capital expenditure" is not defined in the Act but it has to be understood in a business sense except in so far as there may be rules of construction applicable to it. Vide — 'AIR 1949 PC 311 (B)'. There is a considerable volume of case law both in England and in India on this subject but they do not enable us to lay down a definite and tangible test to distinguish capital expenditure from revenue expenditure and draw the boundary line between the two. The decisions however are of considerable assistance in deducing certain relevant general principles, which afford guidance in deciding whether on the facts of a case the expenditure under consideration falls under the one head or the other. No useful purpose would therefore, be served in examining critically the innumerable cases English and Indian which have considered the question from one aspect or the other. But some of the decisions, which have become land marks in deciding the question, may be usefully referred to.

It may be taken that until 1926 i. e., until the decision of Viscount Cave, Lord Chancellor in — 'British Insulated and Helsby Cables Ltd. v. Atherton', 1926 A. C. 205 (F), even a working principle for the guidance of the courts was not firmly established. In that case, however, Viscount Cave, Lord Chancellor formulated a test, which, with slight variation, has ever since been followed both in England and in India. The Lord Chancellor considered that the opinion of Lord Dunedin in — 'Vallamborosa Rubber Co. v. Farmer', (1903) 5 Tax Cas 529 (G)'

"that in a rough way I think it is not a bad criterion of what is capital expenditure as against what is income expenditure to say that capital expenditure is a thing that is going to be spent once and for all, income expenditure is a thing that is going to recur every year"

was not a decisive test applicable to every case. According to Viscount Cave, the test is:

"But when an expenditure is made, not only once and for all, but with a view to bringing into existence an asset or an advantage for the enduring benefit of a trade, I think that there is very good reason (in the absence of special circumstances leading to an opposite conclusion) for treating such an expenditure as properly attributable not to revenue but to capital."

Lord Atkinson in the same case stated that the word "asset" need not be confined to something material. Romer, L. J. in — 'Anglo Persian Oil Co. v. Dale', (1932) 1-K. B. 124 at p. 146 (H), observed:

"It should be remembered, in connection with this passage (referring to the above passage of Viscount Cave) that the expenditure is to be attributed to capital if it be made with a view to bringing an asset or advantage into existence. It is not necessary that it should have that result. It is also to be observed that the asset or advantage is to be for the 'enduring' benefit of the trade. I agree with Rowlatt J. that by 'enduring' is meant 'enduring in the way that fixed capital endures'. An expenditure on acquiring floating capital is not with a view to ac-

quiring an enduring asset. It is made with a view to acquiring an asset that they may be turned over in the course of trade at a comparatively early date. Nor, of course, need the advantage be of a positive character. The advantage may consist in the getting rid of an item of fixed capital that is of an onerous character, as was pointed out by this Court in — 'Mallett v. Stavely Coal and Iron Co.', (1928) 2-K. B. 405 (I)."

(6) Lord Sands in the — 'Commrs. of Inland Revenue v. Granite City Steamship Co., Ltd.', (1927) 13 Tax Cas 1 at p. 14 (J), laid down yet another test, which has also been adopted in a number of cases.

"Broadly speaking, outlay is deemed to be capital when it is made for the initiation of a business, for extension of a business or for a substantial replacement of equipment."

This undoubtedly helps to determine whether the expenditure is a capital expenditure and whether the asset is a capital asset or not. If an amount is spent for starting a business, or if the business is already existing to extend and expand the business or even if it be to replace substantial machinery and other equipment of the business, it would undoubtedly be a capital expenditure.

Another principle is to find out whether the expenditure is in relation to the fixed or circulating capital. In the former case, it will be expenditure of a capital nature while in the latter it will be revenue. Fixed capital is what the owner turns to profit by keeping it in his own possession while circulating capital is what he makes profit of by allowing it to rotate in the business. The circulating capital, which is turned over in the business in the process of being turned over yields profit or loss. Fixed capital is not involved directly in the process of the business. It only affords a source from and out of which the profits are produced. A man's stock-in-trade in his business is circulating capital whereas the plant and machinery, which are fixed and which are used in the manufacturing process, are capital assets. If a person however is a trader in machinery and plant, his stock-in-trade will be the plant and the machinery. It all depends upon the nature of the trade, which a person carried on, whether the capital employed in the business is fixed capital or is circulating capital. If a man buys and sells goods, the goods are his stock-in-trade. Instead of directly selling the goods, he may use it as raw material for the manufacture of finished goods which he sells in the market.

Another distinction, which is emphasised in the cases is between the purchase of the source from which the material is taken, which becomes directly the stock-in-trade or which is utilised in the process of manufacture as raw material for the production of the finished goods, which are subsequently marketed and the purchase of the material itself, whether it is raw material which is utilised in the manufacturing process or it is goods which are directly sold without submitting it to any manufacturing process. A dealer in paddy or coal may buy the land or the coal mine, which produces the paddy or coal in which case the outlay in acquiring such an asset will be capital expenditure as he becomes the owner of a fixed capital asset. If, on the other hand, instead of buying the land itself, he buys the crop ready for harvest or the coal, which is drawn from the mine, the purchase will be only of the goods and not the source from which the goods are produced. The amount spent in such a case will be normally treated as revenue expenditure as such goods are his stock-in-trade.

(7) It is not always easy to draw the line so clearly on the facts of every case as in the illustrations above stated. Taking for example the three decisions of this court, which are more or less analogous to the present case, in which a view against the assessee's contentions was taken, the difficulty in applying this test to the facts of each case will be evident. 'AIR 1934 Mad 617 (2) (D)', was a case in which the assessee entered into an agreement with the Government for the excavation of lime shells from certain Government lands. Under that agreement, he was to have the exclusive privilege of excavating chunam shells within the area specified in the agreement for a period of three years on condition of his paying a sum of Rs. 27750, in twelve equal quarterly instalments for the privilege conferred upon him. The document was in the form of a lease. The point raised was whether the sum so paid could be treated as revenue expenditure and was a permissible deduction. The answer given by the Full Bench was that it was a capital expenditure. The terms of the agreement were construed as not constituting the assessee the purchaser of the lime shells as the lime shells were not previously excavated and heaped up the land and the amount paid was not rent in any sense of the term notwithstanding the fact that it was payable in instalments. "The amount was not used" in the language of Bowen L. J. said the learned Judges "for the purpose of the concern but was utilised to acquire the concern".

Reference was made in the judgment to the decision of the House of Lords in — 'Smith and Sons v. Moore', (1921) 2-A. C. 13 (K). The appellant's father in that case carried on business as a shipping and coal agent for a number of years. Prior to the death of the father, the appellant acquired the business under his father's trust disposition and settlement on the terms of taking over the assets of the business at a valuation but without paying anything for goodwill. The assets included certain forward coal contracts made by the father with several colliery owners for the delivery of coal in periodic instalments at prices, which were favourable to the purchasers. The appellant valued these coal contracts at £30,000 and claimed in arriving at the profits of the business chargeable to excess profits duty, to deduct the said sum as part of the purchase price of the stock-in-trade. It was held by Lord Haldane and Lord Sumner that it was not a permissible deduction as it was capital expenditure. The reasoning adopted by the House of Lords was that when he acquired the business of the father, it was not by selling the contracts but by retaining them that he was able to employ the circulating capital by buying under them. Though the contracts were of short duration, they were part of his fixed capital and the fact that he paid a price for them made no difference. That principle was applied in the case before the Full Bench and it was therefore held that the expenditure, i.e., the rent paid was a capital expenditure, which could not be deducted. This was followed in — 'AIR 1937 Mad 302 (E). It was also a case in which the assessee got the exclusive right to excavate shells under a contract with the Government; the term of this contract was similar to this one in the previous case. The learned Judges thought that the case before them was indistinguishable from the case in — 'AIR 1934 Mad 617 (2) (D)'.

(8) On behalf of the assessee, the contention was raised that in the document in the case the payment was described as "annual lease amount" and that made a difference between that case and the earlier case in — 'AIR 1934 Mad 617 (2) (D)',

as thereby the agreement became a rental agreement. The contention was repelled with the observation that the words "annual lease amount" occurring in the document did not make any materail difference and that the transaction was exactly similar to the one, which was considered by the learned Judges in — 'AIR 1934 Mad 617 (2) (D)', with reference to the present assessee, the earlier decision in — '1939-7 ITR 652 (Mad) (A)', decided in circumstances similar to the present case that the expenditure was capital expenditure. The learned Judges followed two earlier decisions. At p. 657, their Lordships observed:

"Now in the present case what the assessee paid for was the right to win conch shells. He was not purchasing the right to any specified quantity of conch shells. It was merely the right to win what he could from the beds where the conch shells were lying. What he got was the means of obtaining the material for his business, not the material itself. This case is clearly governed by the decision in — 'AIR 1934 Mad 617 (2) (D)' and — 'AIR 1937 Mad 300 (E)'."

(9) The decision in — 'Golden Horse Shoe (New) Ltd. v. Thurgood', (1934) 1 K. B. 548 (L), was distinguished as in that case the dumps were part of stock in trade of the company. The test applied by Romer L. J. was "Are the dumps the raw materail of the appellants' business, or do they merely provide the means of obtaining that raw material?" In my opinion, they are the raw material itself So that the distinction drawn by the learned Judges between the decision of the English Court of Appeal and the case before them was that in the case before them the quantity was not specified and what was acquired was the means of obtaining material for the business and not the material itself. The lease of course was obtained under an agreement with the Government. Whether this view is correct, is the question now before us.

(10) On behalf of the assessee, Mr. Subbaraya Aiyar contends that this opinion is not sound in view of the decision of the Judicial Committee in — 'AIR 1949 PC 311 (B)'. The appellants in that case were manufacturers of beedies and for that purpose 'Tendu' leaves were required which were obtained by them under short term contracts with the Government and other owners of forests entered into by them wholly and exclusively for their business. In consideration of a sum payable in instalments, the privilege to pick and carry away the leaves was granted to them. The question that arose for decision was whether the payments made under the contracts were allowable deductions, being expenditure on revenue account and not on capital account. The answer of the Privy Council was that it was an allowable deduction. The contracts in the case were construed as conveying no interest in land and no interest in the trees and the plants.

"They simply and solely conferred upon the grantees the right to pick and carry away the leaves which of course implied (observed Lord Greene) the right to appropriate them as their own property. The small right of cultivation given in the first of the two contracts is merely ancillary and is of no more significance than would be, e.g., a right to spray a fruit tree given to the person who has bought the crop of apples. The contracts are short-term contracts. The picking of the leaves under them has to start at once practically at once and to proceed continuously."

The fact that the contracts conferred an exclusive privilege upon the assessee was treated as a matter of no significance. It was observed that as there was no definition of capital expenditure in the Act, it must be construed in a business sense unless that sense is excluded by the rules of construction applicable to it. Viewed in that light, their Lordships had no doubt in holding that in a business sense the expenditure was expenditure on revenue account and not on capital account in the same manner as if the 'tendu' leaves had been bought in a shop. Lord Greene observed:

"Under the contracts it is the tendu leaves and nothing but the tendu leaves that are acquired. It is not the right to pick the leaves or to go on the land for the purpose. Those rights are merely ancillary to the real purpose of the contracts and if not expressed would be implied by law in the sale of a growing crop."

It was also pointed out that the cases relating to the purchase of leasing of mines, quarries, deposits of brick earth, land with standing timber etc., were of no assistance in deciding the question before their Lordships. Two decisions however were relied on before their Lordships. One was the decision in — 'Alianza Co. v. Bell', (1904) 2 K B 666 (M), which was affirmed by the Court of Appeal in — '(1905) 1-K. B. 184 (N)', and by the House of Lords in — '(1906) A. C. 18 (O)'. In that case, the assessee acquired the right to work and develop a bed containing a material called caliche, which was utilised in the manufacture of nitrates and iodine. The case was treated as one analogous to the purchase or leasing of a mine and, therefore, the expenditure for the privilege conferred was treated as capital expenditure. "The claim", it was observed, "was one equivalent to a claim to deduct the expenditure made in acquiring the land for it was a claim to deduct the amount carried year by year to a sinking fund set up to meet the exhaustion of the caliche. This case appears to their Lordships to bear no resemblance to the facts of the present case, which resembles much more closely the case described and distinguished by Channell J. at page 673 of the report in — '(1904) 2-K. B. 666 (M)', of the cost of material worked up in a manufactory." "That", said the learned Judge is a

"current expenditure and does not become a capital expenditure merely because the material is provided by something like a forward contract, under which a person for the payment of a lump sum down secures a supply of the raw material for a period extending over several years."

(11) The other case was the timber case — 'Kauri Timber Co., Ltd. v. Commissioner of Taxes', (1913) A. C. 771 (P). The importance of this case is two-fold. It was not a company which carried on any manufacturing business. Its business consisted solely of cutting and disposing of timber. Under a lease for 99 years, the company acquired a right in certain timber bearing lands, it also purchased standing timber in other cases. The case was treated as analogous to a case where the source from which the material proceeded, was acquired for when the land was acquired the expenditure undoubtedly was capital expenditure. Where standing timber was purchased, it was an interest in the land was purchased as the purchasers had the right to allow the trees to grow as long as they liked. The case was, therefore, distinguished on the ground that there the interest in land itself was conveyed under the document. From the judgment of Lord Shaw in that case, the following passage was extracted in the judgment of the Judicial Committee:

"So long as the timber, at the option of the company remained upon the soil, it derived its sustenance and nutriment from it. The additional growths became 'ipso jure' the property of the company."

That emphasises the fact that what was acquired in that case was the land itself; which was the source from which the timber was obtained.

(12) The case, therefore, was distinguished by Lord Greene for he stated at p. 313 — '(AIR 1949 PC 311 (B)') thus:

"In the present case, the trees were not acquired, nor were the leaves acquired until the appellants had reduced them into their own possession and ownership by picking them. The two cases can, in their Lordships opinion, in no sense be regarded as comparable. If the 'tendu' leaves had been stored in a merchant's godown and the appellants had bought the right to go and fetch them and so reduce them into their possession and ownership, it could scarcely have been suggested that the purchase price was capital expenditure. Their Lordships see no ground in principle or reason for differentiating the present case from that supposed."

(13) So that notwithstanding the facts, that the quantity of 'tendu' leaves purchased was uncertain and undefined, and there was also the additional burden of going upon the land and picking the leaves, it was held by the Judicial Committee that the contract was one for the purchase and sale of goods. It is as if the leaves were in the godown and were purchased by the assessee and appropriated by him for his business.

(14) In our opinion, the facts in the case before the Judicial Committee are indistinguishable from the facts of the present case. In one case, the leaves had to be picked from the trees by going upon the land while in the other case the chanks had to be collected and gathered by diving into the sea. It is impossible to construe the documents in the present case as conferring any interest in that portion of the sea from which the exclusive right of winning of chanks was conferred upon the assessee.

(15) A similar view was taken even prior to the decision of the Privy Council in three cases of the Lahore High Court. Two of them related to saltpetre viz., In re, 'Paramanand Haveli Ram' 1945-13 ITR 157 (Lah) (Q), which was followed in — 'Commr. of Income-tax, Punjab v. Bhojraj Harichand', 1946-14 ITR 277 (Lah) (R), which also relate to salt-petre. These decisions were again considered in a later Full Bench of that court in — 'Benarsidas Jagannath v. Commr. of Income-Tax', AIR 1947 Lah 162 (S), in which Mehr Chand Mahajan J. delivered the judgment of the court. The learned Judge formulated the tests after a full consideration of the decisions English and Indian and came to the conclusion that where an assessee, who was a manufacturer of bricks obtained certain lands on lease for the purpose of digging the earth for the manufacture of bricks up to 3 to 3½ feet, the payments made for the privilege conferred was revenue expenditure, which was a permissible deduction. It is unnecessary to quote in extenso the summary of the law contained in that judgment at pages 164 and 165 of the report. With great respect to the learned Judge, we think that the test laid down in that decision for arriving at the conclusion that the payments were debitable to revenue account and not to capital account lays down the law correctly and is in consonance with the decision of the Judicial Committee in — 'AIR 1949 PC 311 (B)'. The principle of that decision would equally apply to the case before us. We respectfully follow the reasoning of the learned Judge.

(16) On behalf of the Commissioner of Income-tax, Mr. Rama Rao Sahib, the learned advocate, strongly relied upon the decision of the Chief Justice and Yahya Ali J. in — 'Commr. of Income-tax, Madras v. Siddareddi Venkatasubba Reddi and Bros.', AIR 1949 Mad 568 (T), which was given before the decision of the Judicial Committee and contended that the principle of the decision in — 'AIR 1949 PC 311 (B)', applies only to raw material acquired for or in connection with a manufacturing process, and as in the present case the assessee was merely a dealer in chanks without subjecting them to any manufacturing process, the principle of — 'AIR 1949 PC 311 (B)', should not be applied. The learned Chief Justice in — 'AIR 1949 Mad 563 (T)', elaborately considered the decisions bearing upon the point and distinguished the cases cited before him, observing that the principles therein laid down did not apply to the business of an assessee, who did no manufacturing business, i.e., the test laid down in the English cases and the Indian decisions would apply only if the raw material is acquired in the course of the manufacturing business. This is clear from his observations at page 575.

In the case before the learned Judges, the assessees, who were doing the business of winning mica and selling it after refinement, entered into an agreement, under which in consideration of the payment of sums of money in instalments, they obtained the mining rights in different plots of land. The duration of the agreement was from 5 to 9 years. The decision was that, as the assessees were not carrying on any manufacturing business, and there was no sale of any raw material, and as their business consisted in winning and selling mica, and for that purpose they acquired mining rights in various places, the money expended for the acquisition of such rights was capital expenditure. We do not, however, think that there is really any distinction between acquiring raw material for a manufacturing business and acquiring material for the purpose of sale. As pointed out, already, the floating or circulating capital may consist of raw materials to be worked up in the case of a business of manufacture, and of manufactured articles purchased and sold in the case of a selling business. When goods are bought for purposes of sale, the business is carried on with them, and it is on the turnover of these & their replacement by further goods that the trader makes his profits or loss. Consequently, if money is invested for the purchase or acquisition of goods, which form the stock in trade, i.e., the circulating and floating capital of the business, such as expenditure is a necessary and proper deduction in computing the profits of the business. If what was acquired under the contracts in the present case was not a fixed asset or a permanent or enduring advantage but merely certain goods, viz., chanks., then, whether they were required for any manufacturing process or for sale would not, in principle, make any difference.

The question, therefore, to be decided is, not whether they were acquired for any manufacturing process of the assessee but whether what was acquired was a capital asset or was merely a stock in trade. If it was merely the purchase of goods and did not involve the acquisition of the source from which the goods are produced, the amount so spent for the acquisition of the goods by purchase would be revenue expenditure. From the judgment of Lord Greene of the Judicial Committee, it is clear that the acquisition of the 'tendu' leaves was treated like a purchase of the goods from a godown and though the question (Is expenditure of this character made in acquiring one of the raw materials of the appellants manufacture capital expenditure within the meaning of this Act?) was formulated, no point was made of it in the actual decision of the case. The

very timber case, viz., — '(1913) A. C. 771 (P)', referred to by Lord Greene was not a case of a manufacturer. The assessee's business in that case consisted of merely cutting and selling timber. Had not the Judicial Committee on the facts of that case come to the conclusion that what was acquired was not interest in the land but was merely the purchase of timber, the amount expended in acquiring the timber would have been clearly from a revenue expenditure.

Lord Shaw at page 778 in that report quotes from Saunders' Reports the following passage:

"The principle of these decisions appears to be this: that whatever at the time of the contract it is contemplated that the purchasers should derive a benefit from the further growth of the thing sold from further vegetation and from the nutriment afforded by the land, the contract is to be considered as for the interest in land; but where the process of vegetation is over, or the parties agree that the thing sold shall be immediately withdrawn from the land, the land is to be considered as a mere warehouse of the things sold and the contract is for goods."

It is probably with reference to this passage, if one may venture a guess, that Lord Greene stated in — 'AIR 1949 PC 311 (B)', that, if the leaves had been stored in a merchant's godown and the appellants had bought the right to go and fetch them and so reduce them into their possession & ownership, it could scarcely have been suggested that the purchase price was capital expenditure. If in that case the documents could have been construed as constituting merely purchase of goods viz., the leaves there is no reason to refuse to apply that principle to the present case, merely because the assessee is not manufacturer. We do not think that there should be any distinction between cases where goods are required for manufacture or where goods are required for sale as such without subjecting them to further manufacturing processes. In either event, the question to be answered is: was it the purchase of goods as such or was it the purchase of the source from which the goods emanated? If the answer is that it was material that was purchased and not the source of the material, the only possible answer that could be given as regards the amount expended, is that the expenditure was a revenue expenditure and not a capital expenditure. We do not, therefore, think that there is any force in the distinction which Mr. Rama Rao Sahib attempted to draw between the case before the Judicial Committee and the present case.

It was then urged that a right of fishery has been treated as a right in immoveable property and, therefore, the right to win chanks may also be treated as conferring an interest in immoveable property and that, therefore, the present case falls within the exception contemplated by Lord Greene in — 'AIR 1949 PC 311 (B)'. We do not think that the right to collect chanks from the sea stands on the same footing as an exclusive fishery right, and on that ground refuse to apply the principle of the decision of the Judicial Committee. We are, therefore, of opinion in view of the decision of the Judicial Committee in — 'AIR 1949 PC 311 (B)', that item of expenditure is revenue expenditure. The question has to be answered in favour of the assessee and against the Commissioner of Income-tax.

(17) The petitioner is entitled to his costs, Rs. 250.

A/R.G.D. Answer accordingly.

A.I.R. 1953 MADRAS 905 (Vol. 40, C. N. 353)

PANCHAPAKESA AYYAR J.

The State of Madras, represented by the District Collector of Tirunelveli, Appellant v. A. M. N. A. Abdul Kader Tharaganar Firm by one of its partners Nallakaruppa Nadar, Respondent.

A. A. O. No. 583 of 1950, D/- 17-3-1953.

(a) Sales Tax — Madras General Sales Tax Act (9 of 1939), S. 18 — Object and scope.

Section 18, Sales Tax Act is intended 'only to cover suits for compensation or damages against tortious or criminal acts committed by Government Officers or servants or by the Government itself', and it does not cover suits for refund of taxes illegally collected or alleged to be illegally collected, or even taxes collected in excess by sheer error. AIR 1939 Mad 421 (FB), Applied. (Para 3)

(b) Limitation Act (1908), Arts. 16, 62 — Applicability.

Article 16, Limitation Act has no application to a case where the tax was merely recoverable as arrears of land revenue, and the claim was not made by the revenue authorities on account of arrears of revenue or on account of demand recoverable as such arrears, and where the tax also had been paid within the 15 days prescribed, and had not become a tax liable to be recovered as arrears of land revenue. The only Article which can be applied properly is Art. 62. AIR 1952 Mad 273, Ref. (Para 4)

Anno: Limitation Act, Art. 16 N. 2; Art. 62 N. 2.

Govt. Pleader, for Appellant; T. R. Sangameswara Ayyar, for Respondent.

CASES CITED:

(A) ('39) AIR 1939 Mad 421: ILR (1939) Mad 566 (FB)

(B) ('52) AIR 1952 Mad 273: 1951-2 Mad LJ 340

JUDGMENT: I have perused the records and heard the learned counsel on both sides.

(2) The only point for consideration is whether, in a suit like the one filed in this case, for recovery of Rs. 900, said to have been collected illegally from the plaintiff as sales-tax, by the defendant, the State of Madras, the suit would become barred by limitation in six months under Section 18, Madras General Sales-tax Act, or at least within a year under Art. 16, Limitation Act, as contended by the defendant in the Courts below, or whether only Art. 62, Limitation Act, giving three years, will apply, in which case, of course, there will be no question of limitation in this suit. The tax in this case was collected from the plaintiff on 27-5-1946, and the suit was filed only on 10-1-1948. So, if S. 18, Sales-tax Act applied, or Art. 16, Limitation Act applied, the suit would be barred by limitation. The District Munsif, Tuticorin, who tried the suit, (O. S. No. 38 of 1948) dismissed it as barred by limitation, on the ground that Art. 16, Limitation Act and S. 18, Sales-tax Act would apply. The principal Subordinate Judge, Tuticorin, by his judgment in A. S. No. 109 of 1949, set aside the order of dismissal and held that Art. 62, Limitation Act alone would apply, and the suit would not be barred by limitation, and remanded the suit to the trial Court for fresh disposal after giving

its findings on the other issues. This civil miscellaneous appeal has been filed by the State of Madras with a view to get an authoritative decision on the point of limitation in such cases.

(3) I have absolutely no doubt that the learned Subordinate Judge was right in holding that Art. 62, Limitation Act alone would apply, and that Sec. 18, Sales-tax Act and Art. 16, Limitation Act would have no application in such cases. Section 18, Sales-tax Act runs as follows:

"No suit shall be instituted against the Crown, and no suit, prosecution or other proceeding shall be instituted against any officer or servant of the Provincial Government in respect of any act done or purporting to be done under this Act, unless the suit, prosecution or proceeding is instituted within six months from the date of the Act complained of."

The very wording of that section will show that it is intended 'only to cover suits for compensation or damages against tortious or criminal acts committed by Government Officers or servants or by the Government itself', and that it will not cover suits for refund of taxes illegally collected or alleged to be illegally collected, or even taxes collected in excess of sheer error. That stands to sense and common sense. Supposing, for instance, a clerk in writing out a demand order, put Rs. 9,000 for Rs. 900, and the person liable to pay the tax paid Rs. 9,000, and then filed a suit a year later for recovering the difference of Rs. 8,100, it will be sheer perversity to argue that S. 18 would apply and bar the suit as it was not filed within six months. It would be clearly a case falling within Art. 62 giving three clear years, from the date of the excess payment, before limitation would operate. Fortunately, in this case, it is unnecessary to continue this discussion further, as there is a ruling of a Full Bench of this Court in — 'Panchayat Board, Tiruvottiyur v. Western India Matches Co.', AIR 1939 Mad 421 (FB) (A), which has held that S. 225, Madras Local Boards Act (14 of 1920), as amended by Act 11 of 1930, containing 'more or less the same provision and wording as S. 18 of the Sales-tax Act', will be limited to suits for compensation or damages and will be inapplicable to suits against a local board for refund of the house-tax alleged to have been illegally collected. The principle of that ruling will apply to all cases of taxes illegally collected, and not merely to house-tax due to local boards or all taxes due to local boards.

(4) Nor can Art. 16, Limitation Act have any application to a case like this, where the tax was merely recoverable as arrears of land revenue, and the claim was not made by the revenue authorities on account of arrears of revenue or on account of demand recoverable as such arrears, and where the tax also had been paid within the 15 days prescribed, and had not become a tax liable to be recovered as arrears of land revenue. So, the only article which can be applied properly to this case is Art. 62, Limitation Act, which prescribes three years, from the date when the money was received by the defendant, as the period of limitation. The jurisdiction of Civil Courts is of course, not ousted. See — 'the Province of Madras v. Satyanarayanamurthy', A I R 1952 Mad 273 (B). So Art. 62 will apply under the Full Bench ruling. The learned Subordinate Judge's decision is correct. This appeal deserves to be and is hereby dismissed with costs.

B/H.G.P. Appeal dismissed.

A.I.R. 1953 MADRAS 906 (Vol. 40, C. N. 354)

RAJAMANNAR C. J. AND
VENKATARAMA AYYAR J.

Perla Annapurnamma Garu and another, Appellants v. Collector of Vizagapatam representing the Provincial Government of Madras, Respondent.

Appeals Nos. 34, 35 and 36 of 1949, D/- 18-11-1952.

Civil P. C. (1908), S. 92 — Parties to a suit under S. 92.

It is not necessary that for every suit under S. 92, there must necessarily be a trustee who can be sued as a defendant. If a trust has been created for public purposes of a charitable or religious nature under a will, a suit will lie for settling a scheme where the direction of the Court is deemed necessary for the administration of such trust. The person who is in possession of the property will be a proper party to the suit. AIR 1923 Mad 376, Foll.; 16 Mad LW 922, Expl. (Para 5)

Anno: Civil P. C., S. 92, N. 28.

P. Somasundaram, for Appellants; Govt. Pleader and V. Balakrishna Eradi, for Respondent.

CASES CITED:

(A) ('22) 31 Mad LT 63: 16 Mad LW 922
(B) ('23) AIR 1923 Mad 376: 46 Mad 300

RAJAMANNAR, C. J.: These three appeals arise out of three suits between the same parties which were tried together and disposed of by the learned District Judge of Vizagapatam by a common judgment dated 11-12-1947. The appellant was the defendant in all the three suits; the respondent, the Collector of Vizagapatam, was the plaintiff. The appellant is the widow of one Perla Ramamurthi Chetty, who died on 2-11-1918, leaving behind him his widow, the appellant, and a daughter, and also his last will and testament dated 1-11-1918. In and by this will, he appointed the appellant as the sole executrix. In these appeals, we are only concerned with three clauses in the will which contain certain charitable bequests. They are as follows:

"1. Out of my property Rs. 50,000 worth immoveable property i.e., lands fetching Rs. 2000 annually should be allotted to the choultry run by me as an endowment. A proper trust deed should be executed to my wife. From the income of these lands, the aforesaid choultry should be properly run as is being done by me hereinafter permanently. The house and Dabarakotulu should be dedicated to the choultry permanently.

2. Out of my property a sum of Rs. 25,000 should be spent for acquiring a site near the railway station and a rest house should be built for the travellers.

3. Out of my property a sum of Rs. 25,000 should be spent for starting school for industrial education or by giving scholarships for encouraging such education."

Though the defendant-appellant entered upon her duties as executrix under the will, it is common ground that the bequests of Rs. 50,000/-, Rs. 25,000 and Rs. 25,000 to the three charitable objects have

not been given effect to, by payment of the monies or otherwise. The appellant states that she has been properly running the choultry, and her counsel has stated before us that the house and Dabarakotlu may be declared to be dedicated to the said choultry.

(2) In O. S. No. 2 of 1944 on the file of the District Judge of Vizagapatam, which was a suit filed by one Perla Satteyya Chetti who claimed to be the adopted son of the deceased Perla Ramamurthi Chetty against the appellant and certain others for an account of their management of the properties left by his adoptive father during his minority, the learned District Judge referring to the charitable bequests above mentioned made certain remarks which were responsible for the institution of the present suits. The learned Judge said:

"I have purposely reproduced the terms of the will to show that in regard to one lakh of rupees provided for public charities the plaintiff and defendants have been successfully managing to avoid giving effect to the terms of the will .....Therefore a copy of this judgment will be forwarded to the District Collector, Vizagapatam with a direction to take action under S. 92, Civil P. C., in consultation with the Government Pleader who is incidentally the advocate for defendant 1 & who in his capacity as Government Pleader states at the Bar that this is the proper procedure in regard to these unexecuted public charities."

(3) The Collector of Vizagapatam thereupon instituted the three suits out of which these appeals arise in the District Court of Vizagapatam under Ss. 92 and 93, C. P. C. O. S. No. 18 of 1946 related to the bequest of Rs. 25,000 for an industrial school, O. S. No. 20 of 1946 related to the bequest of Rs. 25,000 for building a rest house near the railway station, and O. S. No. 19 of 1946 related to the bequest of Rs. 50,000 for the maintenance of the choultry founded by the testator. The three plaints contained similar allegations, namely, that the appellant who must be deemed to be a specific trustee for the public trusts and charities under the will did not give effect to, or carry out, the same and has thus violated the objects of the trust. The prayer in each of the suits was for a decree directing the defendant to pay the respective sums of money bequeathed to the three charities to the plaintiff, the Collector, or to the trustees appointed as per the scheme to be settled by the Court for giving effect to the testator's directions in regard to the utilisation of the amount. The plaintiff also specifically prayed for the framing of a scheme for the management of the respective trusts.

(4) The main plea in defence was that the suits were not maintainable because the administration of the estate has not been completed and therefore there were no completed trusts which could justify action under S. 92, C. P. C.

The learned District Judge overruled the objections raised by the appellant and proceeded to frame a scheme for the administration of the three different trusts. In the decrees which he passed in each of the three suits, we find a clause directing the defendant-appellant to pay the monies or to allot and to convey the properties in accordance with the provisions in the will relating to the respective trusts. The scheme contains provisions for the administration of the trust including the appointment of three trustees.

(5) On behalf of the defendant-appellant, Mr. Somasundaram her learned counsel, contended that the suits were entirely misconceived and that as there were no completed trusts in existence and as there was no allegation of any breach of trust on the part of the appellant as a trustee, a suit under S. 92, C. P. C. was not maintainable. He relied on S. 332, Succession Act in support of his contention that the trusts had not become complete, because the executrix had not consented to the legacies in favour of the trusts. According to him before a suit under S. 92 could be filed, it was necessary that there should be an administration suit in which a distribution of the estate among the several legatees in pursuance of the directions contained in the will was finally made. He cited to us a decision of a Division Bench of this court in — 'Annavarapu Nacharamma v. Venkatapayya', 16 Mad L. W. 922 (A). That related to a suit brought under S. 92, C. P. C., in which there was a prayer for the removal of the defendant from the office of trustee. The defence was that though provision had been made in the will of the deceased of which the defendant was the executrix for the constitution of the trusts, it turned out on administration that there were not sufficient assets, and therefore there was no trust in respect of which a suit under S. 92 would lie. It was this plea of the defendant that was upheld by the learned Judges of this Court. The learned Judges held that though the will of the deceased bequeathed a legacy for the constitution of a trust, the proper procedure to enforce the provisions of the will was a suit for administration. The suit was therefore held to be misconceived and therefore it was dismissed. In our opinion, the scope of this decision is very limited. It can only be authority for this position, namely, that in a suit brought under S. 92, C. P. C. the defendant who happened to be the executrix under a will cannot be made to give effect to the provisions of the will of which she is the executrix. We do not think that this decision should be treated as authority for the wider proposition that it is always necessary that a suit for administration should precede a suit under S. 92, C. P. C. say for the framing of a scheme in respect of a trust in whose favour there is a bequest in a will. This position is made clear in a latter decision of a Division Bench in — 'Venkatanarasimha Rao v. Subbarao', AIR 1923 Mad 376 (B). In that case, the testator provided that a sum of Rs. 400 should be spent every year out of his estate for the spread of the Sanskrit language or for the spread of the Hindu Religion or for both. The said amount was charged on the estate, & the executors were enjoined to have the charitable objects carried into effect as the then existing trustees of Rajahmundry Hindu Samaj may deem fit. The executors appointed under the will declined office. The testator's widow adopted a son who took possession of the estate left by the deceased testator. The trustees of the Hindu Samaj having obtained sanction of the Advocate-General instituted a suit under S. 92, C. P. C., against the adopted son praying that the Court may frame a scheme for the administration of the trust and for appointment of trustees and for other ancillary reliefs. Various pleas were raised by the defendant, but we are concerned with the plea that the suit was premature and not therefore maintainable, because the trust had not been completed. The learned Judges, Spencer and Devadoss JJ. overruled this plea. It was held that it was not necessary that for every suit under S. 92, C. P. C., there must necessarily be a trustee who could be sued as a defendant and that if a trust had been created for public purposes of a charitable or religious nature under a will, a suit would lie for settling a scheme where the direction of the Court is deemed necessary for the administration of such trust and the person who is in possession of the property would

be a proper party to the suit. Devadoss J. dealt with the decision in — '16 Mad L. W. 923 (A)', discussed by us earlier in this judgment, and refused to accept the contention that the decision therein supported a wide proposition that an administration suit was necessary before the trust could be the subject of a suit under S. 92. The learned Judge however went on to observe as follows:

"If the circumstances are such that the intervention of the Court is deemed necessary for the purpose of framing a scheme for any trust which is proved to exist, the Court has jurisdiction to frame a scheme. No doubt the defendant in this suit could not be made to pay amount due or to surrender the property, if any, belonging to the trust he being a stranger to the trust. On the framing of a scheme and on the appointment of trustees, he should be proceeded against by the trustees for such reliefs as they may deem fit..... In this sense, no doubt, the suit against the defendant is unsustainable, but the suit is perfectly competent for the purpose of enabling the Court to frame a scheme in respect of the charitable bequest contained in the will, provided the bequest fulfils other conditions."

These observations are apposite to the present case. Mr. Somasundaram learned counsel for the appellant, conceded that the bequests are not invalid on any ground. They are certainly for public and charitable purposes. It is obvious from the circumstances already narrated that the intervention of the Court is necessary for the purpose of framing a scheme for the administration of the trusts contemplated by the testator. There can therefore be no legal objection whatever to the framing of the scheme as such. We have perused the scheme framed by the learned District Judge covering the three trusts mentioned in the will, and we are in general agreement with the provisions contained therein.

(6) What the learned District Judge did after framing the scheme was to direct the defendant-appellant in O. S. No. 18 of 1946 to pay to the trustees appointed under the scheme a sum of Rs. 25,000 together with subsequent interest at 6 per cent. per annum till the date of payment and in O. S. No. 20 of 1946 to pay a similar sum of Rs. 25,000 with subsequent interest at 6 per cent. per annum and in O. S. No. 19 of 1946 to allot and convey to the trustees appointed under the scheme immoveable properties of the value of Rs. 50,000 and yielding a net annual income of Rs. 2000 from out of the properties which were set-out in the plaint schedule A or from the other immoveable properties of the late Ramamurthi Chettigaru and also the house and Debarakotlu described in the plaint schedule B. From what we have said above, it follows that these clauses in the decree should be deleted, except that part of the clause in O. S. No. 19 of 1946 which provides for the conveyance of the house and Debarakotlu described in the plaint schedule B, therein, to the trustees appointed under the scheme. Indeed, the learned counsel for the appellant has no objection to the decree in this respect being affirmed. We may add by way of abundant caution that the mention of the trust properties in cl. 2 of the scheme shall not be taken to imply an obligation on the part of the defendant-appellant to pay the sums of money or to allot the properties of the value mentioned therein. The trustees who will be appointed under the scheme will be at liberty to take such steps as they are advised to recover what has declared to be the trust property from the persons in possession of the estate of the late Ramamurthi including the defendant-appellant, the executrix. We are not concerned in this suit under S. 92 to find out if there is enough money left in the estate to make the several payments and allot the properties as directed in the will. In these suits, under S. 92, all that we can do is to frame scheme for the administration of what undoubtedly are public charitable trusts.

(7) We wish to make only one amendment in the scheme. Clause 6 of the scheme provides as follows:

"The trustees shall elect one among themselves as Chairman of the Committee."

For this clause, the following clause will be substituted:

"The Chairman of the Municipal Council, Vizagapatam, for the time being, shall be the chairman of the Committee."

We have made this alteration in the interests of the harmonious working of the Committee of trustees, as election is likely to lead to disputes among the trustees.

(8) In the result, the three appeals are allowed to the extent and in the manner indicated above, and are dismissed otherwise. Costs of both parties will come out of the estate of the deceased testator (advocate's fee in all the three appeals Rs. 500/-.)

B/V.S.B. Ordered accordingly.

A.I.R. 1953 MADRAS 908 (Vol. 40, C. N. 355)

RAMASWAMI J.

Vanukuri Danda Reddi, Petitioner v. Vajrala Ramireddi, Respondent.

Civil Revn. Petn. No. 121 of 1951, D/- 24-3-1953.

Debt Laws — Madras Agriculturists' Relief Act (4 of 1938), Ss. 19 and 25A — Order scaling down decree passed by Small Cause Court — Order is not appealable — (Provincial Small Cause Courts Act (1887), S. 27).

(Para 1)

Anno: Provincial Small Cause Courts Act, S. 27 N. 1.

O. Chinnappa Reddy and P. R. Ramakrishna, for Petitioner; A. V. Krishna Rao, for Respondent.

CASE CITED:

(A) ('45) A. A. O. No. 222 of 1945 (Mad)

ORDER: The short point for determination in this civil revision petition is whether the order of the District Munsif of Guntur in I. A. No. 71 of 1950 in S. C. No. 1566 of 1929, an application under S. 19 of Madras Act 4 of 1938, is appealable under S. 25A of the said Act, as has been held by the learned Subordinate Judge of Guntur against the contentions of the learned advocate for the respondent in the lower Court that no appeal lay in such cases inasmuch as the scaling down was of a decree passed by the Small Cause Court and that any decree made by the Small Cause Court is only revisable by the High Court and cannot be appealed against to the Court having appellate jurisdiction ordinarily. The point is concluded by authority, see A. A. O. No. 222 of 1945 (Mad) (A), wherein Wadsworth J. held that against the orders of a Court of Small Causes appeals are excluded by the provisions of S. 27, Provincial Small Cause Courts Act. Therefore the order of the lower appellate Court is set aside and that of the learned District Munsif will stand confirmed. This civil revision petition is allowed with costs.

B/V.R.B. Revision allowed.

A.I.R. 1953 MADRAS 909 (Vol. 40, C. N. 356)

GOVINDA MENON J.

S. Srinivasan and another, Petitioners v. P. Bhakthavatsulu Naidu, Respondent.

Civil Revn. Petn. No. 2199 of 1951, D/- 13-3-1953.

Limitation Act (1908), Art. 159 — Extension of period fixed — Civil P. C. (1908), O. 37, R. 3.

Article 159, Limitation Act can be construed only as prescribing the period of ten days when the summons does not specifically fix a date for the hearing. (Para 4)

A Court has power in a proper case before the passing of decree, to grant leave to defend the suit even though the defendant has not applied for leave within 10 days of the service of summons on him in Form No. 4 of Appendix B, Civil P. C. AIR 1949 Mad 742, Rel on. (Para 4)

Where the summons issued in Form No. 4, Appendix B, Civil P. C., specifically mentions in addition, the date of hearing of the suit, such mention is likely to mislead the defendant and if the defendant has appeared and applied for leave on the date of hearing which is beyond 10 days from the date of service of summons, he ought to be granted leave 'ex debito justitiae' on the principle 'actus curiae neminem gravabit'. (Para 4)

Anno: Lim. Act, Art. 159 N. 2.

Sundararajan and Sivaswami, for Petitioners; A. K. Muthuswami Iyer, for Respondent.

CASES CITED:

(A) ('49) AIR 1949 Mad 742: 1949-1 Mad LJ 514

(B) ('51) AIR 1951 Mad 895: 1951-1 Mad LJ 676

ORDER: This is a petition to revise the order of the Third Additional City Civil Judge, Madras, refusing leave to the petitioner to defend a suit by excusing the delay in filing the application for leave to defend.

(2) The respondent plaintiff filed O. S. No. 332 of 1951 in the City Civil Court on a promissory note as a summary suit under O. 37, R. 1(b), Civil P. C. for recovering a sum of Rs. 2013-14-0. The petitioners defendants were served with the summons as provided in form No. 4 of Appendix B to the Civil P. C. which was marked before the learned Judge as Ex. A. 1. In that summons in addition to the form prescribed there were the further words "Hearing 22-3-1951 at 11 a.m." added to it. The summons were served on 5-3-1951 and therefore ordinarily under Art. 159, Limitation Act the application for leave to defend ought to be filed within ten days of the service of summons. But being misled by the additional words "hearing on 22-3-1951 at 11 a.m." the petitioners thought that they had time for applying for leave to defend until 22-3-1951 and therefore approached their counsel only on 21-3-1951 and instructed him to file the application for getting leave to defend. The lower Court has dismissed the petition on the ground that the period of ten days provided for under Art. 159, Limitation Act having expired there was no jurisdiction in the Court to extend the time for granting leave to defend. Mack J. had to consider a similar case in — 'Murahari Rao v. Bapayya', AIR 1949 Mad 742 (A), where the facts were practically similar. There also summonses were issued under O. 37, R. 1, Civil P. C. to the defendant requiring his appearance within ten days of service. A day after the expiry of the period fixed, the defendant appeared and moved under O. 37, R. 3, Civil P. C. for leave to defend. The District Munsif granted him leave to defend unconditionally and on that order the plaintiff preferred a civil revision petition. While dismissing the same Mack J. observed as follows:

"It is true that there is no specific provision in O. 37, R. 2 or in the Limitation Act empowering a Court to condone a delay in appearance beyond the ten days prescribed by the summons in Form No. 4. Technicality can be met with technicality, because the default recited in this summons for non-appearance within ten days is that the plaintiff will be entitled after the expiration of this period to obtain a decree with costs. It is common ground that no decree was passed by the Court when the defendant filed his application for leave to defend on the 11th day. Furthermore under O. 37, R. 4, even after the decree the Court may, under special circumstances, set aside and give leave to the defendant to defend the suit on terms, it thinks fit. A fortiori if the Court has passed no decree, it clearly has ample discretion to give the defendant such leave, notwithstanding the fact that he has not appeared within ten days of the service of the summons on him in form No. 4, Appendix B."

(3) These observations have special relevancy to the present case and have my support.

(4) Learned counsel for the respondent relies upon certain observations contained in a decision of Rajamannar C. J. and Panchapakesa Ayyar J. in — 'Kamalamma v. Ismail Ispahani Venkata Sastri', AIR 1951 Mad 895 (B), which are as follows:

"While there is no provision in O. 37 of the Code for enlargement of time over and above the ten days for applying and obtaining leave to defend, there is provision in O. 7 of the Original Side rules for extension of time by the Registrar."

I am asked to say that in the circumstances of this case the order of the lower Court refusing leave to defend is justified. As stated by Mack J. it is somewhat incongruous that a Court which after passing a decree on default of appearance can set aside the same, should have no power, before passing the decree to extend the time for applying for leave to defend. In the present case there are ample reasons for the defendants being misled because the summons clearly stated that the hearing was on 22-3-1951. Though in the typed body of the notice it was stated that leave to defend should be obtained within ten days, the insertion in manuscript as a separate paragraph in the summons that the hearing would be on 22-3-1951 is certainly likely to mislead the defendants. 'Actus curiae neminem gravabit', (an act of Court shall prejudice no man). Acts of mistake at the hands of Court should not prejudice a suitor and as such I am inclined to agree with Mack J. that the Court ought to have, before passing the decree, granted leave to defend. Article 159, Limitation Act can be construed only as prescribing the period of ten days when the summons does not specifically fix a date for the hearing. In such circumstances one cannot say definitely that the period of ten days fixed under Art. 159, Limi-

tation Act is an inflexible one. I am therefore inclined to agree with Mack J. and hold that 'ex debito justitiae' leave to defend ought to have been granted. The civil revision petition is therefore allowed and I. A. No. 1067 of 1951 is remanded to the lower Court for disposal according to law. The costs of this revision petition will abide and follow the result.

B/K.S.B. Revision allowed.

A.I.R. 1953 MADRAS 910 (Vol. 40, C. N. 357)

RAMASWAMI J.

Kanakkasseril Kaliani Amma's daughter 3rd tavazhi Karnavansthi Pappikutty, Appellant v. Kanakkasseril 2nd tavazhi tarwad Karnavan and manager Sankunni Nayar and others, Respondents.

Second Appeal No. 965 of 1949, D/- 23-2-53.

Malabar Law — Karnavan — Duties of — Delegation of duty to perform Pooja and Sradhas.

It is well known that when a karnavan of the tarwad is not able to perform a Sradha on account of old age, any male member can take his place and get through it. Similarly, for a pooja if the karnavan is not able to go to the temple for unavoidable reasons and when one member of the tarwad is present on behalf of the karnavan, it cannot be said that that pooja has not been correctly performed. There is no special religious significance in the karnavan himself performing the Sradhas or the ceremonies. (Para 7)

Where, therefore, a term in a partition deed required the karnavan of a particular tavazhi to perform certain sradhas and poojas, it was held that there was compliance with the terms in the deed by the performance of these ceremonies by the tavazhi under the express delegation of the karnavan. (Position of karnavan explained). 28 Mad 182 (FB) and AIR 1917 Mad 95, Rel. on. (Para 7)

M. K. Nambiar, for Appellant; D. A. Krishna Variar, for Respondents.

CASES CITED:

(A) ('05) 14 Mad LJ 415: 28 Mad 182 (FB)
(B) ('70-71) 6 Mad HCR 401
(C) ('70-71) 6 Mad HCR 411
(D) ('17) AIR 1917 Mad 95: 39 Mad 918

JUDGMENT: This is a second appeal which has been preferred against the decree and judgment of the learned Subordinate Judge of Ottapalam in A. S. No. 100 of 1948 confirming the decree and judgment of the learned District Munsif of Chowghat in O. S. No. 11 of 1947.

(2) The facts are: The plaintiff and defendants 1 to 15 are members of one Kanakkasseri tarwad. In a partition in the tarwad evidenced by Ex. A. 1 dated 26-8-1935, the tarwad properties were put in possession of various thavazhis. The plaintiff is a member and karnavathi of the 3rd tavazhi. Defendants 1 to 12 form members of the 2nd thavazhi while defendants 13, 14 and 15 each represent one unit. According to the terms of the partition deed (Paras. 3 to 6) certain items scheduled as schedule I, which are the plaint items, are set apart in common to be kept in possession by the second thavazi under certain conditions. The conditions are that the second thavazhi has to, from out of the income of these items, pay Rs. 25-8-0 to the then karnavans ten days before the due date of the performance of certain ceremonies. The ceremonies are also detailed in the I schedule. They include the Thiruvathira Oottu in the Kazhuvilangu temple, Dharmadeva Pooja, Samkrama Pooja and Pooja in the serpent grove and also three "sradhas" of three deceased karnavans of the tarwad. The total expenses of all these ceremonies is fixed at Rs. 25-8-0 and the expenses for each is also given in the I schedule and these amounts have to be paid ten days before the ceremonies, to the karnavans. The karnavans have to perform the ceremonies and all the members are entitled to be present and witness the ceremonies. The other conditions are that none of the trees in the I schedule be cut, sold or damaged by the second thavazhi. The last condition is that the I schedule properties must not be transferred possession of by the thavazhi. The plaintiff complains that all the three conditions laid down in Ex. A. 1 have been violated by the thavazhi and that consequently she is entitled to recover possession as one of the members of the tarwad. If it is found that there has been a breach of the conditions there is no doubt that the plaintiff can get possession as per the terms of Ex. A. 1. Defendants 1 to 5 deny that any breach has been committed by them, their contention being that they themselves have performed all the ceremonies under the directions of the karnavans, that they have not cut, damaged or sold any trees, and that no possession has been transferred to them.

(3) Both the lower Courts have held that there has been no breach of the conditions in the partition deed which made the defendants liable to surrender possession of the suit properties and hence this second appeal by the defeated plaintiff.

(4) It is contended by the learned advocate for the appellant Mr. Nambiar that there is no compliance with the terms of the partition deed and the trust created therein in regard to the performance of these ceremonies, if the sum of Rs. 25-8-0 is not paid over to the karnavan or in the event of his being a pauper to the seniormost solvent anandravan ten days before the ceremonies and ensuring that these ceremonies are performed and that it is no answer to say that on account of the disruption of the tarwad there is no karnavan as such to be entrusted with the due performance of these ceremonies. In my opinion, both these contentions are correct and I shall deal with them in the next succeeding paragraphs.

(5) There can be no doubt that under the relevant document viz., the partition deed, a trust has been created in regard to the performance of these religious ceremonies and the second thavazhi has been made the trustees thereunder. The trustees have got a right to be in possession of the plaint properties included in the first schedule to the partition deed without powers of alienation and impairing the estate and realise the income and devote only an amount of Rs. 25-8-0 towards the performance of these ceremonies. They are under an obligation to pay Rs. 25-8-0 every year to the karnavan ten days before the date of the ceremonies and in the event of the karnavan becoming an insolvent pay over to the next seniormost member of the common tarwad who was to perform the ceremonies. The makers of this trust, apparently well conversant with the ways of their own tarwad karnavan and seniormost anandravan in regard to the paramount

performance of these ceremonies for the spiritual welfare of the entire family and their well being by securing the blessings of providence, have finally inserted a condition that in case the persons to whom the amount is paid pocketed the amount and did not perform the ceremonies, the second thavazhi was to perform the ceremonies and recoup themselves out of the trust properties. The learned Subordinate Judge seems to have felt difficulty as to how the second thavazhi after paying the money & when the ceremonies are not performed, could recover the amount from the trust and perform the ceremonies themselves. I may dispose of this difficulty, which is more imaginary than real, because the underlying intention of the makers of the trust was that the ceremonies must be performed and that even if they are not performed after the karnavan or the seniormost anandravan is paid over the amount the trustees should perform and recompense themselves from the trust property which is not their exclusive property but the common property of the tarwad which was not divided and had been set apart for this purpose and entrusted to the second tavazhi. The learned Subordinate Judge has also overlooked that if the money is paid over to the karnavan of the seniormost anandravan and he did not perform the ceremonies, they need not be selected for the ensuing years because under the terms of the document it is only the solvent karnavan or the solvent anandravan who could do it and the fact that the money had been pocketed and not expended would be a clear case of not being solvent and the next eligible man has got to be selected for this purpose and which may include this very second thavazhi, provided there is a seniormost anandravan there. Therefore, if the second thavazhi had performed the ceremonies without reference to the karnavan or the seniormost anandravan they would certainly not have complied with the terms of this partition deed creating a trust.

(6) The learned advocate, Mr. Nambiar has properly pointed out that it is no answer for the respondents to say that on account of the disruption of the tarwad there was no karnavan as such for money being paid over. In advancing this contention the respondents overlook the position occupied, and the spiritual duties discharged, by a karnavan and which have been well pointed out in — 'Kenath Puthen Vittil Tavazi v. Narayanan', 28 Mad 182 at p. 192 (A) as follows:

> "A karnavan in Malabar is the senior male member of a group of persons, all of them tracing their descent in the female line from a common female ancestor owning joint property under the absolute control and management of the karnavan. This group form a Marumakatayam tarwad. In this tarwad a mother and her descendants in the female line, by themselves, constitute a thavazhi, i.e. the line of a single mother. But this term is usually applied to any branch of a tarwad in separate possession of a portion of the joint family property holding it thus for convenience of enjoyment. The term is also occasionally applied to such a branch even when there is a severance of interest and the main tarwad loses or is deprived of all interest in the property in the possession of this branch of tavazhi and the latter has really developed into a tarwad by itself. See — 'Velia Kaimal v. Velluthadatha Shamu', 6 Mad H C R 401 (B). While the senior male member in a tarwad is the karnavan of all the members in the tarwad and hence is called the karnavan of the tarwad, every member is the karnavan of his junior in age and anandravan of those senior to him in the tarwad, the terms karnavan and anandravan being correlative. Every member is thus a karnavan or anandravan of every other member in the tarwad. A tarwad may be split into various branches, each branch holding its own property without community in the property held by another branch. When such division has taken place each branch or tavazhi, forms so far as Courts are concerned a separate tarwad by itself the senior male of each branch is treated in law as the karnavan of the tarwad. As pointed out by Holloway J. in — 'Korappan Nair v. Chenen Nair', 6 Mad H C R 411 at p. 414 (C) in popular language all the members of the separated branches still belong to the same tarwad, but 'in the only sense with which Courts of justice are concerned, they do not.' The result is that the members of the original or larger tarwad continue to treat one another as karnavan and anandravans, though there may be no community of property between them and they do not strictly at any rate, as Holloway J. correctly points out, in a Court of law belong to one tarwad. To put it briefly, even though the members of a tarwad may divide all the property, they still continue karnavan and anandravan. For purposes of pollution, for the performance of funeral ceremonies, for purposes of succession the relationship is recognised to subsist."

Therefore, such relationship will continue to be the source of obligations, social and religious, and can subsist between persons without any community of property. In other words, as pointed out in — 'Anandravan v. Raman', AIR 1917 Mad 95 (D), the karnavan has two capacities — a temporal and a spiritual one. In the former he is the manager of the family properties, maintains the junior members, represents the tarwad in transactions with strangers etc. In his latter capacity he presides at the ceremonies and performs all the religious duties which are incumbent on him. A stranger cannot supplant him in this latter office.

(7) If the matter had really stood thus, there would have been much substance in the contentions of the learned advocate Mr. Nambiar. But the finding on facts by both the lower Courts is that the ceremonies were being performed by the second thavazhi under the express delegation of the karnavan. This the karnavan is entitled to do because the performance of the ceremonies in this case is not such that it cannot be delegated to a member of the family. It consists of three Sradhas, a Thiruvathira Oottu, a Sankrama Pooja, a Dharmadeva Pooja and a serpent pooja. The Sradhas have to be performed only by the members of the tarwad under instructions from the Puruhit. The Sradhas which have to be performed are Sradhas of three deceased karnavans. The plaintiff's husband P. W. 1 states that any member of the tarwad can perform the Sradhas of deceased karnavans ordinarily. The remaining ceremonies are to be performed by the priests in the presence of the tarwad members. In these circumstances the learned District Munsif Mr. Balakrishna Menon has pointed out:

> "It is well known that when a karnavan of the tarwad is not able to perform a Sradha

> on account of old age, any male member can take his place and get through it. Similarly, for a pooja if the karnavan is not able to go to the temple for unavoidable reasons and when one member of the tarwad is present on behalf of the karnavan, it cannot be said that that pooja has not been correctly performed."

The learned Subordinate Judge Mr. Chandu Menon concurred and pointed out:

> "These circumstances also will show that there was no special religious significance in the karnavan himself performing the Sradhas or the ceremonies."

These opinions of two learned Malayalee Judges who are themselves members of tarwads well acquainted with the customs of the country are entitled to weight. Therefore, there has been compliance with the terms of the partition deed by the performance of these ceremonies by the second tavazhi under the express delegation of the karnavan.

(8) The learned advocate for the appellant did not raise any other point. In the result, the decree and judgment of the lower appellate Court which are correct have got to be affirmed and this second appeal is dismissed but in the circumstances of the case without costs. No leave.

B/D.R.R. Appeal dismissed.

A.I.R. 1953 MADRAS 912 (Vol. 40, C. N. 358)

KRISHNASWAMI NAYUDU J.

Addanki Ramalingamma, Appellant v. Bhimavarapu Venkatasubbayya, Respondent.

A. A. O. No. 434 of 1949, D/- 17-12-1952.

(a) Madras Hereditary Village Offices Act (3 of 1895), S. 13 — "Emoluments" include also lands. (Para 5)

(b) Madras Hereditary Village Offices Act (3 of 1895), Ss. 13 and 21 — Suit for possession of service 'inam' land — Maintainability in Civil Court — (Civil P. C. (1908), S. 9).

> A suit claiming possession of land to which the plaintiff is entitled and which has been in his possession as heir, the property being village service 'inam' land, cannot be said to be a suit for recovery of emoluments which the civil Courts are barred from entertaining. Case law discussed. (Para 9)

Anno: C. P. C., S. 9 N. 51.

(c) Madras Hereditary Village Offices Act (3 of 1895), Ss. 13 and 21 — Suits not cognizable by civil Courts.

> Sections 13 and 21 must be read together and the classes of suits that are not cognizable by the civil Courts are only those which are mentioned in S. 13(1) and which are to be filed in the revenue Court. 30 Mad 126 (FB), Foll. (Para 7)

B. V. Ramanarasu, for Appellant; Neti Subrahmanyam and J. V. Krishna Sarma, for Respondent.

CASES CITED:

(A) ('07) 16 Mad LJ 514: 30 Mad 126 (FB)
(B) ('10) 5 Ind Cas 137: 33 Mad 208
(C) ('10) 5 Ind Cas 136: 33 Mad 235
(D) ('37) AIR 1937 Mad 282: 173 Ind Cas 333

JUDGMENT: This appeal is against the judgment of the Subordinate Judge of Bapatla dismissing the plaintiff's suit in appeal on the ground that Civil Courts have no jurisdiction to entertain the claim. The plaintiff, who is the appellant, is the widow of one Venkatappa, who was the son of Addanki Lingadu 1. Addanki Lingadu 1 married Venkata Ramamma. Venkatappa had a brother Ragadu, who died leaving a widow Ragi. She also died. Venkatappa and the plaintiff had a son Lingadu 11. Venkatappa died about 25 years prior to suit and Lingadu 11 also died three months after his father's death. The plaintiff claims to be the heir entitled to possession of the suit properties, which consist of certain lands relating to washerman service 'inam' in the Addanki village, Guntur district.

The plaintiff's case in the plaint is that the land was acquired by the plaintiff's husband as a service tenure 'inam' with hereditary rights and he was enjoying the said property by rendering the said service and he died 20 years prior to the date of the suit, that thereafter his only son Lingadu 11, who was aged about 4 years also died, that the suit property passed to the plaintiff by heirship and she has been enjoying the property since then free from disputes by rendering the said service and that the defendant who had no manner of interest to the property about 5 months prior to the suit unlawfully entered into the said field and stealthily carried away the plaintiff's crop and also trespassed on a portion of the property and refused to deliver possession. The suit is for recovery of possession of the land, which is of the extent of 1 acre and 50 cents.

(2) The main defence to the suit is that the property being washerman service 'inam' land, a suit for recovery of possession of that land could only be heard by the Revenue Court under the Madras Hereditary Village Offices Act (3 of 1895) and a civil court has no jurisdiction. On the merits, the defendant contended that he had become entitled to possession of the property under a family arrangement. His case is that his father and Addanki Lingadu 1 were sons of sisters and besides he is the sister's son of Venkata Ramamma, wife of Addanki Lingadu 1, that while he was an infant his mother died and as his father was blind Lingadu affiliated the defendant and his father into his family and vested them with rights in his properties, that after the death of Venkatappa, husband of the plaintiff and Ragadu, sons of Lingadu 1, the defendant had been rendering washerman service, and that Venkata Ramamma, widow of Lingadu 1, and also the mother's sister of the defendant brought one Bapadu from another village Bommanampadu to assist this defendant in rendering service and, in pursuance of a family arrangement then effected the defendant and the said Bapadu had been enjoying the property of Lingadu with equal rights and the arrangement was approved of and acquiesced in by Venkata Ramamma as well as by the plaintiff and Ragi, the widow of Ragadu.

(3) A number of issues were raised in that suit and apart from the issue relating to the jurisdiction of the civil Courts, there were issues as to whether the family arrangement pleaded by the defendant was true and whether the trespass alleged by the plaintiff was true. The learned District Munsif, who heard the suit granted a decree holding in favour of the plaintiff on all the issues finding that there was absolutely no evidence to prove the family

arrangement, that the defendant had trespassed into the land held by the plaintiff and removed the crop raised by her. In appeal the learned Subordinate Judge of Bapatla, without considering the other issues on which findings were given by the first Court, dealt with the issue relating to jurisdiction and held that the suit came within the scope of Ss. 13 and 21 of Act 3 of 1895, which barred the jurisdiction of the civil Court, to entertain such a suit.

(4) The only question therefore for determination in this appeal is whether the conclusion of the learned Subordinate Judge that the civil Court has no jurisdiction is correct. Under S. 13(1) of Act 3 of 1895,

> "any person may sue before the Collector for any of the village offices specified in S. 3 (which includes the office of the village washerman) or for the recovery of the emoluments of any such office, on the ground that he is entitled under sub-s. (2) or (3) of S. 10, Madras Proprietary Estates Village Service Act, 1894, or under sub-s. (2) or (3) of S. 10 or sub-s. (2) or (3) of S. 11 or S. 12 of this Act, as the case may be, to hold such office and enjoy such emoluments."

Sub-sections (2) and (3) of S. 10 of the Act relate to the devolution of the service 'inams' when a vacancy arises. Sub-section (2) recites that the succession shall devolve on a single heir according to the general custom and rule of primogeniture governing succession to impartible zamindaries in southern India. Sub-section (3) gives the power to the Collector where the next heir is not qualified under sub-s. (1) of S. 10, to appoint the person next in order of succession who is so qualified.

(5) The suits contemplated under S. 13 as being entertainable by the Collector are suits relating to the succession to the office to hold such office and to enjoy such emoluments. There is no doubt that 'emoluments' in S. 13 include also lands. Section 21, which restricts the jurisdiction of civil Courts, is as follows :

> "No civil Court shall have authority to take into consideration or decide any claim to succeed to any of the offices specified in S. 3 or any question as to the rate or amount of the emoluments of any such office or, except as provided in proviso (ii) to sub-s. (1) of S. 13, any claim to recover the emoluments of any such office."

The matters therefore that are exempted from the cognizance of the civil Courts under S. 21 are (1) claims to succeed to any of the offices specified in S. 3, (2) claims to any question as to the rate or amount of the emoluments of any such office, and (3) claims to recover the emoluments of any such office excepting the emoluments that are referred to in proviso (ii) to sub-s. (1) of S. 13. Proviso (ii) of sub-s. (1) exempts certain suits to recover the land itself from being filed before the Collector. Proviso (ii) is as follows :

> "When one of the facts in issue in a suit is whether the emoluments of the office consist of land or of an assignment of revenue payable in respect of land, the Collector shall decide the claim on the assumption that only the said assignment constitutes the emoluments; but such decision shall not bar the rights of the claimant to institute a suit in a civil Court for recovery of the land itself."

(6) The present suit is not a suit coming under any of the three categories mentioned in S. 21. It cannot be said to be a suit for establishing the plaintiff's rights to the office. There is no question as to the rate or amount of the emoluments that is in dispute. Nor is the plaintiff seeking to recover the emoluments of the office, though the lands happen to be emoluments of the office itself.

(7) Reliance is placed on the Full Bench decision of this Court in — 'Kesiram Narasimhulu v. Narasimhulu Patnaidu', 30 Mad 126 (FB) (A) which is a judgment of Arnold White C. J., Benson and Miller JJ. where it is held that the jurisdiction of civil Courts is excluded by S. 21, Madras Hereditary Village Offices Act in cases in which the plaintiff sues for lands as emoluments of his office and the defendant resists the claim on the ground that the land is not the emoluments of the office. There the plaintiff, who was a 'karnam', on his land being attached in execution sued to recover the same on the ground that it was service 'inam', the defence being that it was not service 'inam', but the plaintiff's private property. In second appeal, there was a difference of opinion between Subrahmania Aiyar and Moore JJ., Subrahmania Aiyar J. holding in favour of vesting jurisdiction in civil Courts, Moore J. holding to the contrary. The Bench agreed with Moore J. and held that the suit which was the subject-matter of appeal, was one in which the civil Court had no jurisdiction.

The reason for the decision is found in the judgment of Miller J. where the learned Judge after referring to the relevant provisions of the Act, namely, Ss. 13 and 21 observes that the plaintiff could succeed only by showing that he is the 'karnam' of the village entitled as such to enjoy the emoluments and that the land is the emolument of his office, those being the grounds of suit which give him his right of action before the Collector under S. 13(1). The suit was, therefore, held to be a suit for recovery of the emoluments of the office, where it would be necessary for the plaintiff to establish that the lands which were the subject matter of the suit were the emoluments, that he was the office holder and that he was the person doing service in respect of the land. Where, therefore, it becomes necessary to decide whether the land which is the subject-matter of the suit is emoluments of the office, which would again depend upon whether it was granted as emoluments to the office and whether the plaintiff is the office holder it is reasonable to hold as was held in 30 Mad 126 (FB) (A) that it is a suit cognizable by the revenue Court and not by a civil Court.

(8) This Full Bench decision was referred to in two other decisions reported in — 'M. Seetham Naidu v. D. Rama Naidu', 33 Mad 208 (B) and — 'Gavara Ramanna v. Adabala Rattayya', 33 Mad 235 (C). It may be mentioned here that Benson J. one of the Judges in 33 Mad 208 (B) was a party to the Full Bench decision in 30 Mad 126 (FB) (A). In 33 Mad 208 (B), Benson C. J. and Krishnaswami Aiyar J. referred to the Full Bench decision and held that in the case they were considering, the jurisdiction of the civil Courts was not barred. That was a suit where a village officer's 'inam' land was granted on lease by the village officer to the defendant and after the expiry of the lease period, he instituted a suit for recovery of possession. A defence as to jurisdiction was raised and it was held that such a suit was

cognizable by the civil Court. The learned Judges observed as follows :

"The Subordinate Judge relies on the decision in 30 Mad 126 (FB) (A). Far from supporting his view the observations in that case of Miller J. at page 131 are in favour of the plaintiff and the other learned Judges do not dissent from his remarks. Indeed it may be said that the 'ratio decidendi' of that case supports the appellant's argument. Both the learned Chief Justice and Miller J. say that Ss. 13 and 21 of Act 3 of 1895 should be read together. Section 13 confers jurisdiction on the revenue Court and defines the class of suits of which a revenue Court may take cognizance. Section 21 specifies the class of suits of which the civil Courts shall not take cognizance. It is reasonable to hold notwithstanding the apparent generality of the language of S. 21 that the jurisdiction of the civil Court is taken away in those cases in which it is conferred on the revenue Court by S. 13."

(9) In the other case, 33 Mad 235 (C), Arnold White C. J. and Krishnaswami Aiyar J. referred to the Full Bench decision in 30 Mad 126 (FB) (A) and distinguished it on the particular facts of the case which the learned Judges were considering. It was held in that decision that

"a suit in the civil Courts for land, not based on the ground that such land constituted part of the emoluments of any of the offices described in S. 13 of Madras Act 3 of 1895 is not barred by S. 21 of the Act."

The learned Judges, while holding that S. 21 would not apply to that case, observe at page 237 as follows :

"It does not raise a question as to the rate or amount of the emoluments of any such office. If it did, every claim to recover lands would be outside the jurisdiction of the civil Courts, which is opposed to the words 'but such decision shall not bar the right of the claimant to institute a suit in a civil Court for recovery of the land itself', the last sentence in proviso (ii) to S. 13(1) of the Act. A claim to recover lands, in our judgment, does not raise a question as to the rate or amount of the emoluments of the office."

The present suit is a simple suit to claim possession of the land which the plaintiff was entitled and has been in possession as heir, the property being village service 'inam' land vested in the family. It cannot be said to be a suit for recovery of emoluments. If the decision of the suit requires an examination of the right of the plaintiff to the office and also the question as to whether the land forms part of the office, which generally arises when there is a contest between the parties as to their respective claims to the office or dispute regarding the nature of the property as to whether it is service 'inam' or private land then it would be reasonable to hold that it would come within the scope of the suits contemplated under S. 13(1) of Act 3 of 1895.

I am unable to see how a suit which is instituted by a person who happens to be an office holder of property to recover property which is the emolument of the office from a person who does not claim any right to the office and who does not even contest that it is his private property or that it is not service 'inam', could be said to be a suit of which the civil Courts are barred from entertaining. Excepting an allegation in the plaint that the land is washerman service 'inam' and that the plaintiff is doing service, her claim is not based on any of these averments but on the fact that she is the rightful heir of the property and the other fact which she had to establish is that the defendant is a trespasser.

(10) In — 'Veeramma v. Veerappa', AIR 1937 Mad 282 (D) where the office which was service 'inam' was sought to be recovered from a trespasser, Pandrang Row J. held that where the claim is not based on the right to the office or to anything on the ground that it forms the emoluments of an office but is merely for the possession of property on which there was a trespass, the civil Court's jurisdiction is not ousted.

(11) I do not think there is any doubt as to the classes of suits which are contemplated under S. 13(1) in respect of which alone the jurisdiction of the civil Court is ousted by virtue of S. 21 of the Act, though the latter part of S. 21 may lead to the view that all suits for lands except those that are covered by proviso (ii) to sub-s. (1) of S. 13 may be considered to be barred from the jurisdiction of the civil Court. As observed by the learned Judges in 30 Mad 126 (FB) (A) both Ss. 13 and 21 must be read together and the classes of suits that are not cognizable by the civil Courts are only those which are mentioned in S. 13(1) and which are to be filed in the revenue Court.

(12) The learned Subordinate Judge has erred in coming to the conclusion that the civil Court has no jurisdiction. The civil miscellaneous appeal is allowed and the appeal is remanded to the lower Court for being disposed of according to law. Costs of the civil miscellaneous appeal will abide the result of the appeal.

B/V.R.B. Appeal allowed.

A.I.R. 1953 MADRAS 914 (Vol. 40, C. N. 359)

SUBBA RAO AND SOMASUNDARAM JJ.

S. PL. P. Narayana Chettiar, Petitioner v. M. AR. Annamalai Chettiar, Respondent.

Civil Misc. Petn. No. 6577 of 1952, D/- 25-3-1953.

Debt Laws — Madras Agriculturists' Relief Act (4 of 1938), S. 19 (2) — Retrospective operation — (Civil P. C. (1908), S. 11) — (Debt Laws — Madras Agriculturists' Relief (Amendment) Act (23 of 1948), S. 16).

Retrospective operation of S. 19 (2) is controlled by S. 16 of Act 23 of 1948 which came into operation on 25-1-1949. No final decree in appeal, pending on that date, passed till 9-3-1951. Hence S. 16 (2) of the Act of 1948 applies to the case and debtor could and should raise the plea that he is entitled to relief under Madras Agriculturists' Relief Act in the appeal itself. A debtor who had opportunity to file an additional written statement and did so claiming certain other relief not asking for relief under S. 19 (2) of the Act — Held his subsequent application was barred by 'res judicata'. AIR 1941 Mad 929 (FB) and AIR 1952 Mad 591 (FB), Rel. on. (Paras 3, 4 and 6)

Anno: Civil P. C., S. 11 N. 35.

P. S. Panchaksharam, for Petitioner; S. Thyagaraja Iyer, for Respondent.

CASES CITED:

(A) ('52) AIR 1952 Mad 591: 1952-1 Mad LJ 264 (FB)

(B) ('41) AIR 1941 Mad 929: ILR (1942) Mad 346 (FB)

SUBBA RAO J.: This is a petition under S. 19 (2), Madras Agriculturists' Relief Act for scaling down the decree debt. On 9-3-1951 we passed a decree in favour of the plaintiff who had filed a suit for recovery of a sum of Rs. 28,645-8-0 with subsequent interest. The learned Subordinate Judge dismissed the suit on the ground that it was barred by limitation. On 20-10-1949 we delivered a judgment in the appeal against that decree holding that the plaintiff was the validly adopted son of M. A. R. Arunachalam Chettiar and that the suit was not barred by limitation. Learned counsel appearing for the defendants-respondents contended that his clients would not be liable for the suit amount as their father Palaniappa Chettiar became a partner of P. L. S. firm subsequent to the deposit. To enable us to decide the points raised we called for a finding from the learned Subordinate Judge on the following question:

"When did Palaniappa Chettiar, the father of the defendant became a partner of P. L. S. firm?"

The learned Subordinate Judge submitted a finding on 12-1-1950 holding that Palaniappa Chettiar was a partner of P. L. S. firm from the beginning, i.e., from 3-2-1917. After objections were filed to that finding the appeal was again posted before us on 23-2-1951. On that day an additional written statement was filed by the defendants claiming relief under the laws of Burma in respect of interest. As that was a new point raised for the first time, we adjourned the appeal to enable the learned counsel for the plaintiff to investigate the matter and meet the point raised. On 5-3-1951 the said point was argued and we agreed with the defendants to some extent and gave the relief accordingly. That order was made on 9-3-1951. The result was that the plaintiff got a decree as prayed for except in regard to interest. The defendants preferred an appeal to the Supreme Court against our decree.

(2) The defendants filed an application in the Subordinate Judge's Court for scaling down the decree, but that was dismissed. It is represented to us that the learned Judge dismissed that application on the ground that it was not maintainable. After the dismissal of that application the present petition is filed by defendant 2 in this Court for scaling down the decree under the Agriculturists' Relief Act.

(3) Learned counsel for the petitioner relies upon S. 19 (2), Agriculturists' Relief Act. Section 19 (2) was added by Amending Act 23 of 1948. Sections 19 (1) and 19 (2) as they now stand read as follows:

"19 (1) Where before the commencement of this Act, a Court has passed a decree for the repayment of a debt, it shall, on the application of any judgment-debtor who is an agriculurist or in respect of a Hindu joint family debt, on the application of any member of the family whether or not he is the judgment-debtor or on the application of the decree-holder, apply the provisions of this Act to such decree and shall, notwithstanding anything contained in the Code of Civil Procedure, 1908, amend the decree accordingly or enter satisfaction, as the case may be:

Provided that all payments made or amounts recovered whether before or after the commencement of this Act, in respect of any such decree shall first be applied in payment of all costs as are originally decreed to the creditor.

(2) The provisions of sub-s. (1) shall also apply to case where, after the commencement of this Act, a Court has passed a decree for the repayment of a debt payable at such commencement."

Learned counsel for the plaintiff contends that as the petitioner did not raise the question of his relief under the Act at the time the appeal was disposed of by us, he is now precluded from raising that plea. But the advocate for the petitioner says that under S. 19 (2) he is entitled as of right for the amendment of the decree notwithstanding the fact that he did not raise the plea at the time of disposal of the appeal. Under S. 19 (2) the provisions of S. 19 (1) apply to cases where after the commencement of the Act a Court has passed a decree for the repayment of a debt payable at such commencement. The decree in this case was made on 9-3-1951, and therefore the decree in question was one made after the Act came into force. But the retrospective operation of S. 19 (2) is controlled by S. 16 of Act 23 of 1948. Section 16 reads as follows:

"16. The amendments made by this Act shall apply to the following suits and proceedings, namely:

(i) all suits and proceedings instituted after the commencement of this Act;

(ii) all suits and proceedings instituted before the commencement of this Act, in which no decree or order has been passed, or in which the decree or order passed has not become final, before such commencement;

(iii) all suits and proceedings in which the decree or order passed has not been executed or satisfied in full before the commencement of this Act;

Provided that no creditor shall be required to refund any sum which has been paid to or realised by him, before the commencement of this Act."

(4) The scope of this section has been laid down by a Full Bench of this Court in — 'Venkataratnam v. Seshamma', AIR 1952 Mad 591 (A). Satyanarayana Rao J. in delivering the judgment of the Full Bench, states at p. 593 as follows:

"Bearing these principles in mind it is clear that Cl. (ii) applies to pending proceedings, that is, proceedings which were instituted before the commencement of the Act but which did not become final before such commencement. This is made clear by the clause 'in which the decree or order passed has not become final'. It implies therefore that if the decree or order passed in a suit or proceeding becomes final before the commencement of the Act, the provisions of the Act cannot be applied to such a suit or proceeding. But in Cl. (iii) the words 'in which the decree or order passed has not become final' do not occur. It is quite general and applies to all suits and proceedings in which the decree or order passed has not been executed or satisfied in full before the commencement of this Act so that it seems to apply to decrees or orders even if they had become final before the commencement of this Act provided the decree or order has not been executed or fully satisfied."

Section 16 (1) applies to suits instituted after the commencement of the Act, Cl. (ii) to suits or proceedings instituted before the commencement of the Act in which no decree or order has been

passed which has become final, and cl. (iii) to suits or proceedings in which the decree or order passed has not been executed in full before the commencement of this Act. A combined reading of the three provisions indicates that cl. (ii) will apply if the decree or order had not become final before the Act and Cl. (iii) if the decree or order, though became final, was not satisfied before the commencement of the Act. Act 23 of 1948 came into force on 25-1-1949. We delivered judgment on 9-3-1951. At the time the new Act came into force no final decree was passed in the suit. Therefore S. 16 Cl. (ii) applies. If Section 16 (ii) applied, the petitioner could and should have raised the plea when the appeal was argued before us that his client was entitled to relief under the provisions of the Agriculturists' Relief Act. Though he filed an additional written statement claiming reliefs in respect of interest under Burma laws, no attempt was made to ask for a relief under the Agriculturists' Relief Act. A party who had an opportunity to raise a plea but did not raise the plea is precluded by principles of 'res judicata' from raising the plea over again at a subsequent stage. But it is said that the principle of 'res judicata' had no application to the present case as S. 19 (1) which is incorporated by reference to in S. 19 (2) says that a petitioner would be entitled to the relief given to him under that section notwithstanding anything stated in the Code of Civil Procedure. But this argument ignores the fact that the scope of S. 19 (2) is itself limited by the provisions of S. 16 of Act 23 of 1948.

(5) In — 'Sriramareddi v. Sriramareddi', AIR 1941 Mad 929 (B), a Full Bench of this Court had to consider the case of an applicant who did not raise the plea under the Madras Agriculturists' Relief Act at the time when the appeal was disposed of. The facts were: A Division Bench of this Court pronounced a judgment in an appeal. After the judgment has been pronounced an application was made on behalf of respondent 4 by his mother who was his guardian for an order under Ss. 6, 7 and 8, Agriculturists' Relief Act for scaling down the debt. The Act had not been pleaded at any stage before the appeal was heard and decided. When the suit was decided by the trial Court the Act had not come into force. But the Act was in force at the time the suit came up for disposal by the appellate Court. Dealing with the situation, Leach C. J. who delivered the judgment of the Full Bench laid down the procedure to be followed in such cases at page 932:

"We consider that the proper course will be to reserve the final order until the application for scaling down has been decided. All questions arising in the appeal other than the question of scaling down can be decided and the decree left open until a report has been received from the trial Court, the application for scaling down being remitted to that Court for enquiry and report. If this procedure is followed the final decree of this Court will state exactly what the judgment-debtor has to pay, bearing in mind all that he is entitled to under the Agriculturists' Relief Act. But if the application is not made before the judgment is delivered, it will be too late for a judgment-debtor to raise the question. The judgment in such circumstances will be the final judgment and the decree must be drawn up in accordance therewith."

(6) Having regard to the scope of S. 16 of Act 23 of 1948 we are inclined to hold that despite the amended S. 19 (2) of the Act the position of a party who did not raise the plea under the Agriculturists' Relief Act after the said Act came into force is not different from that laid down by the Full Bench in the aforesaid decision.

(7) In this view it is not necessary to consider the question whether the petitioner is an agriculturist within the meaning of the Act.

(8) This petition fails and is dismissed with costs.

B/M.K.S. Petition dismissed.

A.I.R. 1953 MADRAS 916 (Vol. 40, C. N. 360)

MACK J.

Chittirala Mahalakshmamma, Appellant v. Senisetti Hanumayya and another, Respondents.

A. A. O. No. 659 of 1949, D/- 13-2-1953.

(a) Civil P. C. (1908), S. 47 and O. 21, R. 58 — "Plaintiff whose suit is dismissed and.....is dismissed" — Explanation.

M who was daughter-in-law of R, the executant of pronote, exonerated in suit brought against R's widow and M — Suit decreed against assets of R — Execution of decree by attachment of immovable property — M claiming paramount title to attached property under Ss. 47, 151 and O. 21, R. 58 — Claim allowed — Appellate Court holding that M was party to suit and remanding claim petition for disposal on merits under S. 47 — On second appeal held that M ceased to be party to suit on her exoneration and must be treated as person who has been dismissed from suit and not as person against whom suit had been dismissed — Also held that question raised between plaintiff decree-holder and M could not have been adjudicated upon in suit on pronote and consequently issue which could not have been decided in suit itself could not be decided in execution proceedings by way of application under S. 47 — Case held not governed by S. 47 but by O. 21, R. 58. AIR 1930 Mad 817 (FB) and AIR 1933 Mad 435, Foll.; AIR 1926 Mad 484, Not followed; AIR 1930 Mad 817 (FB); AIR 1937 Mad 268 and AIR 1918 Mad 911, Ref. (Paras 3, 4)

Anno: Civil P. C., S. 47 N. 8; O. 21, R. 58 N. 1.

(b) Civil P. C. (1908), S. 47 — Unnecessary party.

It would be opening an avenue of abuse if a plaintiff were to include as defendants in a suit, persons who are really unnecessary and while not being able to have any issues decided as between him and them in the suit itself, be permitted to pursue remedies against them in execution under S. 47, Civil P. C. and have them determined without the payment of any court-fee. No doubt, it is always open to the executing Court to treat any proceedings under S. 47 as a suit and, if necessary order payment of any additional court-fee. Where, however, it is of considerable importance as to who should be the plaintiff in the suit to be filed whether it is the appellant whose property has been attached, or whether it should be the decree-holder who has 'prima facie' failed to show that the property attached belonged to his original debtor, the appellant's claim must be allowed and the decree-holder be referred to a suit. (Para 4)

Anno: Civil P. C., S. 47 N. 8.

P. V. Chalapathi Rao, for Appellant; B. V. Ramanarasu, for Respondents.

CASES CITED:
(A) ('26) AIR 1926 Mad 484: 49 Mad 494
(B) ('30) AIR 1930 Mad 817: 54 Mad 81 (FB)
(C) ('18) AIR 1918 Mad 911: 40 Mad. 964
(D) ('33) AIR 1933 Mad 435: 143 Ind Cas 476
(E) ('37) AIR 1937 Mad 268: 173 Ind Cas 90

JUDGMENT: This is an appeal against the order by the learned Additional Subordinate Judge of Guntur remanding E. A. No. 331 of 1948 for fresh disposal by the District Munsif of Narasaraopet.

(2) The appellant is a widow one Mahalakshmamma who was impleaded as defendant 2 in a suit filed by the respondent decree-holder on a pronote executed by her deceased father-in-law Ramakotayya, whose widow was impleaded as defendant 1. In the suit, the appellant was exonerated, with costs, by the learned District Munsif and the decree-holder obtained a decree against the assets of Ramakotayya in the hands of his widow. In execution he attached immoveable property to which the appellant laid claim in a petition under O. 21, R. 58 and Ss. 47 and 151, Civil P. C. She claimed the attached property as being her own by virtue of a purchase in execution of decree which she obtained against her own father-in-law, who had, it was alleged, taken possession of valuable moveable property belonging to her, while she was a ward of Court, and furnished security for a substantial amount. The learned District Munsif held that the appellant had prima facie title and possession and allowed her claim petition. In appeal, the learned Subordinate Judge taking the view that she was a party to the suit the decree of which was under execution remanded the claim petition for disposal on its merits under S. 47, Civil P. C. negativing the view of the District Munsif that the decree-holder's remedy was in this case by way of a separate suit to set aside the summary order on the claim petition.

(3) I have no doubt that the view taken by the learned District Munsif is correct. There were two views taken in decisions of this Court as regards the application of the explanation to S. 47, Civil P. C. according to which, for the purpose of that section, a plaintiff whose suit has been dismissed and a defendant against whom a suit has been dismissed are parties to the suit. The earlier narrow view taken in — 'Sethu Konar v. Ramaswami Konar', AIR 1926 Mad 484 (A), was that the ground on which a party is exonerated from the suit can never determine whether he continues or ceases to be a party, but it will depend entirely upon whether his name has been struck off from or retained on the record. This view was negatived by a Full Bench decision in — 'Abdul Sac v. Sundara 'Mudaliar', AIR 1930 Mad 817 (B), which followed the earlier view taken in — 'Krishnappa v. Periasami', AIR 1918 Mad 911 (C), by Ayling and Kumaraswami Sastriar JJ. The learned Subordinate Judge considered the decision in — 'AIR 1930 Mad 817 (B)', but took the view that it did not apply to the facts of the present case, as there it was a case of a party claiming a title paramount in a mortgage suit. The learned Subordinate Judge failed to observe that this was a case where the appellant claimed a paramount title to this property as against the deceased executant of the pronote in which the decree-holder obtained his decree. The Full Bench decision is clearly in point and governs the present case. The view taken there was also followed in — 'Jujisti Panda v. Lakshmana', AIR 1933 Mad 435 (D) and — 'Thanagachami v. Veerappa', AIR 1937 Mad 268 (E). In — 'AIR 1933 Mad 435 (D), Beasley C. J. who also delivered the judgment of the Full Bench in — 'AIR 1930 Mad 817 (B)', expressed the view that on the exoneration or the striking out of the names of persons on the ground of misjoinder, they cease to be parties to the suit and that such defendants must be treated as persons who had been dismissed from the suit and not as person against whom the suit had been dismissed. This view was also followed in — 'AIR 1937 Mad 268 (E)', in which it was held that a defendant who was not a necessary party would not be a party to the suit within the meaning of S. 47, if he is exonerated without his claim being adjudicated upon. There can be no doubt following this line of decisions that this is a case which is not governed by S. 47, Civil P. C. but by O. 21, R. 58.

(4) There is a further aspect of S. 47 which requires two conditions to be satisfied in order to bring applications in execution within its scope. The first condition is that it must be a question arising between the parties to the suit in which the decree was passed. The second condition is that it must relate to the execution, discharge or satisfaction of the decree. The word "and" in this connection in S. 47 (1) appears to me to be highly significant. In the present case, the question raised as between the plaintiff decree-holder and the present appellant could not have been adjudicated upon in the suit on the pronote. I entirely fail to see how an issue as between the parties which could not in any event have been decided in the suit itself and does not arise between the parties can be decided in execution proceeding by way of an application under S. 47, Civil P. C. This is an aspect of S. 47, Civil P. C. which has not been specifically adverted to in the decisions to which I have been referred. It would be opening an avenue of abuse if a plaintiff were to include as defendants in a suit, quite improperly, persons who are really unnecessary and while not being able to have any issues decided as between him and them in the suit itself, be permitted to pursue remedies against them in execution under S. 47, Civil P. C. and have them determined without the payment of any court-fee. No doubt, it is always open to the executing Court to treat any proceedings under S. 47 as a suit and, if necessary, order payment of any additional court-fee. In this case, however, it is of considerable importance as to who should be the plaintiff in the suit to be filed whether it is the appellant whose property has been attached, or whether it should be the decree-holder, who has 'prima facie' failed to show that the property attached belonged to his original debtor. I have no hesitation on the facts of this case, in restoring the order of the learned District Munsif and referring the decree-holder to a suit, if so advised. The appeal is allowed with costs throughout. Leave refused.

B/H.G.P. Appeal allowed.

A.I.R. 1953 MADRAS 917 (Vol. 40, C. N. 361)

BALAKRISHNA AYYAR AND CHANDRA REDDI JJ.

Public Prosecutor, Petitioner v. C. Paramasivam and others, Respondents.

Criminal Revn. No. 862 of 1952 and Criminal Revn. Petn. No. 735 of 1952, D/- 2-3-1953.

Evidence Act (1872), S. 25 — Excise Officer — (Criminal P. C. (1898), S. 162) — (Opium Act (1878), S. 20A (inserted by Mad. Act 32 of 1951) — AIR 1932 Pat 293 (SB), Dissented from.

An excise officer invested with the powers of an officer in charge of a police station for investigation of offences under S. 20A of the Opium Act is a "police officer" coming within the purview of S. 25 of the Evidence Act and S. 162, Cr. P. C. and any confession made to him in the course of investigation is inadmissible under S. 25 of the Evidence Act and the statements made to such an officer under S. 162, Cr. P. C. can be used only in the manner enacted therein. Case law discussed. (Paras 14, 48)

Anno: Evidence Act, S. 25 N. 2, 4; Criminal P. C., S. 162 N. 3a, 4.

Public Prosecutor in person; S. Govind Swaminathan and S. Rajaraman, for Respondents.

CASES CITED:

(A) ('46) AIR 1946 Mad 430: 1946 Mad WN Cr 47: 47 Cri LJ 865
(B) ('32) 1932 Mad WN Cr 69
(C) ('34) 1934 Mad WN Cr 67
(D) ('38) AIR 1938 Mad 460: 1938 Mad WN Cr 23: 39 Cri LJ 338
(E) ('27) AIR 1927 Bom 4: 51 Bom 78: 28 Cri LJ 122 (FB)
(F) ('34) AIR 1934 Cal 580: 61 Cal 607: 35 Cri LJ 1071 (FB)
(G) ('47) AIR 1947 Mad 308: 1946 Mad WN Cr 144: 48 Cri LJ 326
(H) ('48) AIR 1948 Mad 116: 1947 Mad WN Cr 120: 49 Cri LJ 100
(I) ('52) AIR 1952 Mad 299: 1952 Mad WN Cr 5: 1952 Cri LJ 640
(J) ('32) AIR 1932 Pat 293: 12 Pat 46: 34 Cri LJ 1 (SB)
(K) ('75-76) 25 WR Cr 36: 1 Cal 207
(L) (1911) 80 LJ KB 1318: (1911) AC 641

BALAKRISHNA AYYAR J.: On 1-1-1952 a consignment of illicit opium was despatched by train from New Delhi to Madras and from Madras on to Chidambaram. Acting on some information that he had received, Mr. Khadir Hussain, an Assistant Inspector of Excise who was also a Deputy Prohibition Officer, shadowed the article to Chidambaram. On 5-1-1952 one Paramasivam went to the railway parcel office at Chidambaram, tendered the way bill to the General Parcel Clerk and after signing in the delivery book took delivery of the parcel. At that stage Mr. Khadir Hussain detained him and questioned him. He also seized the parcel which, on examination, was found to contain 33 seers of opium.

(2) On these allegations Paramasivam and three others were prosecuted before the Sub-Magistrate, Chidambaram. At the trial Mr. Khadir Hussain gave evidence for the prosecution. When he was in the box the Assistant Public Prosecutor asked him what Paramasivam had told him when questioned by the witness after his arrest. To that question the defence counsel took exception on the ground that S. 162, Cr. P. C. prohibited such statements from being given in evidence for the prosecution. The learned Magistrate upheld the objection. On that, the prosecution came upon in revision to this Court. Somasundaram J. who first heard the matter considered that an authoritative decision was necessary on the point that had been raised and so referred the following question to a Bench:

"The question that is raised in this petition is whether in view of Madras Act 32 of 1951 which was introduced as an amendment to S. 20 of the Opium Act (Central Act 1 of 1878), a confession made to a Prohibition Officer is admissible or not."

Before attempting to answer this question it is as well to examine some of the provisions of the Opium Act (Central Act 1 of 1878). Section 4 prohibits the possession, transport, import, export or sale of opium except under certain circumstances referred to in that Act. Section 9 provides penalties for the contravention of S. 4 and some other sections. Section 14, as it stood before it was amended in Madras, conferred on certain categories of officers belonging to the departments of Excise, Police, Customs, Salt, Opium and Revenue, power of entry, search, seizure and arrest when they had reason to believe that opium liable to confiscation under the Act was kept or concealed in any building, vessel or enclosed space. These powers, however, could be exercised only between sunrise and sunset. Section 15 empowers every officer of the departments referred to in S. 14 to seize opium in transit or in any open place. It also confers powers of detention, search and arrest. Section 20 requires that every person arrested and every thing seized under S. 14 or S. 15 shall be forwarded without delay to the officer in charge of the nearest Police Station. Section 21 requires an officer making an arrest or seizure under the Act to send a report of the matter to his immediate official superior within 48 hours thereafter.

(3) It will be noticed that under the Act, as it stood before it was amended, though the officers of the Excise, Customs and other departments were given powers to enter, search, seize and arrest, they had no power to investigate. In 1951 the Madras Legislature amended the Central Opium Act in certain respects. Officers of the Prohibition Department were included in the categories of others referred to in S. 14 who could enter, search, seize and arrest on reasonable suspicion of a contravention of the provisions of the Act. A new section, S. 20A was added which runs as follows:

"The State Government may, by notification in the Official Gazette, invest any officer of the Prohibition Department, or every officer belonging to any special class in that department, with the powers of an officer in charge of a police station for the investigation of offences under this Act."

(4) The result of the amendment is to confer on officers of the Prohibition department in relation to offences under the Opium Act, practically all the powers of a Station House Officer. But, at the same time it will be noticed that the Amending Act does not call these officers Police Officers.

(5) There is no exhaustive definition of the expression "Police Officer" in any of our statutes. Act 5 of 1861 (Indian Police Act) merely says,

"the word 'Police' shall include all persons who shall be enrolled under this Act."

'Ex facie', this definition is not exhaustive, and it is of no help in answering the question that is now before us. In the absence of a statutory definition, and, apart from all authority, one would be tempted to say that a police officer is a person whom any statute or other provision of law calls such, or, on whom it confers all or substantially all the powers and imposes the duties of a police officer. If he is express-

ly called a police officer there is no difficulty whatsoever. If he is not so called then the next step is to ask: what does the law require him to do? What are the duties imposed on him? and what are the powers conferred on him? If these are substantially those of a police officer there need be no qualms in regarding him as one. If his powers and duties are confined to a particular extent of territory or to a particular subject-matter he will be a police officer only in respect of that territory or that subject-matter. The material thing to consider would be not the name given to him, nor the colour of the uniform he is required to wear, but his functions, powers and duties. A police officer does not cease to be such merely because he is put into a white khadder uniform instead of one in khaki drill; a medicine will be just the same whether it is packaged in a glass jar or a plastic container.

(6) Support for the view that regard must be had not to the name but to the powers, duties and functions of the officer, is to be found in the decision reported in — 'Someshwar H. Shelat, in re', AIR 1946 Mad 430 (A). In that case the question for decision was whether a Special Officer of the Commercial Tax Department, who had been empowered by the Provincial Government of Madras in exercise of the powers conferred on them by S. 12 (3) of the Hoarding and Profiteering Prevention Ordinance was a police officer within the meaning and for the purpose of S. 162, Cr. P. C. and S. 25 of the Evidence Act. The sub-section of the ordinance ran as follows :

> "The Controller General and such Inspectors or other officers as may be empowered by the Central or Provincial Government in this behalf shall, within the respective areas for which they are appointed, have power to investigate all offences punishable under this Ordinance, and in conducting any such investigation shall, within the said areas, have all the powers, duties, privileges and liabilities of an officer in charge of a police station under the Cr. P. C., 1898, when investigating a cognizable offence within the limits of his station."

(7) A Bench of this Court had no hesitation in holding that an officer empowered under this section was a police officer.

(8) Mr. V. T. Rangaswami Aiyangar, the learned Public Prosecutor, drew our attention to six decisions of this Court which have a bearing on the question before us. In — 'Mahalakshmayya v. Emperor', 1932 Mad WN Cr 69 (B), Sundaram Chetty J. ruled that a statement by an accused person to an Excise Inspector in answer to questions put by him is not a confession made to a police officer within the meaning of S. 25 of the Evidence Act. In — 'Doraiswami Nadar v. Emperor', 1934 Mad WN Cr 67 (C), Bardswell J. followed this case and ruled to the same effect.

(9) In — 'Public Prosecutor v. Marimuthu Goundan', AIR 1938 Mad 460 (D), Horwill J. followed the two earlier decisions just now referred to. Before that learned Judge the decisions in — 'Nanoo v. Emperor', AIR 1927 Bom 4 (FB) (E) and — 'Ameen Sharif v. Emperor', AIR 1934 Cal 580 (FB) (F) were cited. But he distinguished them saying,

> "The Full Bench of the Calcutta High Court followed a Full Bench of the Bombay High Court, whose decision naturally turned on the interpretation of the Bombay Excise Act which, in this respect, is similar to the Calcutta Act. The Madras Act, however, does not give excise officers quite the same powers as the Bombay and Calcutta Excise Acts, and for that reason this court has on three occasions held that for the purpose of S. 25 of the Evidence Act, an excise officer is not a police officer."

No doubt he went on to add,

> "It appears to me that as S. 25 refers only to a police officer, a court should not extend it to other classes of officers merely on grounds of similarity of function, especially in view of the fact that the Evidence Act was introduced at a time when the methods of the police were much more open to attack than they are now."

(10) In — 'Mayilvahanam, In re', AIR 1947 Mad 308 (G), Yahya Ali J. had to consider the position of an Assistant Inspector of Customs and he took the same view that had been taken in the earlier decisions of this Court. See also — 'Venkata Reddi, In re', AIR 1948 Mad 116 (H) and — 'Vadivel Gounder, In re', AIR 1952 Mad 299 (I).

(11) It seems to me that none of these decisions are in point because they belong to a time before the Central Opium Act was amended by the Madras Legislature in 1951.

(12) In — 'AIR 1927 Bom 4 (FB)' (E), the following question was formulated for the decision of the Court:

> "Is an Abkari Officer, who, in the conduct of investigation of an offence punishable under the Bombay Abkari Act, exercises the powers conferred by the Criminal Procedure Code, 1898, upon an officer in charge of a police station for the investigation of a cognizable offence, a police officer within the meaning of S. 25 of the Evidence Act?"

All the learned Judges, there were five of them, were unanimously of the opinion that the question should be answered in the affirmative. A different view was taken by a Full Bench of three Judges of the Patna High Court in — 'Radhakishun v. Emperor', AIR 1932 Pat 293 (SB) (J). Mr. V. T. Rangaswami Aiyangar, the learned Public Prosecutor, placed special emphasis on this decision because the question that was decided in that case was whether a confession made before an Excise Inspector who, under the Dangerous Drugs Act (Central Act 2 of 1930) not only had the power to arrest and search but had also been invested by the local Government with the powers of an officer in charge of a police station for the investigation of an offence under that Act, is admissible evidence. Section 30 of the Central Act 2 of 1930 runs as follows:

> "The Provincial Government may invest any officer of the Excise Department or any class of such officers, with the powers of an officer in charge of a police station for the investigation of offences under this Act."

Mr. Rajaram pointed out that S. 4 of the Madras Act 32 of 1951 which introduced S. 20-A into Central Act 1 of 1878 is practically a reproduction of S. 30 of the Dangerous Drugs Act. This circumstance no doubt makes the Patna case more apposite but it does not invert the reasoning in that case with any greater force. The Patna case was exhaustively considered by a Full Bench of five Judges in Calcutta. See —

'AIR 1934 Cal 580 (FB)' (F) in which by a majority of 4 to 1 the learned Judges preferred the view of the Bombay High Court to that of the Patna High Court. The report of that decision occupies 56 pages of the book and every conceivable aspect of the matter has been exhaustively discussed. It is held to discover much which can be profitably added to that discussion.

(13) On the view taken by the learned Judges in the Patna case and by Costello J. in the Calcutta case, I would make these observations. It appears to me that they looked too narrowly to the appearance of things and declined to look at the substance behind the appearance. They focussed attention on the label and would not look farther. I also consider that the learned Judges were being much too strict when they refused to consider why these rules of exclusion were embodied in S. 162, Cr. P. C. and S. 25 of the Evidence Act. It is true that the grounds of exclusion are not indicated either in the Evidence Act or the Criminal Procedure Code. But that does not seem a sufficient reason for refusing to consider that aspect of the matter. It has some times been said that he does not know the law who does not know the reason for the law. Surely, if you refuse to look at the reason for a particular rule of law how can any valid conclusion be reached?

(14) I prefer the view taken by the Full Bench in Bombay and in Calcutta, and would say that in relation to an offence under the Opium Act a Prohibition Officer on whom the State Government has conferred the powers of an officer in charge of a police station, is a police officer for purposes of S. 162, Cr. P. C. and S. 25 of the Evidence Act.

(15) It follows that the confession in this case is inadmissible in evidence. In the result the revision petition is dismissed.

(16) CHANDRA REDDI J.: This matter has now come before us having been referred by our learned brother Somasundaram J. to resolve the judicial conflict on the interpretation of S. 20 of the Opium Act. The question to be answered by us is:

> "Is the Excise Officer who exercises the powers conferred by the Criminal Procedure Code in charge of police station in the conduct of an investigation of an offence against excise laws a police officer within the meaning of S. 25 of the Evidence Act and S. 162, Cr. P. C."

(17) The facts relevant for the purpose of this enquiry are the following: It is alleged for the prosecution that on 1-1-1952 a parcel was booked from New Delhi to Madras by train from where the same was sent on the morning of 5-1-1952 to Chidambaram. At this place, the first accused took delivery of the parcel at the instance of accused 2 to 4. When the first accused was taking it out of the parcel office, P. W. 1, an Assistant Inspector of Excise caught hold of him and on an examination it was found to contain 33 seers of opium. After investigation, a charge sheet was laid against the first accused for possession of opium punishable under S. 9 (a) of the Opium Act and against accused 2 to 4 under S. 9 (b) of the said Act for transporting opium. In the course of examination of P. W. 1 he wanted to prove a statement made by the first accused to him which was reduced to writing. An objection was taken on behalf of the accused to the admissibility of the statement on the ground that the officer to whom the statement was made was a police officer within the meaning of S. 162, Cr. P. C. and S. 25 of the Evidence Act. The objection was upheld by the Stationary Sub-Magistrate of Chidambaram, and the statement recorded by P. W. 1 from the first accused was ruled out as being inadmissible. It is against this that the present revision petition has been filed by the State Government.

(18) In support of this petition, it is urged by the learned Public Prosecutor that an excise officer is not a police officer within the meaning of S. 25 of the Evidence Act and the prohibition enacted therein cannot be extended to excise officers.

(19) The question whether an excise officer was a police officer and the confession made to him in the course of investigation was to be excluded by virtue of the provisions of S. 25 of the Evidence Act came up for consideration in a number of cases in this Court. In — '1932 Mad WN Cr 69' (B) Sundaram Chetty J. held that an admission made by an accused person to an excise inspector could not be ruled out as it could not be regarded as a confession made to a police officer coming under S. 25 of the Evidence Act. To the same effect is the ruling of Bardswell J. in — '1934 Mad WN Cr 67' (C). In — 'AIR 1938 Mad 460' (D) Horwill J. took the same view although there was no reference to the two earlier cases. Referring to a Calcutta case which will be alluded to presently and which expressed the opinion that an excise officer was a police officer within the ambit of S. 25 of the Evidence Act, the learned Judge distinguished that case on the ground that it was based on special provisions of the Bengal Excise Act which made excise officers for purposes of excise offences police officers.

(20) The scope of a statement made to an assistant inspector of customs by an accused person in the course of an investigation fell to be considered by Yahya Ali J. in — 'AIR 1947 Mad 308' (G). The learned Judge on a review of the earlier decisions of this Court held that the statement did not come within the prohibition of S. 25 of the Evidence Act. In a more recent case Rajamannar J. (as he then was) in — 'AIR 1948 Mad 116' (H) referred to the earlier decisions of this Court and expressed his concurrence with them.

(21) It must be noted that all these decisions were given on the interpretation of the Opium Act as it stood then. Section 20 of the Opium Act provided:

> "Every person arrested and thing seized under S. 14 or S. 15, shall be forwarded without delay to the officer in charge of the nearest police station; and every person arrested and thing seized under S. 19 shall be forwarded without delay to the officer by whom the warrant was issued....."

Section 14 of the Act as amended in 1947, runs thus:

> "Any officer of any of the departments of Excise, Prohibition, Police, Customs, Salt, Opium or Revenue superior in rank to a peon, guard, or constable, who may in right of his office be authorised by the State Government in this behalf, and who has reason to believe, from personal knowledge or from information given by any person and taken down in writing, that opium liable to confiscation under this Act is.....kept or con-

cealed in any building, vessel or enclosed place, may, between sunrise and sunset:

(a) enter into any such building, vessel or place;

(b) in case of resistance, break open any door and remove any other obstacle to such entry;

(c) seize such opium..... and any other thing which he has reason to believe to be liable to confiscation under S. 11 or any other law for the time being in force relating to opium, and

(d) detain and search, and, if he thinks proper, arrest any person whom he has reason to believe to be guilty of any offence relating to such opium under this or any other law for the time being in force."

(22) Section 15 confers on an officer of the said departments powers to seize in any open place or in transit any opium and detain, search and arrest any person who is believed to be guilty of an offence against this or any other such law.

(23) It is thus seen that any of the officers mentioned in S. 14 of the Opium Act has only power to seize the articles involved in a crime whether they are in an enclosed place or an open place and detain, search or arrest any person suspected of having committed any offence against the statute. He has no power to investigate into these crimes and he can only forward the person and the things seized without any delay to the officer in charge of the nearest police station.

(24) In 1951 the Legislature of the State of Madras amended S. 20 of the Opium Act by inserting S. 20-A by Madras Act 32 of 1951 by which the officers mentioned in the sections already referred to were invested with certain powers of a police officer for investigation. Section 20-A runs thus:

"20-A—The State Government may, by notification in the Official Gazette, invest any officer of the Prohibition department, or every officer belonging to any specified class in that Department, with the powers of an officer in charge of a police station for the investigation of offences under this Act."

(25) Now the question for consideration is whether this amendment has, in any way, altered the position in regard to the state of authority bearing on the subject. That it does bring about a change in respect of powers to be exercised by those officers in the detection of crimes is beyond question. Subsequent to this amendment, the necessity to forward the articles seized and the person apprehended to the nearest police station is dispensed with and the officer concerned himself is authorised to investigate into the matter. But the controversy is whether this has the effect of bringing such an officer within the purview of S. 25 of the Evidence Act and S. 162, Cr. P. C. Section 25 of the Evidence Act says:

"No confession made to a police officer shall be proved as against a person accused of any offence."

While S. 162 (1), Cr. P. C. enacts:

"162 (1): No statement made by any person to a police officer in the course of an investigation under this chapter shall, if reduced into writing, be signed by the person making it; nor shall any such statement or any record thereof, whether in a police diary or otherwise, or any part of such statement or record be used for any purpose (save as hereinafter provided) at any inquiry or trial in respect of any offence under investigation at the time when such statement was made;

...."

(26) The word 'police officer' is not defined anywhere in the Evidence Act while we have only the definition of the "officer in charge of the police station" in the Criminal Procedure Code. From it we do not get any help. Nor is the definition of a "police officer" in the Identification of Prisoners Act, that is, Act 33 of 1920 of any assistance to us in the determination of the question before us.

(27) A similar question arose on the provisions of the Bombay Abkari Act before a Full Bench of the Bombay High Court in — 'AIR 1927 Bom 4 (FB)' (E). The section of the Act which the learned Judges of the Full Bench had to consider was S. 41 which provided that

"every Abkari officer not below such rank as Government may prescribe shall within the area for which he is appointed have power to investigate all offences punishable under this Act."

Sub-section (2) provided that

"such officer shall in the conduct of such investigation exercise the powers conferred by the Criminal Procedure Code, 1898, upon an officer in charge of a police station for the investigation of a cognizable offence."

(28) It is seen that this is analogous to the provisions of S. 20-A of the Opium Act as amended by Madras Act 32 of 1951. In that case, the learned Judges decided that an Abkari Officer invested with powers of an officer in charge of the police station under S. 41 of the Abkari Act was a police officer coming under the rule embodied in S. 25 of the Evidence Act. The ground for the decision was that as the Legislature had deliberately conferred upon an Abkari Officer substantially all the powers of a police officer, he had in effect become a police officer coming within the purview of S. 25 of the Evidence Act. For this reason it was held there that any confession made to such an officer under the Abkari Act or the Criminal Procedure Code was inadmissible in evidence. The observations of Marten C. J. at page 8 are apposite in this context:

"In this connection, I should like to point out that it was open to the Legislature or to Government to do one of two or three things. It could detatch ordinary police officers to investigate excise offences. Or on the other hand, it could appoint other officers of Government or new officers to perform the duties of investigation and arrest and so on, which had previously been performed by ordinary police officers. Whichever course was adopted, any alleged offence would, in effect, be investigated by persons in the position of policemen. In this very case it would appear that the effect of the above sections of the Abkari Act is that certain duties, which previously fell upon ordinary Police Officers, are in fact now being carried out by the Abkari officers, who have been given these particular police powers."

(29) In support of his conclusion the learned Chief Justice relied on the dictum of Sir Richard Garth in — 'Queen v. Hurribole Chander Ghose', 1 Cal 207 (K) that the word "police officer"

was not used in S. 25 of the Evidence Act, in a technical sense but was used in a comprehensive and popular sense. Referring to earlier rulings of that Court and of the Calcutta High Court the learned Chief Justice distinguished them on the ground that they were based on the language of S. 20 of the Opium Act and the provisions of the Bengal Abkari Act which were widely different from those of S. 41 of the Bombay Abkari Act.

(30) Shah J. one of the learned Judges of the Full Bench in the course of his judgment stated that an officer contemplated by S. 41, sub-s. (1) was virtually in the same position as a police officer in the matter of investigation of the offences under that Act. All that was meant by the expression "police officer" in S. 25 of the Evidence Act was "an officer who exercises the powers of the police conferred on him by law" by whatever name he is called. The other three learned Judges also expressed their concurrence with the opinion mentioned above. The principle enunciated in that ruling is applicable to the case before us as the provisions of S. 20-A of the Opium Act bear a close resemblance to those of S. 41 of the Bombay Abkari Act, and I express my respectful accord with it.

(31) The Patna High Court reached an opposite conclusion in — 'AIR 1932 Pat 293 (SB)' (J). The point which the Full Bench of the Patna High Court considered was whether an Inspector of Excise acting in the course of his duties was a police officer within the meaning of S. 25 of the Evidence Act and whether a confession made to him was admissible. The learned Judges answered the point in the negative. In their view an Excise Officer could not be regarded as a police officer merely because he was exercising certain functions in the conduct of investigation of an excise offence. The learned Chief Justice (Courtney-Terrell C. J.) observes that he found himself "in complete disagreement with the arguments which found favour" in the Bombay case. According to him, there was a fallacy in the judgment of the Bombay Full Bench which was attributable to two causes. One was the misconception of the ruling in — '1 Cal 207' (K) and the other the adoption of an erroneous canon of construction of statutes, that is, the consideration of what is supposed to be the object of S. 25 of the Evidence Act, by the learned Judges of the Bombay High Court. In this view of the matter the learned Chief Justice thought that the opinion expressed in — 'AIR 1927 Bom 4 (FB)' (E) was an erroneous one.

(32) Fazl Ali J. who agreed with Courtney-Terrell C. J. observed that as laid down in — '1 Cal 207' (K), it was well settled that the term "police officer" should not be construed in a technical sense but in its more popular and comprehensive sense, while the other learned Judge, Agarwala J. was of the view that the word "police officer" connotes nothing more or less than a member of the police force and he did not think that the observation of Garth C. J. was intended to go beyond that. It is clear that this dictum of Agarwala J. is plainly opposed to that of Garth J. in — '1 Cal 207' (K) in spite of the learned Judge's attempt to reconcile the two dicta. It does not appear to me that the Judges of the Bombay High Court in any way misunderstood the scope of the dictum in — '1 Cal 207' (K). Reliance was placed by Marten C. J. in the Bombay case on — '1 Cal 207' (K) only for the purpose of showing that the term "police officer" was not used in a restricted sense but has a wider import. Nor can I bring myself to agree with Courtney-Terrell C. J. that the Judges of the Bombay High Court adopted an erroneous canon of construction. No doubt a statute has to be construed with reference to the language employed therein and it is not permissible to speculate as to the object or the intention of the Legislature. But when the meaning of an expression is not plain and it is not possible to ascertain the meaning of a term or to gather its import from the statute itself, I think it is permissible to resort to extrinsic guides. In this context the remarks of Lord Atkin in — 'Keats Lewis Merthyr v. Consolidated Colliers', (1911) AC 641 (L) are apposite:

> "In the construction of a statement it is, of course, at all times and under all circumstances permissible to have regard to the state of things existing at the time the statute was passed, and to the evils which as appears from its provisions it was designed to remedy."

(33) It may be recalled that the term "police officer" is not defined in the Evidence Act or in the Criminal Procedure Code. So in trying to understand the signification of that expression it is perfectly legitimate to have regard to the setting and the context in which S. 25 of the Evidence Act was enacted. With great respect to the Judges who decided — 'AIR 1932 Pat 293' (J) I am unable to appreciate their criticism of — 'AIR 1927 Bom 4 (FB)' (E). It looks to me that the legislature must have used that expression in a larger sense than that attributed to it by the Patna High Court.

(34) Subsequent to the ruling of the Patna High Court an identical point arose for consideration before a Full Bench of five Judges of the Calcutta High Court in — 'AIR 1934 Pat 580 (FB)' (F). There the conviction of the accused persons under S. 9 of the Opium Act was mainly based on a confession said to have been made by them to an Excise Inspector. The admissibility of this confession was raised in appeals preferred by the accused against their convictions. In view of the conflict of judicial opinion, the matter was placed before a Full Bench of five Judges. The answer given by the Full Bench (by a majority) was that the Legislature in using the term "police officer" in S. 25 of the Evidence Act did not intend to exclude from its meaning Excise officers exercising powers of detection and investigation of crimes committed against excise laws. There is an exhaustive discussion of the topic and the opposing views expressed in — 'AIR 1927 Bom 4 (FB) (E)' and — 'AIR 1932 Pat 293 (J)' are also considered. Four of the learned Judges approved of the rule of law stated in — 'AIR 1927 Bom 4 (FB)' (E). The reasoning in — 'AIR 1932 Pat 293 (SB) (J)' was not acceptable to them.

(35) The leading judgment of Mukerji J. is a very instructive one. The learned Judge reviewed the case law bearing on the subject and also considered the reason of the rule enacted in S. 25 of the Evidence Act. Discussing the connotation of the term "police officer" in the light of the relevant provisions of Police Act 5 of 1861, he stated that police officers were officers whose duty was to prevent and detect crimes. The learned Judge also referred to one of the meanings given to that expression in the Oxford Dictionary viz., "The civil force to which is entrusted the duty of maintaining public order, enforcing regulation for the prevention

and punishment of breaches of the law, and detecting crime; construed as plural, the members of a police force; the constabulary of a locality, as throwing light on the import of that term."

(36) The position was summed up by the learned Judge at page 586 thus:

"The powers and duties of excise officers investigating offences have been gradually brought more and more on a line with those of the officers of the police force, and they have been made police officers for the purposes of such investigation in all possible manner."

(37) Mallick, Jack and S. K. Ghose JJ. agreed with the opinion expressed by Mukherji J. while Costello J. struck a note of dissent.

(38) Ghose J. in the course of his judgment remarked that in an excise case, an excise officer is the real police officer and the only police officer in the case. He also pointed out that in the earlier Calcutta cases in which the view was taken that an excise officer was not a police officer for purposes of S. 25 of the Evidence Act, the question of an excise officer exercising the powers of a police officer was not discussed and that except in one of them the attention of the learned Judges was not attracted to the material provisions of the Excise Act.

(39) In my judgment, the view taken in — 'AIR 1934 Cal 580 (FB)' (F) is a correct and a sound one and I am wholly in agreement with the reasoning adopted in that case.

(40) I will now refer to a ruling of a Bench of our High Court in — 'AIR 1946 Mad 430' (A). The statutory provision which formed the subject-matter of inquiry before the Bench consisting of Sir Lionel Leach C. J. and Lakshmana Rao J. was sub-s. 3 of S. 12 of the Hoarding and Profiteering Prevention Ordinance 53 of 1944. Sub-s. (3) of S. 12 reads as follows:

"The Controller General and such inspectors or other officers as may be empowered by the Central or Provincial Government in this behalf shall within the respective areas for which they are appointed, have power to investigate all offences punishable under this Ordinance and in conducting any such investigation shall, within the said areas, have all the powers, duties, privileges and liabilities of an officer in charge of a police station under the Criminal Procedure Code, 1898, when investigating a cognizable offence within the limits of his station."

(41) By virtue of this provision the Provincial Government gave certain officers of the Commercial Tax Department power to investigate offences within their respective jurisdictions. With reference to these provisions the following question was submitted by the Chief Presidency Magistrate under S. 432, Cr. P. C. for the opinion of the Court:

"Whether a Special officer of the Commercial Tax Department who has been empowered in this behalf by the Provincial Government of Madras in exercise of the powers conferred on them by S. 12 (3) of the Hoarding and Profiteering Prevention Ordinance introduced by the amending Ordinance No. 43 of 1944, is a police officer within the meaning and for the purpose of S. 162, Cr. P. C. and S. 25 of the Evidence Act."

On an interpretation of the relevant provisions the learned Judges gave the answer in the affirmative. In the course of the order it was remarked thus:

"If an investigating officer is a police officer within and for the purpose of S. 162, Cr. P. C. this practice is obviously illegal. That he is a police officer within the meaning of the section we have no doubt whatever. Section 12 (3) of the Hoarding and Profiteering Prevention Ordinance expressly gives him all the powers, duties and privileges of an officer in charge of a police station under the Criminal Procedure Code, 1898, when investigating a cognizable offence within the limits of his station.

Therefore he has the full status of a police officer and his powers and duties must be limited to those of a police officer under the Criminal Procedure Code, which means that he has no right in an investigation under the Ordinance to require a person to sign a statement and where such a statement is reduced to writing it can only be used in accordance with the provisions of S. 162, Cr. P. C. or S. 27 of the Evidence Act."

(42) The ruling in this case is applicable to the present case with equal force, as S. 20-A of the Opium Act are in 'pari materia' with the provisions of sub-s. (3) of S. 12 of the Hoarding and Profiteering Prevention Ordinance. I respectfully adopt the reasoning in this case. This decision was distinguished by Yahya Ali J. in — AIR 1947 Mad 308' (G) already referred to on the ground that it was based exclusively on the phraseology employed in sub-s. (3) of S. 12 of the said Ordinance which specifically mentioned that the officers concerned should have all the powers, duties, privileges and liabilities of an officer-in-charge of a police station.

(43) It is clear from these observations that Yahya Ali J. rested his conclusion in the case last mentioned on the absence of provision investing the excise officers in the detection of excise offences with the powers of a police officer in charge of the police station. As already pointed out that was a case prior to Madras Act 32 of 1951 which amended S. 20 of the Opium Act.

(44) Rajamannar J. (as he then was) in — 'AIR 1948 Mad 116' (H) to which reference had been already made, in distinguishing Calcutta and Bombay Full Bench decisions in — 'AIR 1934 Cal 580 (FB)' (F) and — 'AIR 1927 Bom 4 (FB)' (E) stated that an identical conclusion could be reached if there was a similar provision in any other enactment. This statement makes it abundantly clear that the learned Judge would have reached the conclusion that an excise officer was a police officer for purposes of S. 25 of the Evidence Act and S. 162, Cr. P. C. if provisions similar to S. 20-A of the Opium Act were in force then.

(45) In the light of the above rulings and on a careful consideration of the relevant statutory provisions, I have reached the conclusion that the term "police officer" is used in S. 25 of the Evidence Act with reference to the functions exercised by the officer and not as an officer of the police department. It only means an officer exercising certain powers and is not confined to an officer belonging to the police department. In my opinion, it is the exercise of functions like the detection of crimes which involves the holding of investigation that marked out these officers for special treatment in regard to the confessions made to them in the course of investigation.

(46) I may add, in recent times, the need to pass laws intended to regulate social and economic life of the people and to add to the revenues of the country as well, has indeed become very great. This had led to the Legislatures investing the officers appointed for the purpose of giving effect to the provisions of these enactments, to check the evasion thereof and to prevent and detect crimes created under various enactments and to bring the offenders to justice, with powers of investigation. The insertion of S. 20-A of the Opium Act is one of such instances. If these officers are invested with the same powers and are in the same position as the officers of the police department in relation to the detection of crimes by holding investigations, there does not seem to be any rational basis for distinction and for not extending the rule in S. 25 of the Evidence Act and S. 162, Cr. P. C. to them, especially when the functions exercised by both categories are essentially the same. In my opinion, it was not so much against an officer of a particular department that the prohibition under S. 25 of the Evidence Act is enacted and the restrictions contained in S. 162, Cr. P. C. are placed as the desire to prevent the use of the statements made to officers engaged in the investigation of crimes to the prejudice of the accused persons.

(47) It is also to be noted that it is Ch. XIV, Cr. P. C. that deals with the investigations, and when the power of an officer in charge of the police station for the purpose of investigation is conferred upon an officer under S. 20-A of the Opium Act, all the sections of that Chapter should be held applicable to such a case. Section 162, Cr. P. C. being one of the sections of that Chapter is equally applicable to a statement made to a prohibition or excise officer in the conduct of investigation.

(48) In these circumstances, the conclusion I have reached is that an excise officer invested with the powers of an officer in charge of a police station for investigation of offences under S. 20-A of the Opium Act is a "police officer" coming within the purview of S. 25 of the Evidence Act and S. 162, Cr. P. C. and any confession made to him in the course of investigation is inadmissible under S. 25 of the Evidence Act and the statements made to such an officer under S. 162, Cr. P. C. can be used only in the manner enacted therein.

(49) In the result the revision petition is dismissed.

B/D.H.Z. Revision dismissed.

A.I.R. 1953 MADRAS 924 (Vol. 40, C. N. 362)

RAGHAVA RAO J.

Madavi Amma, Petitioner v. Nallammal and another, Respondents.

Civil Revn. Petn. No. 1807 of 1952, D/- 16-1-1953.

(a) Houses and Rents — Madras Buildings (Lease and Rent Control) Act (25 of 1949, as amended by Act 8 of 1951), S. 12(b) — Another remedy by way of suit — (Civil P. C. (1908), S. 115).

Obstruction to execution of order of eviction — Order for removal of obstruction — Revision — Act itself providing in S. 12(b) remedy by way of revision — The fact that there is another remedy by way of suit under O. 21, R. 103, Civil P. C. is no reason why revision will not be entertained. (Para 2)

Anno: Civil P. C., S. 115 N. 8.

(b) Houses and Rents — Madras Buildings (Lease and Rent Control) Act (25 of 1949, as amended by Act 8 of 1951), S. 9 — Suits under — Procedure to be followed is one under O. 19, Civil P. C. — Petition for removal of obstruction to execution of eviction order disposed of solely on affidavits — Procedure held not irregular — From the fact that order of eviction is to be executed as if it were a decree, it does not follow that the proceeding which has given rise to the order for eviction can be regarded as a regular suit, to which the ordinary procedure of trial of suits under the Code of Civil Procedure becomes applicable — (Civil P. C. (1908), O. 19, R. 1). (Para 3)

Anno: Civil P. C., O. 19, R. 1 N. 7.

M. S. Venkatarama Iyer and S. Viswanathan, for Petitioner; K. Vaitheeswaran, for Respondents.

CASES CITED:

(A) ('51) AIR 1951 Mad 822: 1951-1 Mad LJ 59

(B) ('51) AIR 1951 Mad 804: 1949-2 Mad LJ 699

ORDER: In the course of proceedings for execution of an order for eviction under the Madras Buildings (Lease and Rent Control) Act, 1949, the present petitioner caused an obstruction which was directed to be removed by the executing Court. This revision petition which is preferred against the order of removal is sought to be sustained by Mr. M. S. Venkatarama Aiyar learned advocate for the petitioner, with reference to S. 12(b) of the Madras Buildings (Lease and Rent Control) Act, 1949, as amended by Madras Act 8 of 1951.

(2) A two-fold objection has been raised to the case of the petitioner before me by Mr. Vaithiswaran, learned advocate for the respondent. Firstly he says that the proper remedy for the petitioner is a suit under O. 21, R. 103, Civil P. C. as would follow from the ruling of this Court reported in — 'Mathradas Vadilal v. Kishen Jhavar', AIR 1951 Mad 822 (A), which in its turn is based upon an earlier Bench ruling of this Court in — 'Thangaswami Chettiar v. Bapoo Sahib', AIR 1951 Mad 804 (B). I am not satisfied that this objection can be upheld. Where the Act does itself provide for revisability of an order of the kind with which I am concerned, as indeed S. 12(b) of the Act does, I do not think I shall be justified in refusing to consider the merits of this revision on the ground of the existence of a remedy by way of a separate suit. It is true that ordinarily I do not interfere in revision where there is a remedy by way of a suit, but as I have said revision being the remedy specifically provided for by S. 12(b) of the Act, I proceed to consider the merits of this case.

(3) Learned advocate for the respondent urges on this aspect that there is no ground for revision because such evidence as the petitioner could well have adduced she undoubtedly was not prevented by the Court or by the opposite side from adducing. The only point urged for the petitioner is that the Court below disposed of the petition for removal of obstruction on affidavits solely, and that while that sort of procedure might be permissible in proceedings under the Civil Procedure Code,

the Court below should have adopted the procedure of a regular trial by means of oral evidence in the matter out of which this revision petition arises.

I am not satisfied that this contention is correct. Order 19, Civil P. C. which provides for the procedure applicable to suits which by S. 9, Madras Buildings (Lease and Rent Control), Act 1949, as amended by Act 8 of 1951, has been made applicable to proceedings under this latter Act sufficiently authorises the procedure adopted by the Court below in the present case. It is contended by Mr. Venkatarama Aiyar that because an order for eviction under the Madras Buildings (Lease and Rent Control) Act, 1949, is executable as if it were a decree passed by the executing Court itself, the procedure adopted by the Court below was irregular. I do not think that that provision as to executability has anything to do with the question as to whether a procedure by way of affidavits was or was not quite sufficient in the circumstances of the present case. Merely because the order for eviction is to be executed as if it were a decree, it does not, in my opinion, follow that the proceeding which has given rise to the order for eviction can be regarded as a regular suit, to which the ordinary procedure of trial of suits under the Code of Civil Procedure becomes applicable. The order for eviction may well be executable as if it were a decree but the supposition is that it is not a decree excepting so far as the executability is concerned. Much less does it follow that the proceeding in which the order for eviction is made is to be regarded as a suit to which the provisions of the Code of Civil Procedure apply. This revision petition is for the reasons given above dismissed with costs.

B/R.G.D. Revision dismissed.

A.I.R. 1953 MADRAS 925 (Vol. 40, C. N. 363)

BALAKRISHNA AYYAR J.

Ananthoth Gopalan, Appellant v. Eram Veettil Kanaran and another, Respondents.

Second Appeal No. 1029 of 1949, D/- 5-2-1953.

(a) Civil P. C. (1908), S. 100 — Concurrent findings of fact — (Transfer of Property Act (1882), S. 53A).

Where in a suit to recover possession defendant 1 claimed protection under S. 53A, T. P. Act alleging that plaintiff had notice of contract between defendant 1 and defendant 2 the question whether the story of defendant 1 that he told the plaintiff about the unregistered document executed by defendant 2 conferring kanom rights upon defendant 1 was true, was a plain question of fact and where on that point both the Courts had found the evidence to be acceptable, in second appeal the High Court could not go behind it. (Para 2)

Anno: Civil P. C., S. 100 N. 54; T. P. Act, S. 53A N. 16.

(b) Transfer of Property Act (1882), S. 53-A — Proviso to the section.

The proviso to S. 53A is intended to protect persons who, in actual truth and in fact, have no notice of the interests of the defendants; but when actually and as a matter of fact they have such notice, the informality of the manner in which they acquired that notice or information is not material. The main thing is that the transferee should know; it does not matter how he knows it. So long as it is credible information, which a person of ordinary prudence will take notice of, he will be bound by it. (1865) 55 ER 918, Disting. (Para 3)

Anno: T. P. Act, S. 53-A N. 15, 16.

(c) Transfer of Property Act (1882), S. 53-A — Act of part performance under the section.

Where the document expressly stated that the demise fee of Rs. 125/- had been recovered in respect of the document and there was oral evidence, which was accepted by the Courts below, that defendant 1 told the plaintiff and his father that money had already been paid under the document there was sufficient compliance with the requirements of S. 53-A and the payment of money can be treated as an act in furtherance of the contract. (1883) 8 AC 467, Explained. (Para 5)

Anno: T. P. Act, S. 53-A N. 10.

M. K. Nambiar, for Appellant; D. A. Krishna Variar and M. Sekhara Menon, for Respondents.

CASES CITED:
(A) (1865) 35 Beav 317: 55 ER 918
(B) (1883) 52 LJQB 737: 8 AC 467

JUDGMENT: The jenmam right in the suit properties belongs to defendant 2. In May 1943 he put defendant 1 in possession of the properties under an oral lease. The lease was apparently for a period of one year. On 30-6-1944, defendant 2 executed a kanom kuzhikanam in favour of deft. 1. See Ex. D. 1. The document refers to the oral demise of 9-5-1943, admits receipt of the kanom amount of Re. 1 and demise fee of Rs. 125 and proceeds to confer kanom kuzhikanom right for a period of 12 years. But this document was not registered. On 24-7-1944, defendant 2 executed a registered kanom kuzhikanom deed in favour of the plaintiff (Ex. P. 1). On the strength of Ex. P. 1 the plaintiff sued to recover possession of the suit property. The District Munsif of Nadapuram dismissed the suit. His appeal to the Subordinate Judge of Tellicherry having failed, he has come up to this Court.

(2) One of the defences, which defendant 1 set up, was that he is entitled to the protection conferred by S. 53-A, T. P. Act. This plea was accepted by the learned Subordinate Judge. Mr. Nambiar, the learned counsel for the appellants argued that the learned Subordinate Judge was wrong in having done so. He raised in the main two points. One was that before defendant 1 can be given the protection conferred by S. 53A, T. P. Act, it must be shown that the plaintiff had notice of the contract in favour of defendant 1. Dealing with the finding of the Courts below that the plaintiff had such notice, Mr. Nambiar stated that the finding was based upon a misapprehension of the evidence. The evidence of defendant 1 was that some time after Ex. D. 1 had been executed he was travelling in a bus with the plaintiff and the plaintiff's father and that during the course of the journey, he informed the plaintiff about the execution of Ex. D. 1 and also about the payment of money. This is what he stated in chief:

"Two months before the auction of the shops the plaintiff's father Chathukutty, the plaintiff and I went together by bus to Badagara. We were going to see some shop renters to arrive at an agreement to prevent high bids due to

competition. When we went on that occasion, Ex. D. 1 had already been signed. Plaintiff asked me whether I had taken a written lease. I told him that money had been paid and documents executed but not registered."

But in cross-examination he deposed:

"I do not remember the date on which Chathukutty, the plaintiff and I went to Muttangal to try to see that there was no competition in bidding..... On our way to Muttangal I spoke to them about my having taken a lease of the plaint property. I cannot say whether any one else heard it. He knew only of my having taken an oral entrustment of the property and not a written lease."

Mr. Nambiar laid emphasis on this last sentence appearing in this series of answers and argued that assuming the story of defendant 1 that he had a conversation with the plaintiff and his father during the course of their journey by bus to Badagara or Muttangal is true, what he told them must have been about the oral lease of 1943 and not about Ex. D. 1. I am inclined to think that this series of answers in cross-examination are the result of a certain amount of confusion either in the mind of the cross-examining counsel or in the mind of the witnesses or of both, because immediately afterwards the witness stated:

"When Chathukutty came to my shop I had told him about my having taken an oral lease. That was three or four months before we went to Muttangal."

Apparently there were two distinct talks and there was some confusion about them. This, however, is not a matter which I need pursue further because the question whether the story of defendant 1 that he told the plaintiff and his father about Ex. D. 1 is true is a plain question of fact and on this point both the Courts have found the evidence to be acceptable. In second appeal, I cannot go behind it.

(3) Mr. Nambiar next argued that even assuming this evidence is true, the talk was necessarily of a casual nature; so casual in fact that nobody need have taken notice of it. According to him, a casual talk is not sufficient to constitute the sort of notice that S. 53-A, T. P. Act requires. In support of this argument of his, he referred to the decision—'Re Tichener', (1865) 55 ER 918 (A). I do not read that decision as laying down a general rule that in no case will information given in the course of what he called a casual conversation be sufficient to constitute notice. Of course, the informality attending a conversation may be such that no man of ordinary prudence would take any notice of it. If the information had been made available in such circumstances, it may be legitimate to say "I heard it so casually that I took no notice of it." But that cannot be said in this case. It is true the conversation was informal but the information given was such that anybody in the position of the plaintiff was bound to have remembered it. The proviso to S. 53-A, T. P. Act is intended to protect persons who in actual truth and fact have no notice of the interests of the defendants; but when actually and as a matter of fact they have such notice, the informality of the manner in which they acquired that notice or information does not appear to be material. The main thing is that the transferee should know; it does not matter how he knows it. So long as it is credible information, which a person of ordinary prudence will take notice of, he will be bound by it.

(4) The second contention of Mr. Nambiar was that the payment of Rs. 125 which Ex. D. 1 recites, is not sufficient part performance within the meaning of S. 53-A, T. P. Act. Para. 2 of S. 53-A requires that the transferee should have done some act in furtherance of the contract. Mere payment of money, he said, would not be an act in furtherance of the contract. In support of his argument he referred to the decision in — 'Maddison v. Alderson', (1883) 8 AC 467 (B). At pp. 478 and 479 the following passage occurs:

"And it may be taken as now settled that part payment of purchase money is not enough; and judges of high authority have said the same even of payment in full."

The reason for the rule was explained immediately afterwards:

"The best explanation of it seems to be that the payment of money is an equivocal act not (in itself) until the connection is established by parol testimony, indicative of a contract concerning land..... All the authorities show that the acts relied upon as part performance must be unequivocally and in their own nature referable to some such agreement as that alleged."

(5) In this particular case, there can be no doubt whatsoever as to why the sum of Rs. 125 was paid. The document Ex. D. 1 expressly states that the demise fee of Rs. 125 has been recovered in respect of the document and there is oral evidence, which was accepted by the Courts below, that the first defendant told the plaintiff and his father that money had already been paid under the document. That seems to be sufficient compliance with the requirements of S. 53-A, T. P. Act and I am not prepared to say that no payment of money can be treated as an act in furtherance of the contract. If the Legislature had intended to lay down a rule that no payment of money was to be treated as an act in furtherance of the contract, I would have expected it to insert the words "not being a payment of money" before the expression "in furtherance of the contract" in para. 2 of the section. Both the points taken before me have failed.

(6) In the result, the appeal fails and is dismissed with costs.

B/H.G.P. Appeal dismissed.

A.I.R. 1953 MADRAS 926 (Vol. 40, C. N. 364)

RAJAMANNAR C. J.
AND VENKATARAMA AYYAR J.

In re T. K. Ratna Mudaliar, Appellant.

O. S. A. of 1953 (S. R. No. 19278 of 1953), D/- 21-4-1953.

Letters Patent (Madras), Cls. 13 and 15 — Judgment.

Neither an order of the High Court refusing to transfer a case from the file of the City Civil Court, Madras, to the Original Side of the High Court to be heard along with a suit pending on the file of the High Court, nor an order staying the suit on the file of the High Court until the disposal of

the suit in the City Civil Court, is a "judgment" within the meaning of Cl. 15 of the Letters Patent. No appeal under Cl. 15 therefore is maintainable from such an order. AIR 1928 Mad 209; L. P. A. No. 74 of 1950; AIR 1953 SC 198, Rel. on; AIR 1924 Mad 90, Held no more good law.
(Paras 2, 3)

S. G. Ranga Ramanujam, for Appellant.

CASES CITED:
(A) ('28) AIR 1928 Mad 209: 51 Mad 330
(B) ('50) L. P. A. No. 74 of 1950 (Mad)
(C) ('24) AIR 1924 Mad 90: 45 Mad LJ 153
(D) ('53) AIR 1953 SC 198: 1953 SCJ 300

RAJAMANNAR C. J.: An appeal is sought to be preferred under Cl. 15 of the Letters Patent against an order of Subba Rao J. refusing to transfer O. S. No. 20 of 1951 from the file of the City Civil Court, Madras, to the Original Side of this Court to be heard along with a suit pending on the file of this Court, and staying the suit on the file of this Court until the disposal of the suit in the City Civil Court.

(2) On the authorities, it is clear that the appeal is not maintainable. Neither the order refusing to transfer a suit from the file of the City Civil Court to this Court, nor an order staying a suit pending in this Court is a "judgment" within the meaning of Cl. 15 of the Letters Patent. See — 'Narasa Reddi v. Tar Mahommed', AIR 1928 Mad 209 (A) and — 'L. P. A. No. 74 of 1950 (Mad)' (B).

(3) Learned counsel for the appellant relied upon a ruling in — 'Krishna Reddi v. Thanikachala Mudali', AIR 1924 Mad 90 (C) in which it was held that an order transferring a suit from the file of a mofussil Court to this Court is a judgment within the meaning of Cl. 15. This decision cannot be deemed to be good law any longer after the recent decision of the Supreme Court in — 'Asrumati Debi v. Rupendra Deb', AIR 1953 SC 198 (D). Their Lordships held that an order of transfer of a suit made under Cl. 13 of the Letters Patent is not a judgment within the meaning of Cl. 15, and therefore is not appealable. There is abundant authority for the position that an order staying a suit is not a "judgment" within the meaning of that clause.

(4) The appeal is not competent. The papers will therefore be returned to the party.

B/R.G.D. Order accordingly.

A.I.R. 1953 MADRAS 927 (Vol. 40, C. N. 365)
RAGHAVA RAO J.

V. M. Chockalingam Chettiar, Petitioner v. T. A. S. V. Alagammai Achi and another, Respondents.

Civil Revn. Petn. No. 1279 of 1952, D/- 3-2-1953.

(a) Civil P. C. (1908), O. 8A, R. 8 (Mad.) — Party already on record.

The third party procedure can be availed of as against a person already on record.
(Para 2)

(b) Civil P. C. (1908), O. 8A (Mad.) — Applicability.

In applying the third party procedure what the Court has to see is whether the joinder of the claims between defendant 1 and defendant 2 on the one hand and the plaintiff and defendant 1 on the other, would be so far improper if really they were claims litigated in two different suits separately instituted. The fact that simple suit for recovery of money on deposit with defendant 1 would get enlarged in its scope by the addition to the record of the pleadings as between defendant 1 and the second defendant and by the issues that might be consequential upon those pleadings is not a ground for refusal of the application of O. 8A to a case otherwise appropriate.
(Para 2)

P. S. Chandrasekhara Ayyar and P. S. Ramachandran, for Petitioner; T. R. Srinivasan and T. Ramalingam, for Respondents.

CASE CITED:
(A) ('39) AIR 1939 Mad 172: ILR (1939) Mad 259

ORDER: In a suit for recovery of certain money of the plaintiff alleged to have been deposited with defendant 1, defendant 1 pleaded in his written statement that the money deposited with him was really defendant 2's money and not the plaintiff's and that as the money had been deposited on the understanding that the money was to be payable to defendant 2's order, defendant 1 had already obtained full discharge in respect of the obligation which the plaintiff sought to enforce by the adjustment of the said money between defendant 2 and himself towards the debts due by defendant 2 to defendant 1. There was thereafter an application made to the Court below to enable defendant 1 to avail himself of the third party procedure provided under O. 8-A, Civil P. C. The application having been rejected by the Court below, defendant 1 has come up in revision to this Court.

(2) Mr. P. S. Chandrasekhara Ayyar, learned advocate for the petitioner, has contended in the first instance that the main reason given by the Court below for its order under revision is that defendant 2 was already a party to the record and therefore the procedure prescribed by O. 8-A did not apply to the case. This, it is common ground before me, proceeds upon a mistake about what O. 8-A, Civil P. C. provides; for, while where a person against whom a third party procedure is sought to be availed of is not already a party to the record he has to be impleaded on an application to be made for that purpose, it does not, in my opinion, follow that the third party procedure cannot be availed of as against a person already on record. This ground given by the learned Subordinate Judge in fact has not been supported or rather seriously supported by Mr. T. R. Sriniavsan, learned advocate for the respondent, in view of O. 8-A, R. 8, Civil P. C. The point pressed by Mr. Srinivasan, however, is that the application of the third party procedure to the circumstances of this case is calculated to involve his client as well as the Court in embarrassment for the reason that that would result in the joinder of what substantially would be two suits between two different parties in one and the same trial and that it would also have the effect of prolonging the disposal of his own suit as against defendant 1 which would without this application of the third party procedure be a simple suit for recovery of money deposited with defendant 1 in the name of his client.

Learned counsel points out that the third party procedure ought not to be applied by a Court

ordinarily in cases where its application would have this effect. As pointed out by Venkatarama Rao J. in — 'Venkatakrishna Naidu v. Narayanaswami Iyer', AIR 1939 Mad 172 (A), the considerations governing the application of the third party procedure to any particular case are substantially similar to those considerations which influence the discretion of the Court in impleading parties under O. 1, R. 10, Civil P. C. Agreeing with this view of the matter which I myself expressed in the course of arguments, I am of opinion that what I have to see is whether the joinder of the claims in question, that is to say, between defendant 1 and defendant 2 on the one hand and the plaintiff and defendant 1 on the other, would be so far improper if really they were claims litigated in two different suits separately instituted. Applying this test, as in my opinion a proper test applicable to the class of case before me, I am of opinion that this was pre-eminently a case in which the Court below ought to have exercised its discretion in favour of allowing the application of defendant 1. As pointed out by the learned advocate for the petitioner before me, there is at least one common question which would arise as between the two claims which would get combined for trial if O. 8-A, Civil P. C. were to be applied to the present case, viz., whether the moneys in question originally deposited by defendant 2 belonged to the plaintiff or belonged to defendant 2 or were merely placed in the name of the plaintiff with defendant 1. Were the suit of the respondent before me a suit on a negotiable instrument, different considerations might possibly arise. But all that Mr. Srinivasan, learned advocate for the respondent, has urged is that his simple suit for recovery of money on deposit with defendant 4 would get enlarged in its scope by the addition to the record of the pleadings as between defendant 1 and defendant 2 and by the issues that might be consequential upon those pleadings. As I have already stated, that, in my opinion, is not a ground for refusal of the application of O. 8-A, Civil P. C. to a case otherwise appropriate.

(3) For the reasons given by me, it follows that this revision must be allowed. In the circumstances of the case, there will be no order as to costs so far as this Court is concerned.

B/D.H.Z. **Revision allowed.**

A.I.R. 1953 MADRAS 928 (Vol. 40, C. N. 366)

PANCHAPAKESA AYYAR J.

P. R. M. S. Chellappa Chettiar, Applicant v. Official Assignee of Madras and another, Respondents.

I. P. No. 126 of 1952 and Appln. No. 230 of 1953, D/- 27-4-1953.

Presidency Towns Insolvency Act (1909), S. 11(b) — Temporary residence of debtor.

A man driving a train to Madras, or a bus to Madras, or flying over Madras in an aeroplane, without having any permanent residence in Madras, cannot be said to be a resident of Madras, and therefore, the High Court of Madras has no jurisdiction to adjudicate him an insolvent.

(Para 1)

Anno: Presidency Towns Insolvency Act, S. 11 N. 1.

Official Assignee and V. N. Srinivasa Rao, for Respondents.

ORDER: This is an application for annulling the adjudication of respondent 2, L. S. Vardon, an Engine Driver, resident at Erode. L. S. Vardon was adjudicated insolvent on his own petition on 4-12-1952. He had alleged in the petition that he was a permanent resident of Madras and was residing at No. 1/9-A, Jeson Street, Park Town, Madras. On 11-3-1953, more than three months after adjudication, the applicant, Chellappa Chettiar, one of the creditors claiming Rs. 5,000/- as due to him, has brought this application for annulling the adjudication on the ground that it had been obtained by misrepresentation and fraud, and that Vardon, an Engine Driver of the Southern Railways, was a permanent resident of Erode where he has got a permanent official residence, and all his children, and that he was simply on a casual visit to Madras when he filed the petition. The learned counsel for Vardon does not intend to prove the allegations in Vardon's counter that Vardon is really a permanent resident of Madras. He simply says that, besides being then on a visit to Madras, Vardon is in the habit of coming to Madras now and then in the train, being an engine driver, and that he has got his wife in Madras in the house mentioned above.

But it is admitted that he has not left any of his goods or properties in the house alleged and that he merely comes to Madras in the train occasionally. A man driving a train to Madras, or a bus to Madras, or flying over Madras in an aeroplane, without having any permanent residence in Madras, cannot be said to be a resident of Madras, any more than a man passing in a plane or train through several towns can be said to be a resident of those various towns. The position may be different if it was proved that this Vardon actually resided in Madras, either with his wife or without his wife in the house concerned. Vardon has not cared or dared to get into the box and prove anything like that. The object of getting adjudications in 'Madras' by such mufassel persons appears to be to have as few creditors as possible know about the insolvency and prove their claims, and prevent many or even those who come to know from coming all the way to Madras, at an enormous waste of time, money and energy, to prove their claims, and thus get an easy rid of their debts and an easy discharge.

As there is no proof that Vardon was a resident of Madras at the time of his petition, his adjudication deserves to be and is hereby annulled, but, in the circumstances, without costs, as this application has been filed more than three months after the adjudication and more than a month after the applicant was informed about the adjudication. Possibly, this delay was due to the applicant's verifying the facts thoroughly before filing the application, but, still, the delay is there. The Official Assignee does not oppose this application. He will be allowed to charge the usual Government charges from the assets of Vardon in his hands before re-delivering the balance to the insolvent whose adjudication has been annulled.

B/V.R.B. **Adjudication annulled.**

A. I. R. 1953 MADRAS 929 (Vol. 40, C. N. 367)

RAJAMANNAR C. J. AND VENKATA-RAMA AYYAR J.

Dandigunta Venkataramaiah (Minor) and **another**, Appellants v. Dandigunta Audi**narayanaiah** and others, Respondents.

Letters Patent Appeal No. 35 of 1949, D/-**2-3-1953,** from judgment of Panchapakesa **Ayyar** J., in S. A. No. 255 of 1946, D/- 10-11-**1948.**

Civil P. C. (1908), O. 21, R. 85 (Mad.) and S. 11 — Non-deposit of stamp within time — Sale confirmed on compromise — Effect.

Where the decree-holder purchaser fail**ed to** deposit within time into Court the **stamp** or the amount required for stamp **for** the sale certificate under O. 21, R. 85, **the** sale in his favour cannot be deemed **to** have been automatically cancelled, **when** the sale was confirmed in accordance **with** a compromise between the parties and **subsequently** the Court had condoned the **delay** in depositing the amount required **for** stamps for the sale certificate. Case **law** Ref. (Para 3)

Where the judgment-debtors had filed **an** application to have the sale set aside on **this** very ground and the application and **the** revision against it were both dismiss**ed** and the judgment-debtors were fully re**presented,** the judgment-debtors are bound **by** it and cannot agitate the subject-**matter** once again. (Para 4a)

Anno: Civil P. C., S. 11 N. 23.

K. Umamaheswaram, for Appellants; K. **Krishnamurthy,** for Respondents.

CASES CITED:

(A) ('39) AIR 1939 Mad 57: 1938-2 Mad LJ **833**

(B) ('41) AIR 1941 Cal 85: 193 Ind Cas 390

(C) ('43) AIR 1943 All 282: ILR (1943) All **580**

(D) ('35) AIR 1935 All 243: 57 All 658

(E) ('23) AIR 1923 Mad 48: 43 Mad LJ 477

RAJAMANNAR C. J.: For a disposal of this **appeal** under Cl. 15 of the Letters Patent against **the judgment** of Panchapakesa Ayyar J. dismiss**ing a** second appeal, S. A. No. 255 of 1946, it is **sufficient to state** the following facts:

In execution of a decree in a suit on a mort**gage executed** by the father of the two appel**lants to** respondent 3, the mortgaged property **was brought** to sale and eventually on 7-12-1936 **purchased** by the mortgagee-decree-holder, respon**dent 3. To** the mortgage suit, defendant 1, the **father** (the executant) and one of his sons, defen**dant 2** in the present suit, were added as parties. **The two** plaintiffs-appellants in this second ap**peal, had** not been born by that time. Plaintiff 1 **was born** on 1-9-1932, long after the decree in the **suit. Plaintiff** 2 was born on 1-9-1935 during execu**tion proceedings.** The plaintiffs were not brought on **record** in the execution proceedings, presumably **because** their father deft. 1, sufficiently & adequately **represented** their interests. Though the sale took **place on** 7-12-1936, the decree-holder purchaser did **not deposit** into Court the general stamp for a **certificate** under O. 21, R. 84, Civil P. C. or the **amount** required for such a stamp as provided in **O. 21, R.** 85 of the Code. Immediately after the **sale, there** was an application to set aside the sale **filed by** the two judgment-debtors. That applica**tion however** was concluded by a consent order **under** which if the judgment-debtors did not pay **by a particular** time the sale would stand con-

firmed. In accordance with this compromise, the sale was confirmed on 31-7-1937. On 7-8-1937 the decree-holder purchaser filed an application, E. A. No. 191 of 1937, to have the delay in paying the amount necessary for the sale certificate excused. This application was ordered, & the delay was excused. Subsequently there was an application by the two judgment-debtors to set aside the sale, 'inter alia', on the ground that the provisions of O. 21, R. 85 had not been complied with. That application was dismissed and a civil revision petition filed in this court C. R. P. No. 1636 of 1937 against the order of dismissal was also dismissed on 28-1-1938. More than three years after this, the appellants instituted the suit, out of which this appeal arises, on 16-7-1941. The suit was ostensibly for a partition of the family properties, but in effect a suit to get rid of the sale in favour of respondent 3. Both the Courts below dismissed the suit, and Panchapakesa Ayyar J. who heard the second appeal also dismissed it but granted leave to appeal.

(2) The only point raised by Mr. Umamaheswaram, learned counsel for the appellants before us, was that when the decree-holder purchaser failed to deposit into Court the stamp or the amount required for stamp for the sale certificate under O. 21, R. 85, the sale in his favour must be deemed to have been automatically cancelled and the properties should have been resold under O. 21, R. 86. It must therefore be deemed that there was no sale in favour of respondent 3, though the sale might have been confirmed and a sale certificate issued to him. He relied upon rulings of this Court and other Courts, in support of the position that the requirements of O. 21, R. 85 of the Code are mandatory and failure on the part of the purchaser to comply with its provisions would have the result of automatically cancelling the sale in his favour.

In — 'Monni Aidruz v. Mira Mohideen', AIR 1939 Mad 57 (A), it was held that under O. 21, R. 86 of the Code, if there was default in payment of the balance of the purchase money as required by O. 21, R. 85, it was obligatory on the Court to resell the property. In that case, there was a default by the purchaser and the Court directed a resale. It was this order that was the subject-matter of the appeal decided by a learned Judge of this Court in that case. It was held that the order directing resale was perfectly valid and in accordance with the plain language of O. 21, R. 86, Civil P. C. In that case, the Court did not excuse the delay in payment and did not accept the deposit made out of time. Nor did the Court ever confirm the sale.

In — Annapurnmma Dasi v. Bazley Karim', AIR 1941 Cal 85 (B), the question no doubt arose in a subsequent suit, but it does not appear from the report of the judgment in that case that the Court condoned the delay in making the deposit It was held that on default of payment the purchaser forfeited all claims to the property. Much assistance cannot be derived from this case.

In — 'Inamullah v. Muhammad Idris', AIR 1943 All 282 (C), the matter came up in execution proceedings. The auction-purchaser there deposited the amount of the purchase money beyond time and the executing Court restored the sale in favour of the purchaser in spite of the protest by the judgment-debtor. Meanwhile, the judgment-debtor had deposited the whole of the decretal amount. It was held by Mullah J. that on failure of the auction-purchaser to deposit the amount of the purchase money the sale in his favour was automatically cancelled and the Court had to hold

another sale. As, however, the judgment-debtor had deposited the full amount under the decree there was no necessity for holding a resale.

The decision in — 'Naval Kishore v. Buttumal', AIR 1935 All 243 (D) does not carry us any further. In that case, there was an appeal against an order of the executing Court confirming a sale, although the balance of the purchase money had not been deposited within the time allowed. The auction-purchaser there obtained the permission of the Court to deposit the amount after the prescribed time had elapsed. It was held that the Court had no jurisdiction to extend the time.

(3) It may be admitted that all these decisions are authorities for the position that if the auction-purchaser does not comply with the provisions of O. 21, R. 85, he cannot insist on complying with it after the lapse of the prescribed time and demand that the sale in his favour should be confirmed. But actually what happened in this case was that the sale was confirmed in accordance with a compromise between the parties and subsequently the Court condoned the delay in depositing the amount required for stamps for the sale certificate. In these circumstances the question is whether the sale should be deemed to be void as contended by counsel for the appellants.

(4) On this point, we have the direct authority of a decision in — 'Subramania Nambudiri v. Vykunta Kammathi', AIR 1923 Mad 48 (E). In that case, in execution of a decree there was a sale on 26-8-1915. The decree-holder himself was the purchaser in execution & he had been allowed to set off the decree amount against the sale price and to pay the balance. He was unable to make the deposit of the balance within 15 days, but the Court allowed him six days more. The balance was deposited a day after the six days. The sale was confirmed and a sale certificate was issued to the purchser in September 1915. A petition was filed in December 1920 purporting to be under Ss. 47 and 151, Civil P. C. praying that the sale may be declared to be a nullity. The learned Judges held that though a Court ought not to extend the time for deposit by the purchaser under O. 21, R. 85 of the Code or accept a deposit paid beyond time without the consent of all the parties concerned, nevertheless if the Court did so extend the time or accept the deposit without such consent, then it is an irregularity and does not make the sale a nullity. The principle of this decision would apply to the facts of this case. The learned Judge who decided — 'AIR 1939 Mad 57 (A)', had evidently this decision also in mind when he observed as follows:

> "Mr. Thiagarajan Iyer relied upon decisions of this Court and of other High Courts, where it was held that even though the deposit as required by O. 21, R. 85 was not made within the time limited, with the consent of all parties the Court might confirm the sale, & if the Court confirmed the sale it was only an irregularity. But those decisions do not throw light on the question in dispute, namely, if the Court declines to confirm the sale but passes an order directing a resale, whether the Court was not justified in doing so."

(4a) In the present case, we have the further facts that the application was filed by the judgment-debtor to have the sale set aside on this very ground. Not only was that application dismissed but a civil revision petition against the order of dismissal was also filed and failed. No doubt the present appellants were not 'eo nomine' parties to that application or to the civil revision petition, but it cannot be denied that the judgment-debtor therein, the father amply represented the appellants and their interest. There was no question of any conflict between the interests of the father and the sons, the plaintiffs. In effect, the plaintiffs must be deemed to have been parties to all the proceedings at its several stages. The order passed on the application by the two judgment-debtors to set aside the sale must be held to be binding on the plaintiffs also. In this suit, they cannot agitate once again the subject-matter of that application.

(5) On both the grounds the appeal must be and is dismissed with costs.

B/R.G.D. Appeal dismissed.

A. I. R. 1953 MADRAS 930 (Vol. 40, C. N. 368)

MACK J.

V. T. C. Chengama Naidu, Appellant v. Velayudha Mudaliar and others, Respondents.

A. A. O. No. 313 of 1949, D/- 12-3-1953.

Civil P. C. (1908), Ss. 144, 151, 47, O. 21, R. 93 — Application for mesne profits by way of restitution against auction purchaser — (Debt Laws — Madras Agriculturists' Relief Act (4 of 1938), Ss. 23, 24).

It is difficult to lay down any hard and fast rule as regards the maintainability of an application for mesne profits in a case where a third party purchases property, enters into possession and enjoys it under specific orders of a Court which are subsequently set aside in appeal.

Where a sale is set aside on deposit of the amount of debt scaled down under Madras Act 4 of 1938, and judgment-debtor applies for mesne profits against the auction purchaser by way of restitution, the restitution is ordered, not strictly under S. 144, but under the inherent powers of the Court under S. 151, Civil P. C. Each case of restitution of this kind requires to be determined on its own facts.

Sections 23 and 24 of the Madras Act 4 of 1938 leave unimpaired the inherent right of the Court to see that any suitor before it is not injured by its own act or by a decision which is reversed by a Court of appeal when the party before it, is a bona fide auction purchaser for valuable consideration.

On the facts of the case it was held to be just and equitable to award the judgment-debtors mesne profits estimated by the lower Court, but at the same time to allow to the auction purchaser interest on his deposit of purchase money as compensation for deprivation of its use for a long period. (Para 5)

Anno: C. P. C., S. 144, N. 10, 13, 22, 34; S. 151 N. 1; S. 47 N. 38; O. 21, R. 93 N. 10.

Kasturi Sivaprasada Rao, for Appellant; R. Gopalaswami Ayyangar, K. Rajah Ayyar and M. Natesan, for Respondents.

CASES CITED:

(A) ('42) AIR 1942 Mad 727: 1942-2 Mad LJ 311
(B) ('42) AIR 1942 Mad 271: 1941-2 Mad LJ 1060
(C) (1870) 40 LJ PC 1: (1870) 3 PC 465
(D) ('37) AIR 1937 Mad 694: 1937 Mad WN 342

JUDGMENT: This is an appeal by a court-auction purchaser against an order by the learned

District Judge of Chingleput directing him to pay mesne profits of Rs. 2914-8-6 to the judgment-debtors in O. S. No. 6 of 1929. In execution of a mortgage decree in this suit for Rs. 18000 on a principal of about Rs. 11000 about 12 acres of land were brought to sale and purchased by the appellant for Rs. 4411 on 4-8-1937. An application, M. P. No. 453 of 1937 was made under O. 21, R. 90, Civil P. C. for setting aside the court sale. During its pendency Act 4 of 1938 was passed and an application was made by the debtors under S. 19 to scale down the decree debt. M. P. No. 453 of 1937 was first heard and dismissed on 20-12-1940, and the court sale in favour of the appellant was confirmed whereupon he took possession through Court on 18-1-1941. The judgment-debtors filed an appeal, C. M. A. No. 10 of 1941. This was allowed in July 1942 by Wadsworth and Patanjali Sastri JJ. and the order confirming the sale was set aside with a direction that the scaling down application should be disposed of in the first instance. This decision is incidentally reported in — 'Velayudha Mudali v. Chengama Naidu', AIR 1942 Mad 727 (A). The decree was then scaled down to only Rs. 366. This sum was deposited by the judgment-debtors and the sale set aside on 22-9-1943.

(2) The auction purchaser's efforts in appeal failed and he ultimately surrendered possession on 16-1-1945. The mesne profits he has been directed to pay to the judgment-debtors cover the period of his possession from 12-1-1941 to 16-1-1945 that is, a period of four years.

(3) This application by the judgment-debtors was filed under Ss. 47, 144 and 151, Civil P. C. They claimed Rs. 5000 as mesne profits, and in addition a sum of Rs. 900 as damages caused to the indigo vat and well by the auction purchaser. The application was heard as regards maintainability by the Principal Subordinate Judge of Chingleput, Sri Ramaswami Goundar (now Ramaswami Goundar J.) who held that the application for mesne profits was maintainable and directed an enquiry. The present appeal is against the order passed by Sri P. N. Ramaswami, District Judge, (now Ramaswami J.) who estimated mesne profits at Rs. 2914-8-6.

(4) Mr. Sivaprasada Rao for the appellant does not challenge the quantum of mesne profits. He contends that an application for mesne profits on these facts is not maintainable on the ground that the auction purchaser cannot be considered to be in wrongful and illegal possession of the property having obtained it on orders of a Court which had confirmed the sale in his favour. He relied mainly on — 'China Kondayya v. Ramalinga Reddi', AIR 1942 Mad 271 (B), a decision by Wadsworth and Patanjali Sastri JJ. under S. 23 of Act 4 of 1938. That was a case in which the decree-holder himself purchased and obtained possession of an item of property on 18-2-1938. Act 4 of 1938 then came into force on 22-3-1938. The sale was set aside under S. 23 of the Act on 7-11-1938 and the decree scaled down. The judgment-debtors applied for redelivery and claimed that mesne profits should be adjusted towards the scaled down decree. The learned Bench negatived this relief. Wadsworth J. expressed the view that Act 4 of 1938 is an expropriatory measure, and that the process of expropriation should not proceed beyond that which is laid down either by the express language of the Act or by necessary implication therefrom. The only consequence as laid down in S. 23 when such a sale is set aside is that it "shall be deemed not to have taken place at all". Under S. 24, a purchaser shall be entitled to an order for re-payment of any purchase money paid by him against the person to whom it has been paid where a sale is set aside under S. 23 or S. 23-A. The view taken by Wadsworth J. was that in the absence of express provision that the judgment-debtor should be entitled to the profits of the land when the sale is set aside under S. 23, it was not possible to read any such provision into the Act by necessary implication. Patanjali Sastri J. as he then was observed that the question was by no means free from difficulty but agreed on the whole though not without some hesitation with the judgment of Wadsworth J. The present case is not on all fours with the decision cited. For one thing the application under O. 21, R. 90, Civil P. C. to set aside the sale was not considered on its merits in appeal in C. M. A. No. 10 of 1941 before the High Court which directed the scaling down application to be disposed of first. On the present application there was also an attack by the auction purchaser that the scaling down of the debt to Rs. 366 only from about Rs. 18000 was the result of collusion between the decree-holders and the judgment-debtors.

(5) It is difficult to lay down any hard and fast rule as regards the maintainability of such an application for mesne profits in a case where a third party purchases property, enters into possession and enjoys it under specific orders of a Court which are subsequently set aside in appeal. So long ago as 1870 the Privy Council in — 'Rodger v. Comptior D'Escompte de Paris', (1870) 3 PC 465 at p. 475 (C) said it is the duty of the Court

> "to take care that no act of the Court in the course of the whole of the proceedings does an injury to the suitors in the Court."

In such a case, as this, restitution is ordered not strictly under S. 144, but under the inherent power of the Court under S. 151, Civil P. C. This was the view taken by Venkataramana Rao J. in — 'Radhabai v. Jagannatha Naidu', AIR 1937 Mad 694 (D), a decision which was before the learned Judge who decided the question of maintainability. Each case of restitution of this kind, as it appears to me requires to be determined by its own facts. In the present case the sale price paid by the auction purchaser, that is, Rs. 4411 was deposited on 4-8-1937 and lay in Court deposit till 16-1-45 the date on which the auction purchaser surrendered possession, that is for a period of eight years without earning any interest. It appears to be most inequitable to award mesne profits against the auction purchaser and to deny to him interest on his deposit, at six per cent simple interest per annum the interest roughly for eight years on Rs. 4411 would amount to Rs. 2117-4-0. If in an application under O. 21, R. 90, the auction purchaser is himself shown to be a party to a fraud in publishing or conducting a sale in collusion with the decree-holder it would be a clear case for directing him to pay full mesne profits by way of restitution in the event of a dismissal of the application under O. 21, R. 90 being set aside in appeal and the resulting confirmation of sale being set aside also on this ground. In my view this is not a case which is altogether covered by S. 23 of Act 4 of 1938 and I am unable to interpret the decision in — 'AIR 1942 Mad 271 (B)' as depriving the Court of all discretion to award mesne profits in suitable cases. As I see it Ss. 23 and 24 leave unimpaired the inherent right of the Court to see that any suitor before it is not injured by its own act or by a decision which is reversed by a Court of appeal when the party before it is a bona fide auction purchaser for valuable consideration. On the facts of this case I think it is just and equitable to award the judgment-debtors mesne profits estimated by the lower Court, but at the same time to allow to the auction purchaser interest of

Rs. 2117-4-0 on his deposit. Six per cent solatium is just and adequate compensation for deprivation of the use of this money for this long period.

(6) In the result the judgment-debtors will have a decree against the auction purchaser for Rs. 797 (excluding annas and pies) with interest at six per cent per annum from the date of this petition. In the circumstances I direct the parties to bear their own costs throughout.

B/D.R.R. Order accordingly.

A. I. R. 1953 MADRAS 932 (Vol. 40, C. N. 369)

VENKATARAMA AYYAR J.

Golla Narasimhalu, Petitioner v. Kodi Narasimham and others, Respondents.

Writ Petn. No. 920 of 1952, D/- 20-3-1953.

(a) Municipalities — Madras District Municipalities Act (5 of 1920) — Election — Election Rules framed under Act, R. 27A(1)(a).

Breach of the rule does not render an election 'ipso facto' void. Before the election can be set aside it must be established that the result of election had been affected by the breach. Case law Rel. on. (Para 2)

(b) Municipalities — Madras District Municipalities Act (5 of 1920) — Election — Election Rules framed under Act, R. 27A(1)(a).

All voting papers marked in such manner as to indicate identity of elector — Result is that all of them must be rejected in spite of the fact that it affected all the candidates equally. Consequently no vote at all is recorded and there is no election in which any person can be said to have been elected. No exception in the result can be made out on the ground that it was the mistake of the election officer and that it would be unjust to defeat the declared intentions of the voters for his mistake. Case law Rel. on. (Paras 4, 5)

P. Rama Reddy and V. Venkataramana Reddi, for Petitioner; Mohan Kumaramangalam, for Respondent 1.

CASES CITED:

(A) (1875) 44 LJ CP 293: LR 10 CP 733
(B) ('36) AIR 1936 Mad 669: 71 Mad LJ 199
(C) (1892) 4 O'M & H 162

ORDER: This is an application under Art. 226 of the Constitution to quash the decision of the Election Commissioner in O. P. No. 32 of 1952. The facts are not in dispute. On 16-9-1952 elections were held for the Municipal Council, Nandyal. The petitioner and respondent 1 herein and two other candidates contested the seat for ward No. 12. The petitioner got 280 votes, respondent 1st 240 votes and the other two candidates far less and accordingly, the petitioner was duly declared elected. Thereupon, respondent 1 filed O. P. No. 32 of 1952 before the Subordinate Judge of Kurnool who is the Election Commissioner under the Act for setting aside the election on various grounds. We are concerned in this petition with only one of them, that the polling officer entered on the ballot papers the names of the electors and their serial number in the electoral list. Rule 27-A(1)(a) of the Election Rules is as follows:

"A ballot paper shall be rejected if it bears any mark by which the elector can be identified."

The contention of respondent 1 before the Election Commissioner was that in marking the ballot papers with the names and the serial number of the electors the polling officer had violated the mandatory provisions of R. 27-A(1)(a) that those votes ought accordingly to have been excluded from the count and that the reception of those votes by the Election Officer constituted a material irregularity by reason of which the election was liable to be set aside. It is to quash this decision that the present application for a writ of certiorari has been filed. Mr. P. Rama Reddi, the learned advocate for the petitioner, concedes that there has been a breach of R. 27-A(1)(a), but he contends that there is no definite finding that the result of the election had been affected thereby and that in the absence of such a finding, the election should not have been set aside. He relied on R. 10(c) which is as follows:

"If in the opinion of the Election Commissioner the result of the election has been materially affected by any irregularity in respect of a nomination paper or by the improper reception or refusal of a nomination paper or vote or by any non-compliance with the provisions of the Act or the rules made thereunder the election of such returned candidate shall be void."

The contention is that it was not sufficient merely to prove that there was a breach of the rules, but that it must further be established that the result of the election had been materially affected by such breach. On behalf of the respondent, certain passages in the judgment were referred to as amounting to a finding on the evidence that the electors had voted in fear of the petitioner and that the result of the election was materially affected thereby. But the finding in fact is that there was no threat by the petitioner and the conclusion of the Election Commissioner rests solely on the ground that there had been a breach of R. 27-A(1)(a).

(2) I agree with the contention of the petitioner that a breach of R. 27-A(1)(a) does not 'ipso facto' render the election void and that before it could be set aside it must be established that the result of the election had been affected thereby. In — 'Woodward v. Sarsons', (1875) L. R. 10 C. P. 733 (A), a polling officer in charge of one of the booths marked on the ballot paper the number of the voters in the electoral list. It was held that these papers should not be counted and if counted by the Election Officer, they should be struck out by the Election Commissioner on scrutiny. Then the Court proceeded to count the other valid votes recorded in the several booths and held that even excluding the invalid votes, the result of the election had not been affected. In — 'Mahabaleswarappa v. Ramachandra Rao', AIR 1936 Mad 669 at p. 670 (B), the facts were that 322 ballot papers had been marked by the polling officer with the numbers of the voters on the electoral rolls. All these votes were rejected by the Election Officer. Out of the remaining votes, the successful candidates got 1206 votes and his rival 1092 votes. The Election Commissioner having set aside the election on the ground that the secrecy of the ballot box had been violated, it was held by Venkatasubba Rao and Cornish JJ. that the election could not be set aside merely because there had been a breach of the rules and that it must further be proved that it had affected the result of the election. The position was thus stated by Cornish J.:

"The next question was whether this non-compliance had materially affected the result of the election. Rule 10(c), which makes this the basis of the Commissioner's power to declare the election void, has been extracted from S. 13 of the Ballot Act. The words 'result of the election' in the section have been held to mean the return of the candidate and not the amount of

his majority. (See Rogers on Election, Vol. II, p. 41 and the cases there cited). The words must have the same meaning in the rule. So that if the number of ballot papers rejected by reason of non-compliance with the rules did not suffice to turn the scale against the elected candidate, though the extent of his majority might be affected, the result of the election could not be held to have been materially affected. This is made very clear by O'Brien J. in — 'East v. Clare', (1892) 4 O' M & H 162 (C), where he said, 'I do not at all agree with the construction put upon that section by Grove J. in the 'Hackney case'. He there says that 'the result of the election' does not necessarily mean the return of the candidate, but means his return by the particular number of votes. In his opinion therefore if the mistake or non-compliance with the rules produced a diminution of the votes by which the successful candidate was elected, although it might not be sufficient to destroy his majority, 'the result of the election' would be affected and recourse could not be had to S. 13. In my opinion that decision is entirely wrong. In — '(1875) L R 10 C P 733 (A)' no less than 294 votes were spoiled by the mistake of the presiding officer, but they would not, if admitted, have turned the scale against the successful candidate and therefore did not affect 'the result of the election'. It was held that this did not render the election invalid."

(3) The learned Judges then found that even if the rejetced votes and the votes of those who did not go to the polls were counted in favour of the defeated candidate, the successful candidate had a comfortable majority and that, therefore, the result of the election was not affected. It must, therefore, be held that a mere violation of R. 27-A (1)(a) is not sufficient to invalidate the election and that it must further be shown that the result of the election has been affected thereby.

(4) It is next contended for the petitioner that as the polling officer had impartially marked all the ballot papers which had been cast into the box with the names of the voters and their serial number, the result of the election was not affected; because all the candidates were equally affected and their mutual position remained the same as the result of the marking of the ballot papers as without it. This contention has much in commonsense and justice to commend it. But it must fail on the principle of the matter. Rule 27-A(1)(a) requires that the ballot papers marked in such manner as to disclose the identity of the elector should be rejected. If all the ballot papers are marked so as to violate R. 27-A(1)(a) all of them will have to be rejected and the result is there is no person who can be said to have been elected. In — '(1875) L R 10 C P 733 (A)' and — 'AIR 1936 Mad 669 (B)' after rejecting the ballot papers which were marked there were still others which were valid on which an election could be declared and then the only question was whether the result of the election had been affected. But where there is no vote at all recorded there is no election which could be declared and the question whether the result of the election had been affected does not even arise. On this ground, the declaration of the Election Officer should be set aside and a fresh election ordered.

(5) It was argued for the petitioner with considerable force that it would be unjust to defeat the declared intention of the voters for a mistake committed by the polling officer over whose action the electors have no control. But R. 27-A(1)(a) does not provide for any exception in such cases and in — '(1875) L R 10 C P 733 at p. 744 (A)' the marked ballot papers were rejected even though the mistake was on the part of the polling officer. In the 'Champaran case (Election cases India and Burma, Hammond, page 301)' it was found that a large number of ballot papers had been marked by the mistake of the polling officer. Those votes were rejected and a re-election ordered on the ground that a large section of the electorates had in effect been deprived of its franchise. See also — 'Burdwan Division Second Case (Khanna's Indian Election Cases, Vol. IV page 94)'.

(6) It is unnecessary in this view to consider whether the election is liable to be set aside on the ground that on the facts found it could not be said to have been held under the Act. In — '(1875) L R 10 C P 733 (A)', Lord Coleridge C. J. observed on this aspect of the matter as follows:

"We think, though there was an election in the sense of there having been a selection by the will of the constituency that the question must in like manner be, whether the departure from the prescribed method of election is so great that the tribunal is satisfied, as matter of fact that the election was not an election under the existing law. It is not enough to say that great mistakes were made in carrying out the elections under those laws; it is necessary to be able to say that, either wilfully and erroneously, the election was not carried out under those laws, but under some other method. For instance, if during the time of the old laws, with the consent of a whole constituency, a candidate had been selected by tossing up a coin, or by the result of a horse race, it might well have been said that the electors had exercised their free will, but it should have been held that they had exercised it under a law of their own invention, and not under the existing election laws, which prescribed an election by voting. So now, when the election is so to be an election by ballot, if, either wilfully or erroneously, 'a whole constituency' were to vote, but 'not by ballot at all', the election would be a free exercise of their will, but it would not be an election by ballot and therefore not an election under the existing election law."

It is arguable that as all the ballot papers had been marked, there had been no election by ballot under the Act and on that ground the election was liable to be set aside. But it is unnecessary to decide this point as the election must be set aside on the ground that there was in fact no vote recorded and that, therefore, there was no election.

(7) In the result, this petition must be dismissed. In the circumstances of this case, the parties are directed to bear their own costs.

B/M.K.S. Petition dismissed.

A. I. R. 1953 MADRAS 933 (Vol. 40, C. N. 370)

RAMASWAMI J.

In re Ayya Nadar, Defendant-Petitioner.

Civil Revn. Petn. No. 2228 of 1952, D/- 9-12-1952.

Civil P. C. (1908), S. 11, Expln. IV — "Ought."

It cannot be said of any matter that it 'ought' to have been set up as a ground in the former suit, if its introduction would have been 'incongruous' to the matter of that suit. Thus, in a suit for possession of a property on the allegation that it was purchased by the plaintiff from his mother, it cannot be said that the

plaintiff ought to have sued also for partition of the property alleging that it was joint family property. AIR 1923 Mad 257, AIR 1948 Pat 302 and AIR 1935 Mad 90, Distinguished. (Para 8)

Anno: C. P. C., S. 11 N. 37 Pt. 9.

P. S. Chandrasekharan and P. S. Ramachandran, for Petitioner.

CASES CITED:
(A) ('66) 2 Suth 46: 11 Moo Ind App 50 (PC)
(B) ('79) 3 Suth 540: 4 Cal 190 (PC)
(C) ('08) 31 Mad 385
(D) ('03) 13 Mad LJ 448: 26 Mad 760
(E) ('17) AIR 1917 Mad 481: 1916-1 Mad WN 286
(F) ('31) AIR 1931 Bom 114: 32 Bom LR 1473
(G) ('07) 34 Ind App 72: 29 All 331 (PC)
(H) ('13) 35 All 227: 40 Ind App 74 (PC)
(I) ('14) AIR 1914 Lah 289: 24 Ind Cas 636
(J) ('17) AIR 1917 Lah 19: 37 Ind Cas 119
(K) ('93) 19 Ind App 234: 20Cal 79 (PC)
(L) ('41) AIR 1941 Rang 118: 194 Ind Cas 482
(M) ('31) AIR 1931 Bom 187: 130 Ind Cas 606
(N) ('31) AIR 1931 Mad 268: 135 Ind Cas 13
(O) ('33) AIR 1933 Cal 900: 60 Cal 1158
(P) ('23) AIR 1923 Mad 257: 46 Mad 135
(Q) ('48) AIR 1948 Pat 302: 26 Pat 24
(R) ('35) AIR 1935 Mad 90: 67 Mad LJ 709
(S) (1879) 48 LJ CP 705: 4 AC 504

ORDER: This is a Civil Revision Petition which is sought to be filed against the finding given by the learned District Munsif, Koilpatti, on a preliminary issue regarding 'res judicata' raised in O. S. No. 42 of 1952.

(2) The facts necessary for understanding this finding are: The plaintiff Subbiah Nadar and the defendant Ayyah Nadar are brothers. This plaintiff had purchased from his mother Shenbagathammal the eastern portion of a land 2-98 acres in extent and for which the sale deed stood in the name of that Shenbagathammal. The vendee was obstructed from taking possession of the property and therefore he filed O. S. No. 98 of 1949. In that suit the defendant-brother raised the plea that though the sale deed stood in the name of the mother, in reality the property had been purchased with the funds of the joint family and that the sale deed had been taken 'benami' in the name of the mother and that the plaintiff was not entitled to the eastern half of the property claimed by him as vendee. This suit was dismissed and there was an appeal therefrom in A. S. 127 of 1950 on the file of the Sub-Court, Tuticorin, and therein the findings of the lower Court were confirmed and the appeal was dismissed.

(3) The plaintiff has therefore filed this suit for partition and reducing into separate possession of his half share in the aforesaid entire property viz., the eastern and western portions.

(4) The contention of the defendant among other things was that the present suit was barred by the principle of 'res judicata' and that this plaintiff might and ought to have put forward this claim in the previous suit.

(5) The learned District Munsif rejected this contention on the ground that the plaintiff was not bound to put forward this claim in the prior suit because if he had done so, it would have resulted in putting forward incongruous pleas and that this is not contemplated by the line of cases on the subject.

(6) There can be no doubt that the plea of 'might and ought' cannot be extended to the extent of compelling a litigant to set up incongruous pleas in order to exhaust all the possible permutations and combinations of attacks or defences which might be evolved. Just as the provisions relating to "might and ought" have been engrafted in S. 11, C. P. C. in order to avoid multiplicity and protraction of proceedings by wilful keeping back grounds of attack or defence in order to furnish ammunition for fresh rounds of litigation, and to put an end to causes becoming infinite when the lives of men are finite, and to prevent litigants from becoming so many Sisyphuses the non-necessity to put forward incongruous pleas, even though by not putting them forward a litigant would not exhaust all his possible claims, is based upon the common sense principle that no man can be compelled to come to Court in order to advance pleas which will work out their mutual destruction.

The absurdity of compelling a party to put forward such incongruous pleas is well brought out in two well known stories possibly apocryphal of pleadings in American Courts. The first was a suit filed for damages in regard to a domestic utensil namely a kettle which had been lent and not returned in the good condition it was when it was lent. The alternative defences set up by the defendant and put forward by his counsel to the Court were: "May it please your Honour", said Counsel,

> "In the first place we contend that the kettle in dispute was cracked when we borrowed it; secondly, that it was whole when we returned it; and thirdly, that we never had it."

The second is a case where damages were claimed for arson. The alternative defences put forward in that case and pleaded by the defending counsel were:

> "I shall first prove to the Jury (civil trials are by Jury) that the defendant is incapable of such an act; if that does not convince you I shall show that my client was insane when the act was committed; if that fails I shall prove an absolute alibi; and as a last resort, may it please the Court, I shall show that the building was over-insured and consequently there was no loss and that this alleged crime was only a neighbourly kindness to the owner of the building."

(7) In the instant case if this plaintiff had put forward both the claims it would certainly have been incongruous and would have brought about their mutual destruction without any effort on the part of the defendant. His case was that he had paid hard cash for the purchase of the property whose title and possession were with his mother and that that title and possession had passed to him under that sale deed. If he were to advance the plea that he should get a half share in the property in any event, would any Court believe the payment of consideration or the 'bona fides' of the sale or the title and possession set up in the mother supported by a sale deed in her name etc.? Only a suicidal client and a lunatic advocate would put forward such incongruous pleas in Court, the evidence in support of which will be such that it might be destructive of the other plea and unite causes of action leading to inconsistency and confusion.

(8) In fact though in the immortal language of Mr. Bumble, the law may be an ass, it is not so asinine as to impose such patent hardships on the prospective litigant. The question whether a matter might have been made a ground of attack or defence in the former suit, rarely presents any difficulty. Whether it ought to have been made a ground of attack or defence depends upon the facts of each case. If a matter could have been set up as a ground of attack or defence in the

former suit, 'and' if its introduction into that suit was 'necessary' for a complete and final decision of the right claimed by the plaintiff therein, it will be deemed to be a matter which 'ought' to have been made a ground of attack or defence in that suit: — 'Mootoo Vijaya v. Katama Natchiar', 11 Moo Ind App 50 (A); — 'Doorga Persad Singh v. Doorga Kunwari', 4 Cal 190 at p. 196 (B), unless where the evidence in support of one ground is such as may be destructive of the other ground and in such a case two grounds need not be set up in the same suit.

The reason given is that the test of determining whether both the grounds ought to have been set up in the same suit is afforded by the provision of O. 2, R. 1, C. P. C. and the provisions of that rule as to the framing of suits are only to be applied as far as practicable. It is clear therefore that it cannot be said of any matter that it 'ought' to have been set up as a ground in the former suit, if its introduction would have been 'incongruous' to the matter of that srit: — 'Masilamania v. Thiruvengadam', 31 Mad 385 (C); — 'Ramaswamy v. Vaithinatha', 26 Mad 760 (D); — 'Rangaswamy v. Appalaswamy', AIR 1917 Mad 481 (E); — 'Anant Subrao v. Mahableshwar Bhat', AIR 1931 Bom 114 (F); — 'Deputy Commr. of Kheri v. Khanjan Singh', 29 All 331 (G); — 'Lala Soni Ram v. Kanhaiya Lal', 40 Ind App 74 (H); — 'Dewan Chand v. Hari Chand', AIR 1914 Lah 289 (I); — 'Mt. Aishan v. Muhammad Din', AIR 1917 Lah 19 (J); — 'Kameswar Pershad v. Rajkumari Rattan Koer', 20 Cal 79 at pp. 85, 86 (K); — U Sin v. Ma Ma Lay', AIR 1941 Rang 118 (L); — 'Ningaya Bharmanna v. M. Gurappa', AIR 1931 Bom 187 (M); — 'Krishnaswami v. Manikka Mudali', AIR 1931 Mad 268 (N); — 'Debendra Nath v. Nagendranath', AIR 1933 Cal 900 (O).

Thus, a person claiming property on the allegation that it is wakf property and that he is the manager thereof is not bound to claim the same property in the same suit alternatively in his own right in the event of its being held that the property was not 'wakf' property. Having asserted that the property is 'wakf' property, he could not have consistently claimed the same property as his personal property except possibly in an alternative form. He was however not under an obligation to adopt the latter course. The mere fact that he could have claimed the property in the alternative as his own property is no ground for saying that he ought to have done so. Again, Expln. IV to S. 11, C. P. C. does not apply unless the parties are litigating under the same title. Thus, if A sues B for a declaration that he was the owner of certain property, he is not bound to plead in the alternative that if he is not the owner he is a permanent tenant.

In the instant case the plaintiff having asserted in the previous suit that the property was the separate property of his mother and which she was competent to dispose of in any manner she liked, he could not have pleaded in the alternative that it was joint family property and that he is entitled by birth to take a half share therein along with his brother subject to the rights, if any, of the mother. Therefore, Expln. IV to S. 11, C. P. C. is not applicable to this case as has been found to be on the facts by the learned District Munsif.

(9) I shall now briefly refer to three decisions cited by the learned advocate for the petitioner. In — 'Muhammad Rowther v. Abdul Rahman Rowther', AIR 1923 Mad 257 (P), a person instituted a suit against a trespasser in possession, for partition and recovery of his share in certain lands on the footing that he was a co-owner under a joint purchase made by himself and his two deceased brothers. But his claim was dismissed on the ground that the purchase was not a joint one but the sole purchase of one of the deceased brothers. The former instituted a subsequent suit to recover his share as one of the heirs of the deceased purchaser. It was held that the suit was barred by the rule of 'res judicata' as the plaintiff ought to have joined his subsequent ground of title in the former suit under S. 11, Expln. IV, C. P. C. This decision proceeded on the footing that the joining together of the two claims one under the purchase and the other as a heir would not lead to any confusion or any embarrassment. That is not the case here.

The second decision is — 'Goshawarali v. Adhik-Lal Sahu', AIR 1948 Pat 302 (Q), wherein the facts were: In 1928 M executed a mortgage in favour of T in respect of plot I. In 1929 he executed another mortgage in favour of S in respect of plots 1, 2 and 3. In 1931 M executed another usufructuary mortgage bond in favour of P in respect of plots 1, 2 and 3 of which P was put in possession. In February 1934 M executed a sale in favour of D in respect of plots 1 and 2. M executed in March 1934, another sale deed in favour of P in respect of plots 1, 2 and 3. P was dispossessed in 1937 by D on the strength of his purchase. P instituted a suit for possession on the strength of his purchase. The suit was dismissed on the ground that D was entitled to possession on account of his prior purchase. P instituted another suit for ejectment of D as trespasser. In this suit P based his claim on the usufructuary mortgage bond of 1931.

It was held (i) that the cause of action in this suit was the same as in previous suit; (ii) that P was litigating under the same title in both the suits and (iii) that therefore the suit was barred by constructive 'res judicata' under S. 11, Expln. IV, C. P. C. It will be seen that this is not the case of a person litigating under different titles but a case of suing twice on identical cause of action.

The third decision is — 'Venkataramayya v. Lalbibi Saheba', AIR 1935 Mad 90 (R), where a former suit by the wife of a last male holder against some purchasers in a court sale by a mortgagee, alleging the suit properties had been gifted to her by her husband and that no title passed to the alienees under the court sale was dismissed and a later suit was filed by the daughters of the last male holder for partition of the suit properties, and the wife, the plaintiff in the former suit, claimed her right to a share in the properties and the question was, whether the matter, which not only might but also ought to have been made a ground of attack in the former suit by her, could not be availed of now by the rule of 'res judicata' it was held that the claim of a share by the wife was barred by 'res judicata'.

The facts of the instant case are very different and I have already pointed out how the introduction of the present plea into the former suit was not necessary for a complete and final decision of the right claimed by the plaintiff in that suit and that in fact if it had been introduced, it would have been incongruous & a wholly supererogatory task taken upon himself by the plaintiff in order to destroy his own case.

(10) I cannot more fittingly close this matter than in the words of Lord Penzance:

"Procedure is the machinery of law after all — the channel and the terms whereby law is administered and justice reached — It strangely departs from its proper office if in place of facilitating it, it is permitted to obstruct and even

to extinguish legal rights and is thus made to govern where it ought to subserve:" — 'Kendall v. Hamilton', (1879) 4 AC 504 at p. 525 (S).

(11) In the result, this revision petition is dismissed.

B/V.R.B. Petition dismissed.

A. I. R. 1953 MADRAS 936 (Vol. 40, C. N. 371)

RAMASWAMI J.

In re Ganapathia Pillai and another, Accused, Petitioners.

Cr. Revn. Case No. 814 of 1952 and Cr. Revn. Petn. No. 689 of 1952, D/- 20-1-1953.

(a) Penal Code (1860), S. 99 — Principle of section.

Section 99 rests partly on the probability that the acts of a public servant will be lawful, in which case resistance must necessarily be unlawful; partly on the theory that resistance is unnecessary since the law will set right what has been wrongly done in its name; and, lastly, on the ground that it is good for society that a public servant should be protected in the execution of his duty even where he is in error. (Para 4)

Anno: Penal Code, S. 99 N. 1.

(b) Penal Code (1860), S. 52 — No reference to moral element of honesty — (General Clauses Act (1897), S. 3 (22)).

Section 52 makes no reference to the moral elements of honesty and right motive which are involved in the popular significance of "good faith" and which are predominant in the positive definition enacted in the other Acts of the Legislature, for example, the General Clauses Act, 1897. While an honest blunderer acts in good faith within the meaning of the General Clauses Act, an honest blunderer can never act in good faith within the meaning of the Penal Code for being negligent. Good faith according to the Penal Code does not require logical infallibility but due care and caution which must in each case be considered with reference to the general circumstances, the capacity and intelligence of the person whose conduct is in question. (Para 5)

Anno: Penal Code, S. 52 N. 1.

(c) Penal Code (1860), S. 99 — "Colour of office".

The words "colour of office" refer to irregular as distinguished from illegal acts. They show that the act was within the jurisdiction but that the jurisdiction had been exercised irregularly or on insufficient grounds. (Para 6)

Anno: Penal Code, S. 99 N. 1.

(d) Penal Code (1860), S. 99 — "Not strictly justifiable in law."

The words "not strictly justifiable in law" are not intended to cure the want of jurisdiction but only an erroneous exercise of it. When the error affects the procedure rather than the principle, it would be covered by the clause. Explanation (1) goes with this paragraph and it is intended to protect persons who may have acted in ignorance of the fact that the person they were dealing with was a public servant. (Para 7)

Anno: Penal Code, S. 99 N. 4.

(e) Penal Code (1860), S. 353 — "Prevent or deter".

The terms "prevention" and "deterrence" are not synonymous. In the first place, prevention does not mean only deterrence by physical force but by other means as well. Secondly, the distinction seems to be with reference to the stage of interference by the accused. (Para 10)

Anno: Penal Code, S. 353 N. 2.

(f) Penal Code (1860), Ss. 353 and 99 — Assault on public servant acting in good faith and colour of office.

An Inspector of Labour is, under the Madras Shops and Establishments Act, within his rights in making the surprise visit to a shop and noting the result of his visit in the book kept for that purpose in the shop. Even though the act done or attempted to be done by him may not be strictly justifiable by law, he would be protected under S. 99.

Hence, the fact that there is some irregularity in the inspection of the shop by the Inspector does not absolve the person using force against the officer from being convicted under S. 353. Case law referred. (Paras 8, 11)

(Note—There are observations made as to how a public servant should behave considerately, tactfully and courteously which is the minimum standard of conduct that is required of public servants in general and subordinate officials engaged in enforcing Acts, like the Madras Shops and Establishments Act in particular.) (Para 12)

Anno: Penal Code, S. 353 N. 4.

C. K. Venkatanarasimham, for Petitioners; R. Santhanam, for Public Prosecutor, for the State.

CASES CITED:

(A) ('88) 12 Bom 377
(B) ('68) 10 W R Cr 20
(C) ('26) AIR 1926 Oudh 398: 27 Cri LJ 589
(D) ('11) 12 Cri LJ 566: 1911-2 Mad WN 479
(E) ('98) 1 Weir 310: 21 Mad 249
(F) ('37) 1937 Mad WN Cr 129: 1937 Mad WN 569
(G) ('37) 1937 Mad WN Cr 165: 1937 Mad WN 741
(H) ('98) 1 Weir 123: 21 Mad 78
(I) ('98) 1 Weir 135: 21 Mad 296
(J) ('90) 1 Weir 67: 13 Mad 148
(K) ('96) 1 Weir 45: 19 Mad 349
(L-M) ('86) 1886 All WN 106: 8 All 293
(N) ('02) 6 Cal WN 680: 29 Cal 417
(O) ('04) 13 Mad LJ 285: 27 Mad 52
(P) ('36) AIR 1936 Lah 851: 38 Cri LJ 186
(Q) ('48) AIR 1948 Mad 472: 1948 Mad WN Cr 68: 49 Cri LJ 705
(R) ('07) 6 Cri LJ 38: 11 Cal WN 836
(S) ('47) AIR 1947 Lah 249: 48 Cri LJ 717
(T) ('21) AIR 1921 Pat 415: 22 Cri LJ 442
(U) ('96) 23 Cal 896
(V) ('01) 5 Cal WN 134: 28 Cal 411
(W) ('96) 1896 All WN 48: 18 All 246
(X) ('03) 6 Cal WN 342: 30 Cal 97
(Y) ('32) AIR 1932 Pat 315: 34 Cri LJ 269
(Z) ('38) AIR 1938 All 120: 39 Cri LJ 360
(Z1) ('39) 1939 Nag LJ 397

(Z2) ('49) AIR 1949 Mad 434: 1949 Mad WN Cr 133: 50 Cri LJ 581
(Z3) ('36) AIR 1936 Pat 74: 37 Cri LJ 104
(Z4) ('92) 2 Mad LJ 120: 15 Mad 221
(Z5) ('24) AIR 1924 Lah 238 (1): 24 Cri LJ 594
(Z6) ('42) AIR 1942 Mad 552 (2): 43 Cri LJ 757
(Z7) ('16) AIR 1916 All 53: 38 All 506: 17 Cri LJ 413
(Z8) (1900) 2 Bom LR 541
(Z9) ('32) AIR 1932 Rang 21: 33 Cri LJ 175
(Z10) ('28) AIR 1928 Lah 827: 29 Cri LJ 645
(Z11) ('32) AIR 1932 Cal 871: 34 Cri LJ 181
(Z12) ('33) AIR 1933 All 759: 34 Cri LJ 1211
(Z13) ('38) AIR 1938 All 118: 39 Cri LJ 363
(Z14) ('37) AIR 1937 Pat 633: 39 Cri LJ 100
(Z15) ('23) AIR 1923 Rang 231: 24 Cri LJ 848
(Z16) ('38) AIR 1938 Nag 529: 39 Cri LJ 954
(Z17) ('36) AIR 1936 Nag 86: 37 Cri LJ 587
(Z18) ('24) AIR 1924 Mad 760: 26 Cri LJ 97
(Z19) ('15) AIR 1915 Lah 456: 30 Ind Cas 748
(Z20) ('34) AIR 1934 Cal 730: 38 Cal WN 1008

ORDER: This is a criminal revision case which has been filed against the conviction and sentence of the learned Sub-Magistrate of Tiruchendur in C. C. No. 447 of 1951 and confirmed by the Sub-Divisional Magistrate of Tuticorin in C. A. No. 14 of 1952.

(2) The facts are: The petitioners who are father and son, are running a grocery shop in Udangudi, a major Panchayat. P. W. 1, Shanmugham, Assistant Inspector of Labour, made a surprise inspection of this shop under the Shops and Establishments Act on the night of 5-2-1951 (Monday and a shandy day) at 10-30 p. m. according to his watch and at 9-20 p. m. according to the time-piece in the shop. This P. W. 1 wanted to note the time of inspection in the register kept for that purpose. The accused objected and wanted this P. W. 1 to record the time as 9-30 p. m. as well as per the time-piece in the shop. There was a dispute and according to P. W. 1 accused 1 pushed him by the chest and accused 2 snatched away the register from his hand in addition to having abused. This created a scene and a crowd gathered. Inasmuch as it had become late, P. W. 1 sent next day telegrams to his superior officers and despatched a report to the Sub-Inspector, Kulasekharapatnan. The Police charge-sheeted both the accused. P. W. 1 is corroborated by his peon P. W. 2 and practically by the peon of the Udangudi Panchayat Board office, P. W. 3. P. W. 4 is the Sub-Inspector who received the telegram and complaint and investigated the case. The case for the accused was that no such thing as alleged took place and that this case has been foisted upon them at the instance of the Executive officer of the Udangudi Panchayat Board, a friend and casteman of P. W. 1. They examined three witnesses of whom the village Munsif of Udangudi, D. W. 1, stated that at 11-30 p. m. that night accused 1 gave him the statement Ex. D. 2 explaining his version of the incident and that before that when at 10-55 p. m. P. W. 1 met him he did not tell him anything about the assault. D. W. 2, a neighbouring shop-keeper and D. W. 3 the Secretary of the Co-operative Stores who is stated to have come there on hearing the 'galatta', testified that when P. W. 1 inspected the petitioner's shop he compelled the shop assistants to sign in the book that the time was 10-30 p. m., whereas the correct time was 9-45 p. m. and that when the accused protested P. W. 1 tucked up his sleeves, threw down the book and assumed a fighting attitude and that D. W. 3 pacified and separated them. Both Courts have believed the prosecution version and accused were convicted under S. 353, Penal Code and sentenced to pay a fine of Rs. 50 each.

(3) In regard to the findings of fact, they are binding on me and I have to consider here only the point of law which seems to have been suggested in the lower Court but which has been pressed only in this Court. The point is briefly this: 5-2-1951 happened to be a Monday and a shandy day. In G. O. No. Ms. 229 (Development) dated 16-1-1951 published in the Fort St. George Gazette on 30-1-1951, it has been notified that shops in Udangudi Major Panchayat could be kept open on Mondays (shandy days) till 11 p. m. The point now urged is that there was irregularity in the inspection by P. W. 1 and therefore if force is used by the accused and the officer acting under the Shops and Establishments Act is assaulted, it does not amount to an offence.

(4) Under S. 99, Penal Code, it is enacted that (a) an act done or attempted to be done, (b) by a public servant, (c) acting in good faith, (d) under colour of his office, (e) though that act may not be strictly justifiable by law, does not give rise to the right of private defence. These clauses in favour of public servants rest partly on the probability that their acts will be lawful, in which case resistance must necessarily be unlawful; partly on the theory that resistance is unnecessary since the law will set right what has been wrongly done in its name; and, lastly, on the ground that it is good for society that public servants should be protected in the execution of their duty even where they are in error. But in order to secure the protection of S. 99, I. P. C. it is essential that the act done or attempted to be done by a public servant must be (a) in good faith, (b) under colour of his office, (c) though that act may not be strictly justifiable by law.

(5) Good faith: As to what constitutes good faith, a negative definition of good faith has been given in S. 52, I. P. C. as "Nothing is said to be done or believed in good faith which is done or believed without due care and attention." This section makes no reference to the moral elements of honesty and right motive which are involved in the popular significance of "good faith" and which are predominant in the positive definition enacted in the other Acts of the Legislature. The General Clauses Act, 1897, S. 3 (20) (now 22) which applies to all Acts of the Governor-General in Council and Regulations made after the commencement of the Act (11-3-1897), on the contrary, says that a thing shall be deemed to be done in good faith where it is in fact done honestly, whether it is done negligently or not. The Madras General Clauses Act, 1891, S. 3(11) defines good faith according to the definition given in the Penal Code. It therefore follows that while an honest blunderer acts in good faith within the meaning of the General Clauses Act, an honest blunderer can never act in good faith within the meaning of the Penal Code for being negligent. He has not acted with due care and attention. Due care and attention implies a genuine effort to reach the truth and not the ready acceptance on ill-natured belief. The question of good faith is a question of fact and must be gathered from the surrounding circumstances. Mere actual belief without any reasonable grounds for believing is not simultaneous with good faith; but good faith does not require logical infallibility but due care and caution which must in each case be considered with reference to the general circumstances and the capacity and intelligence of the person whose conduct is in question. The law does not expect the same

care and attention from all persons regardless of the position they occupy: — 'Bhawoo Jivaju v. Mulji Dayal', 12 Bom 377 (A), — 'Sheo Suran v. Mahomed Fazil Khan', 10 W. R. Cr. 20 (B); — 'Emperor v. Daya Shankar', AIR 1926 Oudh 393 (C); — 'Public Prosecutor v. Rajammal', 1911-2 Mad W. N. 479 (D); — 'Queen-Empress v. Subba Naicker', 21 Mad 249 (E); — 'Krishnaya v. Emperor', 1937 Mad W. N. 569 (F); — 'Public Prosecutor v. Suryanarayana Reddi', 1937 Mad W. N. 741 (G).

(6) Colour of office: The words under "colour of office" should be carefully construed. They refer to irregular as distinguished from illegal acts. They show that the act was within the jurisdiction but that the jurisdiction had been exercised irregularly or on insufficient grounds. In short, the act has been done wrongly though it might have been done rightly. In other words, the clause is not intended to cure the want of jurisdiction but only an erroneous exercise of it and that when the error affects the procedure rather than the principle such an irregularity for example as initialling a warrant instead of signing it, the mode of delivering possession or the like — it would be covered by this clause: — 'Queen-Empress v. Tiruchittambala', 21 Mad 78 (H); — 'Queen-Empress v. Poomalai', 21 Mad 296 (I); — 'Queen-Empress v. Ramayya', 13 Mad 148 (J); — 'Queen-Empress v. Pukotkotu', 19 Mad 349 (K); — 'Bhawoo v. Mulji', 12 Bom 377 (A); — 'R. v. Janki Prasad', 3 All 293 (L.M.); — 'R. v. Bhailal', 29 Cal 417 (N); — 'Doraiswami Pillai v. Emperor', 27 Mad 52 (O); — 'Ghulam v. Emperor', AIR 1936 Lah 851 (P); 'Muni Reddi In re', AIR 1948 Mad 472 (Q).

(7) Not strictly justifiable in law: In the case of — 'Bisu Haldar v. Emperor', 11 Cal W. N. 836 (R), it was pointed out that the phrase under comment as stated in Mayne's commentary on Criminal Law seems to point to cases where there is an excess of jurisdiction, as distinct from a complete absence of jurisdiction, to cases where the official has done wrongly what he might have done rightly, not to cases where the act could not have possibly been done rightly. In other words, the clause is not intended to cure the want of jurisdiction but only an erroneous exercise of it and that when the error affects the procedure rather than the principle, it would be covered by the clause. Explanation (1) goes with this paragraph and it is intended to protect persons who may have acted in ignorance of the fact that the person they were dealing with was a public servant. — 'Dhara Singh v. The Crown', AIR 1947 Lah 249 (S). Where the public servant has a distinctive badge or uniform, his position would be manifest to all who have to deal with him. But if the public servant has no distinctive badge or attire, he has to state who he is before he can claim exceptional treatment. If he was however attended by peons whose badges proclaim his position or if he was already known in the locality or to the other party as in the instant case, it would be sufficient. — 'Moinuddin v. Emperor', AIR 1921 Pat 415 (T); — 'Abdul Gafur v. Empress' 23 Cal 896 (U) — 'Raman Singh v. Empress', 28 Cal 411 (V); — 'Empress v. Dalip', 18 All 246 (W); — 'Birbal v. Emperor', 30 Cal 97 (X); — 'Puna Mahtan v. Emperor', AIR 1932 Pat 315 (Y); — 'Ramji v. Emperor', AIR 1938 All 120 (Z); — 'Emperor v. Kisanlal', 1939 Nag LJ 397 (Z1); — 'Ramaswami Chetti v. King', AIR 1949 Mad 434 (Z2).

(8) If we bear these principles in mind, it is idle to contend that what this public servant as defined in S. 21, Penal Code had done was not in good faith and under colour of his office. On the night in question it is in evidence that all the shops excepting the grocery shop of these accused were closed at that time. It is the duty of this P. W. 1 to make surprise visits and see that the regulations made under the Act are complied with. It is also equally his duty to make entries in the book kept for that purpose in the shop. The only point urged is that this P. W. 1 must have known the Gazette notification which specified that the shops could be kept open till 11 p. m. on that day. It is seen from the evidence that this Gazette notification, which has been published very shortly before the date of this offence, was not known to both P. W. 1 and the accused and in fact in the lower Court this point was raised and disposed of as follows: The learned Sub-Magistrate writes:

> "It was suggested that on shandy days the shops could be kept open till late in the night. P. W. 1 has stated that they apply only to hotels and establishments and not to shops."

The appellate Magistrate writes:

> "It has not been shown to me that the time rule was not applicable to the appellant's shop as it was a shandy day. P. W. 1 was questioned on this point bringing to his notice S. 7(1) of the Act. He has said that that section is applicable only to hotels and eating houses and not to grocery shops like that of the appellants."

It will be noticed that the dispute in this case was not whether the shop could be kept open till 11 p. m. but that the P. W. 1 wanted to note the time as 10-30 p. m. whereas according to the accused it was only 8-30 p. m. Even assuming that the shop could be kept open till 11 p. m., P. W. 1 could enter the shop and check the time and make a note of it. The question whether the shop can be kept open till 11 p. m. or not was a question to be decided with reference to prosecuting these accused for keeping the shop open after specified hours. Therefore, first of all P. W. 1 was within his rights in making the surprise visit and noting the result of his visit in the book kept for that purpose; and secondly, even though the act done or attempted to be done by him may not be strictly justifiable by law, he would be protected under the previous two clauses, viz., in good faith and under colour of his office.

(9) The point of law taken therefore fails.

(10) The final point for consideration is whether the act of the accused persons would amount to using criminal force with intent to prevent or deter a public servant from discharging his duty. The terms "prevention" and "deterrence" are not synonymous. In the first place, prevention does not mean only deterrence by physical force but by other means as well. Secondly, the distinction seems to be with reference to the stage of interference by the accused. Prevention means thwart, to hinder, to stop, to check or to restrain. Inspection or entry may be prevented at the very start. These words are sufficiently wide to take in the following acts: Constructive obstruction, or passive conduct by remaining within closed doors, or a mere withholding of assistance may not amount to obstruction. To merely run away when an officer enters may not be obstruction. But slamming of door in the face of an officer just when he was about to enter is obstruction. Mere evasion is insufficient to show obstruction. Similarly, obstruction has to be distinguished from mere objection or annoyance without using force or any threatening language. Mere objection or protest does not fall within the section unless it verges on threat which is likely to be carried out imme-

diately: — 'Thakur Prasad v. Emperor', AIR 1936 Pat 74 (Z3); — 'Queen-Empress v. Sommanna', 15 Mad 221 (Z4); — 'Maturam v. Emperor', AIR 1924 Lah 233 (1) (Z5); 'In re Thimmakka', AIR 1942 Mad 552 (2) (Z6) — 'Emperor v. Aijaz Husain', AIR 1916 All 53 (Z7); — 'Queen-Empress v. Gaygappa', 2 Bom LR 541 (Z8); — 'Ah Choung v. Emperor', and 1932 Rang. 21 (Z9) and — 'Mt. Darkan v. Emperor', AIR 1928 Lah 827 (Z10). Threats may not amount to obstruction in all cases. The point for determination in such cases is whether the act of the accused was such as to prevent the public servant from carrying out his duties. If the acts of accused caused a public servant to abstain from proceeding with the task entrusted to him, the offence of obstruction is not made out. Where threats combined with an attitude of an aggressive character, or where there is an exhibition of dangerous weapons by the accused, or where the threat is likely to be carried out immediately, the offence of obstruction may be held to be made out: — 'Nafur Sardar v. Emperor', AIR 1932 Cal 871 (Z11); — 'Emperor v. Tohfa', AIR 1933 All 759 (Z12); — 'Nanhua v. Emperor', AIR 1933 All 118 (Z13) and — 'Dukhan Sahu v. Emperor', AIR 1937 Pat 633 (Z14). To constitute obstruction actual physical force is not necessary. If there is sufficient indication that force would be used if the officer persists in executing the work he is commissioned to do, it would be sufficient to constitute obstruction. If it is shown that fight would ensure if officer proceeds to execute his work it would be obstruction: — 'Emperor v. Annawadin', AIR 1923 Rang 231 (Z15). Even the use of abusive language as a result of which sale had to be adjourned by an officer was held to be obstruction: — 'Provincial Government C. P. and Berar v. Balaram Jagannath', AIR 1938 Nag 529 (Z16). Blocking gateway or deliberately placing a cycle in front of a police constable and thereby preventing him from dealing with an offender was held to be obstruction under the Penal Code. Similarly, closing a house and thus preventing a policeman from removing stolen articles found in the room and threatening to kill him was held to be obstruction. Again obstruction like jostling an officer was held to be an offence: — 'Emperor v. Babulal Munnilal', AIR 1936 Nag 86 (Z17); — 'Narayana Raju v. King-Emperor', AIR 1924 Mad 760 (Z18) and — 'Mt. Jatto v. Emperor', AIR 1915 Lah 456 (Z19).

(11) The facts alleged in the instant case and found concurrently by both the lower Courts certainly constitute use of criminal force to deter a public servant from discharging his duties.

(12) The conviction is technically correct and is confirmed. In regard to sentence I must point out that this is a case where in the first instance there should have been no prosecution. The evidence on record shows that this P. W. 1 did not behave considerately tactfully and courteously which is the minimum standard of conduct that is required of public servants in general and subordinate officials engaged in enforcing Acts like the Madras Shops and Establishments Act in particular. It is incumbent upon these subordinate officials to bear in mind the wise words of Dr. Sethna in his foreword to Borkar's Bombay Shops and Establishments Act:

"In Social legislation, the most important factor of consideration in the enactment of law is that of bringing about harmony between classes, especially capital and labour. Without capital, labour cannot prosper, without co-operation & welfare of labour, the capitalist or the employer cannot thrive. How can that desirable and harmonious relationship be brought about, so as to produce the common good of society — the 'summum bonum'? Not by mechanical legislation or provision of all sorts of penalties to be enforced indiscriminately without consideration of the circumstances of the case, but by a persuasive and guiding policy on the part of the factory inspectors who should advise rather than straightway take the case to the doors of a police Court to have the offender convicted: If the proper guidance that is required to be given by the factory and shop establishment officers is given to employers, the employers will surely work with a spirit of lending success to so important and so desirable a legislation. These Acts, which are meant for the welfare of the employees as also the employers and are sponsored through by a well-meaning and beneficent Government, should be welcomed by all men of rational thought. It is the duty of the citizen to co-operate with the administration; for in the strength of the State is his own strength, and in the good of those who work under him is his own good. The good citizen must help the Government and should carry out the 'Sentential legis'. But then the officers of the Government also should tarry before rushing forward to police Courts those, who innocently fall into the pitfalls of the technicalities of the law. In a complicated age of laws — all not easy to understand — the layman should be looked upon with an eye not of severity but of guidance and warning. All wilful defaults should be made punishable; but innocent or technical or unwilful defaults should not be punishable without warning to the technical or the 'pseudo' offender. Just as in the Companies Act defaults are punishable only if the same are knowing and wilful, defaults under the Shops and Establishments Act should be punishable only if the same are knowing and wilful, but not otherwise. The learned Registrars of Joint Stock Companies enforce the filing of documents and compliance with the provisions of the Companies Act, mainly after giving notice to the offender to make good the default. Prosecutions are launched, as a rule, after the offender has been found knowingly and wilfully in default. The same course of administrative tendency is highly desirable in the case of the working and enforcement of Acts such as the Shops & Establishments Act, if the utmost willing co-operation of the employees is to be won by the administration."

See also — 'Superintendent and Remembrancer of Legal Affairs, Bengal v. H. E. Watson', AIR 1934 Cal. 730 (Z 20) (Per Mcnair J.).

(13) The fine amounts are reduced to Rs. 5 in each case and the excess fines if collected will be refunded.

B/V.S.B. Ordered accordingly.

A. I. R. 1953 MADRAS 939 (Vol. 40, C. N. 372)

PANCHAPAKESA AYYAR J.

In the matter of A. P. Subramania Mudaliar, an Insolvent; Official Assignee of Madras, Applicant v. A. P. Subramania Mudaliar and others, Respondents.

Petn. No. 134 of 1952 and Appln. No. 229 of 1953, D/- 6-4-1953.

Presidency Towns Insolvency Act (1909 as amended by Act 3 of 1950), S. 53 — Attachment.

Attachment before judgment made absolute after decree — Property sold in execution of another decree — Balance

deposited in Court — In execution of decree deposit directed to be transferred to executing Court to the credit of the decree — Before actual transfer of deposit, judgment-debtor declared insolvent — Attaching decree-holder is not in position of secured creditor — He cannot be permitted to withdraw the amount — He must seek his remedy like other ordinary creditors of proving his debt and applying for dividend before Official Assignee. 26 Mad 673 (FB); AIR 1952 Mad 256 and AIR 1941 Mad 183, Relied on.; AIR 1938 Mad 360 (FB), Ref. (Para 4)

Anno: Presid. Towns Insol. Act, S. 53 N. 1.

M. A. Rajagopalan, for Insolvent; V. Radhakrishnaiyya and M. K. Harihara Ayyar, for Respondents.

CASES CITED:

(A) ('03) 13 Mad LJ 278: 26 Mad 673 (FB)
(B) ('33) AIR 1933 PC 134: 56 Mad 405 (FB)
(C) ('38) AIR 1938 Mad 360: ILR (1938) Mad 744 (FB)
(D) ('52) AIR 1952 Mad 256: 1951-2 Mad LJ 271
(E) ('41) AIR 1941 Mad 183: ILR (1941) Mad 398

ORDER: This is a petition by the Official Assignee, Madras, for orders declaring that respondents 2 and 3 have no manner of right to the amount Rs. 3,132-0-0, deposited in C. S. No. 132 of 1952, on the file of this Court, and that the applicant alone is entitled to the same, and for an order permitting the applicant to draw out the said amount of Rs. 3,132-0-0.

(2) The facts were briefly these. The Official Assignee is in charge of the properties of the insolvent, and the insolvency petition was admitted on 12-12-1952. Respondent 3 filed O. S. No. 662 of 1952 against the insolvent and obtained attachment before judgment of a house of the insolvent (who had not become an insolvent by then) subject to a mortgage. He got a decree in that suit, for Rs. 9,265/- or so, on 23-7-1952, and the interim attachment was made absolute on 23-7-1952. At the instance of the mortgagee of the house, the auctioneers, Murray & Co., sold the house. After discharging the mortgagee's dues, a balance of Rs. 3,132-0-0 remained. Respondent 2 filed C. S. No. 139 of 1952 on the file of this Court against the insolvent for dissolution of partnership and accounts, and took out a direction against the auctioneers and the mortgagee for depositing the balance of Rs. 3,132-0-0 into Court. On 23-2-1953, the said amount was directed by this Court to be deposited in Court to the credit of C. S. No. 139 of 1952, to be disposed of, later on, by paying out to the correct party entitled to receive it.

On 8-11-1952, respondent 3 filed E. P. No. 2388 of 1952, in O. S. No. 662 of 1952, in the City Civil Court, Madras, praying for the issue of an order for depositing the excess proceeds, of the sale held by the mortgagee through the auctioneers on 23-10-1952, or, in other words, for bringing the excess of Rs. 3,132-0-0 into the City Civil Court, for respondent 3 to take the money out by way of execution and part satisfaction of his decree in O. S. No. 662 of 1952. The City Civil Court Judge passed an order on 10-11-1952: "Interim Pro. Order and notice 29-11-1952". But, as a matter of fact, it is admitted that the amount was not taken to the City Civil Court or put to the credit of O. S. No. 662 of 1952 and the E. P. therein before 12-12-1952, the date when the insolvency application was admitted. The amount still remains in this Court.

(3) The question, under these circumstances, is whether the rights of the O. A. to the amount of Rs. 3,132-0-0 should prevail over the rights of respondents 2 and 3 under S. 53, Presidency Towns Insolvency Act, as it stands amended now by Act 3 of 1950.

(4) Respondent 2 does not contest the application by the O. A. Respondent 3 appears by counsel and contests. I have heard the arguments of the learned O. A. and the learned counsel for respondent 3, and I have no hesitation whatever that the O. A.'s application should be allowed and he permitted to draw out the said amount of Rs. 3132-0-0, and respondent 3, the attaching creditor, left to his remedies, like other ordinary creditors, of proving his debt and applying for a dividend before the O. A.

(5) Mr. Harihara Iyer, for respondent 3, urged that, as respondent 3 had not only got an interim order of attachment but also an absolute order of attachment and an interim prohibitory order and notice, before the admission of the insolvency petition on 12-12-1952, respondent 3's claim should prevail over the O. A.'s, and respondent 3 should be allowed to have the sum of Rs. 3132-0-0 sent to the City Civil Court to the credit of O. S. No. 662 of 1952, & the E. P. therein, so that it may be drawn out by him in part satisfaction of his decree.

(6) The learned O. A. relied on a Full Bench ruling of this Court in — 'Kristnaswamy Mudaliar v. Official Assignee, Madras', 26 Mad 673 (FB) (A). There it was held that the effect of an attachment under the Civil Procedure Code is only to prevent alienation and that it does not confer title but only gives the judgment-creditor certain rights in execution, and that an attachment will not operate when those rights are not exercised before the presentation of a petition in insolvency so as to create in favour of the judgment-creditor a title which prevails against that of the Official Assignee under the vesting order in insolvency, made after the order of attachment.

Though the Privy Council seems to have remarked in — 'Anantapadmanabhaswami v. Official Receiver, Secunderabad', AIR 1933 PC 134 (FB) (B), that the above Full Bench decision required reconsideration, they actually refused to go into the question of its correctness or otherwise in that case, as it was unnecessary for them to do so. A Full Bench of this Court in — 'Manickam Chettiar v. Income-tax Officer, Madura South', AIR 1938 Mad 360 (C), re-affirmed the correctness of the previous Full Bench decision and said that an attaching creditor was not in the position of a secured creditor and the fact of his attachment would not prevail against the O. A.'s rights in insolvency, as the assets had not been realised in the course of the execution by sale or otherwise. Nor can Mr. Harihara Iyer's reliance on the interim prohibitory order passed by the City Civil Judge, on 10-11-1952, before the admission of the insolvency petition, be of any avail to him, as even that would not amount to 'realisation of the assets', but only to 'an attempt to realise the assets'.

In — 'Sambayya v. Official Receiver, Guntur', AIR 1952 Mad 256 (D), Raghava Rao J. has held that the mere order, on an execution petition, to send for the money of the judgment-debtor would not be tantamount to an order 'realising the assets' within the meaning of S. 51, Provincial Insolvency Act (the wording of S. 53, Presidency Towns Insolvency Act is the very same now), and that,

therefore, when a petition to adjudicate the judgment-debtor is filed a few days after such an order, and the money is not 'in fact' received by the Court before the date of the petition, the prior order sending for the money cannot have the effect of bringing into operation the exception referred to in that sub-section, and will not avail against the O. R. (here the O. A.) in insolvency. That decision covers the point in question, and I fully agree with the principle therein. It has been held by a Bench of this Court in — 'D. D. Italia v. Official Assignee, Madras', AIR 1941 Mad 183 at p. 185 (E), that a mere attachment creates no charge, and that an attaching creditor is in no better position than any other ordinary creditor. That is, of course, the correct position in law so far as this State is concerned.

(7) This petition is, therefore, allowed, but, in the peculiar circumstances, and as it is very hard case, without costs.

B/R.G.D. Petition allowed.

A. I. R. 1953 MADRAS 941 (Vol. 40, C. N. 373)

RAMASWAMI J.

In re Venkataswami Aiya, Petitioner.

Cri. Revn. Case No. 614 of 1952 and Cri. Revn. Petn. No. 510 of 1952, D/- 19-1-1953.

(a) Stamp Act (1899), S. 70 — Revenue Board authorizing District Registrar and District Magistrate to sanction prosecution under Stamp Act — Prosecution held validly initiated.

(Para 4)

Anno: Stamp Act, S. 70 N. 1.

(b) Stamp Act (1899), Ss. 27, 64 and Art. 58 — Scope.

Settlement deed—Stamp duty should be calculated on valuation shown in deed itself — Registrar can under S. 35 refuse registration on ground the property is grossly undervalued and call for particulars—Document registered — Subsequent information as to under-valuation — Prosecution under S. 27 read with S. 64 can be initiated — Burden is on prosecution to show affirmatively that terms of S. 27 have not been complied with — Accused is entitled to rely upon evidence that has been produced on behalf of the prosecution to urge that such evidence does not establish the guilt — S. 64 requires proof of intention to defraud—Mere non-payment does not make person liable for prosecution under S. 64 — Intention to be inferred from circumstances. Case law Ref. (Paras 6, 7, 9 & 10)

Anno: Stamp Act, S. 27 N. 4; S. 64 N. 1, 5; Art. 58 N. 2, 7.

(c) Stamp Act (1899), S. 64 (b) — Applicability — Scribe and vendor.

Clause (b) of S. 64 applies to a person who is employed or concerned in or about the preparation of a deed without complying with the requirements of S. 27. The clause is not restricted to the scribe of the instrument but is wide enough to reach and punish the person who is in truth the author of the deed and is responsible for it, though he writes the deed through the hand of another person. A person who is the moving spirit in the matter of sale and who is the real purchaser though the deed is nominally taken in the name of another and who engineers the whole thing and arranges for the wording of the sale deed, is a person concerned in or about the preparation of the instrument: The scribe who scribes the deed without any knowledge of the fraud, does not commit an offence under this clause, unless the prosecution affirmatively and adequately establish that the scribe scribed the deed with intent to defraud or with knowledge of the fraud. Case law Ref. (Para 11)

What amounts to fraud indicated. (Para 12)

(No fraudulent intention held proved). (Para 13)

Anno: Stamp Act, S. 64 N. 3.

K. V. Ramaseshan, for Petitioner, Public Prosecutor, for the State.

CASES CITED:

(A) ('50) AIR 1950 Mad 738: ILR (1951) Mad 119 (FB)
(B) ('84) 7 Mad 350 (FB)
(C) ('85) 8 Mad 453 (FB)
(D) ('97) 20 Mad 27
(E) (1935) 104 LJKB 433: 1935 AC 462
(F) ('42) 1942 Mad WN 596: 1942 Mad WN Cr 140
(G) ('36) AIR 1936 PC 242: 1936 Mad WN Cr 165: 37 Cri LJ 914
(H) ('10) 11 Cri LJ 204: 32 All 171
(I) ('18) AIR 1918 Cal 113 (1): 45 Ind Cas 275: 19 Cri LJ 515
(J) ('40) AIR 1940 Lah 274: 41 Cri LJ 729
(K) ('37) 1937 Mad WN 867
(L) ('37) 1937 Mad WN 1071
(M) ('44) AIR 1944 Sind 222: 46 Cri LJ 369
(N) 1 Weir 905
(O) ('37) AIR 1937 Nag 57: 38 Cri LJ 258
(P) ('29) AIR 1929 Cal 723: 31 Cri LJ 700

ORDER: This criminal revision case is preferred against the conviction and sentence in C. C. No. 10 of 1951 on the file of the Additional First Class Magistrate, Kollegal, from which C. A. No. 1 of 1952 was filed before the Sessions Judge, Coimbatore, wherein the conviction was confirmed and the sentence was modified.

(2) The facts are: One Chinna Malappa executed a settlement deed Ex. P. 10 on 29-7-1950. It was written by Venkataswami Aiyah, karnam of Ikkadahalli village, Kollegal taluk. The document was registered as No. 1937 of 1950 of Book I of the Sub-Registrar of Kollegal. The value of the property as set forth in the document is Rs. 2000. The District Registrar initiated the prosecution of both these persons under S. 27 read with S. 64, Stamp Act on the foot that the property had been grossly under-valued. The executant died on 2-8-1950. The case against him abated. The enquiry proceeded against this scribe only. Both the Courts below found that this accused was guilty as charged and sentenced him to pay a fine. The Additional First Class Magistrate fined him Rs. 100 and the Sessions Judge reduced it to Rs. 50.

(3) This conviction is challenged in this criminal revision case on the following grounds, viz., (a) that there has been no valid sanction for the institution of the complaint, and (b) that the circumstances alleged against this scribe do not make out the offence contemplated by S. 27 and S. 64, Stamp Act.

(4) Point (a): There is no substance in this point because though it is quite true that originally under the Standing Orders 101 and 102, embodied in the Madras Stamp Manual containing the Indian Stamp Act and the Court-fees Act, with the Notifications issued thereunder and the Board's Standing Orders connected therewith (4th Edn. 1933) only Collectors and Revenue Divisional

Officers are found to have been authorised under S. 70, Stamp Act to sanction prosecutions in respect of offences punishable under the Stamp Act. Subsequently the District Registrars have also been so authorised. Ex. P-12 is the copy of G. O. Ms. No. 3306, Revenue dated 28-12-1949 in which the Local Government accepted the recommendation of the Board of Revenue to authorise the District Magistrate under S. 70, Stamp Act to sanction prosecution. Exhibit P-13 is copy of the proceedings of the Board of Revenue Ref. No. 3129-50 dated 17-5-1950 empowering District Magistrate to sanction prosecution. Therefore, there is no substance in the contention about the want of proper sanction for the complaint being launched by the District Registrar.

(5) Point (b): I shall now briefly consider the scope of Ss. 27 and 64 and Art. 58, Stamp Act to find out whether the facts of the instant case make out the offence for which the revision petitioner has been convicted.

(6) Section 27, Stamp Act requires that the consideration and other facts and circumstances which affect the stamp duty payable must be stated in the instrument. In the case of a settlement deed, the Article applicable is 58. The duty has to be paid on the amount or value of the property settled as set forth in such settlement. It is unnecessary to trace the chequered interpretations of this phrase "as set forth in such settlement" because we have the authoritative Full Bench decision of this Court in — 'Joint Secretary Board of Revenue, Madras v. Venkatarama Ayyar', AIR 1950 Mad 738 (A); wherein the previous decisions in — 'Reference under Stamp Act, S. 46', 7 Mad 350 (B); — 'Reference under Stamp Act, S. 46', 8 Mad 453 (FB) (C); — 'Reference under Stamp Act, S. 46', 20 Mad 27 (D) of this High Court and the decisions of the other High Courts have been referred to. This Full Bench decision affirmed the view that stamp duty should be calculated on the value shown in the document itself. But at the same time it was held in that case that although the Registrar before whom a document is presented for registration cannot embark on the independent enquiry regarding the value of the property, yet he has power under S. 35, Stamp Act, to refuse registration if the document is not duly stamped; from which it would seem to follow that he can require the person seeking registration to furnish the particulars required for the calculation of the duty payable. For instance, he can refuse to accept the settlor's evasive statement in the document, "value for purposes of stamp and registration Rs. 3,000" when the true value of the property was rupees two lakhs.

In this case it was also held that the word "value" in Art. 58 means the market value of the property at the time of the execution of the document and not its value to the executant when he acquired it, that is, purchase or a nominal or fractional value. It was also pointed out that if persons who conveyed property could value it as they pleased, the Act would be purposeless, for little or no revenue would be collected. Notwithstanding the above, the stamp duty is only to be calculated on the value as set forth in the settlement.

The principles underlying the provisions of the Stamp Act with regard to valuation and estimation of the duty payable are that the value of the property should be taken from the face of the document and that the revenue of the Government is protected by requiring the parties to make a true and full disclosure of all facts and circumstances having any bearing on the duty payable failing which they must suffer the consequences of their false & defective statements. The learned Judges observed:

> "No machinery is set up in the Stamp Act for ascertaining the true value of the property or consideration, as the case may be, in every case that comes before the Registrar; and it would clearly be impracticable to cast the burden on the Registrar in each case to ascertain what the true market value is. If the stamp duty were payable only on a market value to be ascertained, then it would have to be definitely stated in the Act who was to ascertain the market value and what rights, if any, an aggrieved party had by way of appeal, revision or the like."

(7) In other words, as the law stands two courses are open when a document is sought to be registered on an under-valuation. First of all if the Registrar either from his own information or otherwise suspects that the valuation given is an under-valuation with intent to cheat the Government of the legitimate duty, he can ask for particulars from the party and if satisfied with its under-valuation, can refuse to register the document unless proper duty was paid. Secondly in case where the document gets registered and the information is subsequently received that the valuation shown is an under-valuation and that the legitimate stamp duty has been intentionally evaded to defraud the State, it will be open to the Registrar to initiate a prosecution under S. 27 read with S. 64, Stamp Act.

(8) In the instant case what happened was this. P. W. 4 and D. Ws. 1 and 2 are brothers, being the sons of the deceased Chinna Mallappa. Chinna Mallappa executed Ex. P-10, the document in question. P. W. 4 felt aggrieved at the execution of Ex. P-10 because under that document his brothers D. Ws. 1 and 2 got the properties mentioned therein. Therefore, he preferred a complaint to the Inspector General of Registration stating that the properties in Ex. P-10 were deliberately under-valued to avoid stamp duty. P. W. 2 the District Registrar at Erode investigated the complaint and sanctioned the prosecution of the executant Chinna Malappa and the scribe, the petitioner before us.

(9) But whatever may be the circumstances under which the prosecution is launched, the burden of proof is upon the prosecution to show affirmatively and satisfactorily that the terms of S. 27 have not been complied with. In all criminal cases the onus of proving everything essential to establish the charge against the accused lies on the prosecution. The difficulty of proving a fact may affect the quantum of evidence demanded in the first instance but does not change the dominant presumption of innocence. It is not also necessary in all these cases for the accused to produce independent evidence. He is entitled to rely upon evidence that has been produced on behalf of the prosecution to urge that such evidence does not establish the guilt: See — 'Woolmington v. Director of Public Prosecutions', (1935) AC 462 (E) (House of Lords) followed in — 'Mancini v. Director of Public Prosecutions', 1942 Mad W N Cri 140 (F). See also — 'Mahadeo v. King', AIR 1936 PC 242 (G).

(10) Section 64, Stamp Act requires proof of intention to defraud. Thus, a person selling property ostensibly for Rs. 1,000 while the real consideration was Rs. 1,000 in cash and Rs. 19,000 as deposit with the vendee to be drawn by the vendor, is guilty under S. 64(c), Stamp Act: — 'Emperor v. Rameshar Das', 32 All 171 (H). Mere non-payment of a proper stamp duty does not make

a person liable for prosecution under S. 64 of the Act unless it is proved that he had an intention of defrauding the Government of its stamp revenue: — 'Brojendra Nath Bakshi v. Emperor', AIR 1918 Cal 113(1) (I). In order to maintain a conviction under S. 64, it is necessary to prove intention to defraud. This intent can only be inferred from the circumstances: — 'Ramchand v. Emperor', AIR 1940 Lah 274 (J); — 'Krishnaswami Iyer v. Emperor', 1937 Mad W N 867 (K). The ingredients of the offence under S. 64(a), Stamp Act are that the consideration quoted in the document is not the real consideration and the intention or effect was to defraud the Government of stamp revenue: — 'Narasimha Iyer v. Tahsildar of Wallajah, North Arcot', 1937 Mad W N 1071 (L). In fact the Boards Standing Order 103 runs as follows:

> "In dealing with cases care is necessary to discriminate between cases in which an intention to defraud is required to be shown and those in which it is not."

Thus, in prosecution under S. 64 or 68 or for device to evade duty on receipt under S. 65, the fraudulent intention must be established; in other cases such an intention is not a necessary element of the offence.

(11) Clause (b) of S. 64, Stamp Act applies to a person who is employed or concerned in or about the preparation of a deed without complying with the requirements of S. 27. The clause is not restricted to the scribe of the instrument but is wide enough to reach and punish the person who is in truth the author of the deed and is responsible for it, though he writes the deed through the hand of another person: — 'Chimandas v. Emperor', AIR 1944 Sind 222 (M). A person who is the moving spirit in the matter of sale and who is the real purchaser though the deed is nominally taken in the name of another and who engineers the whole thing and arranges for the wording of the sale deed, is a person concerned in or about the preparation of the instrument: — 'In re Sengoda Goundan', 1 Weir 905 (N); and — 'In re Trimbak Madho', AIR 1937 Nag 57 (O). It is not correct to say that a vendee of a sale deed will never be liable under S. 64(a) or 64(b) and that the executant of the document alone would be liable. If the vendee was concerned with the preparation of the conveyance and if the consideration was stated therein to be Rs. 300 instead of Rs. 2000, which was the real value of the properties, and if there was no good faith, the vendee also will be liable under S. 64(b). Hence the scribe who scribes the deed without any knowledge of the fraud, does not commit an offence under this clause: — 'Panchanan Roy v. Emperor', AIR 1929 Cal 723 (P). The prosecution must therefore affirmatively and adequately establish that the scribe scribed the deed with intent to defraud or with knowledge of the fraud.

(12) There has always been a general reluctance amongst lawyers to attempt to define fraud, and this is not unnatural when we consider the number of different kinds of conduct to which the word is applied in connection with different branches of law, and especially in connection with the equitable branch of it. "I shall not attempt", said the late Sir J. F. Stephen,

> "to construct a definition which will meet every case which might be suggested, but there is little danger in saying that whenever the words "fraud", or "intent to defraud" or "fraudulently" occur in the definition of a crime two elements at least are essential to the commission of the crime, namely, first, deceit, or an intention to deceive or in some cases mere secrecy; and secondly, either actual injury or possible injury or an intent to expose some person either to actual injury or to a risk of possible injury by means of that deceit or secrecy."

This intent is very seldom the only or the principal intention entertained by the fraudulent person, whose principal object in nearly every case is his own advantage. The injurious deception is usually intended only as a means to an end, though it does not prevent it from being intentional. Therefore, it is only when there is an intention to deceive and by means of deceit to obtain an advantage, there is fraud.

(13) In the instant case the element of intent to defraud has not been satisfactorily proved. First of all, it has not been shown what is the real market value of the land as contra-distinguished from the under-valuation charged. This must be affirmatively and satisfactorily proved by the prosecution. On the other hand, the burden of it has been thrown upon the scribe, the petitioner before us. The trial Court has stated: "It is in evidence that the accused who is the karnam of the village knows the value of the land in question. Exs. P-24 and P-25 are useful in this respect. (How, no information is vouchsafed). The accused cannot be heard to say that the karnam he is, is ignorant of the value of lands in the village and hence that his intention was not to defraud the Government when he wrote the document in question." This is merely begging the question. Secondly, the accused as a matter of fact taken upon himself the burden of showing that there was no under-valuation and examined D. W. 8, a village official, and who is his own brother. The trial Court dismissed his evidence in the following unsatisfactory manner: "For example D. W. 8 Balachandra Iyer is the brother of the accused who also is a village official. His evidence is interested. His records also are not clear." On the other hand, there is a volume of respectable evidence on the side of the karnam that there was no such gross under-valuation as would by itself be proof of intent to defraud. Thirdly, it has not been shown that the karnam derived any advantage from this under-valuation, even assuming that there was an under-valuation which has not been affirmatively proved. It is quite true that the deriving of this advantage cannot be proved by direct evidence. But sufficient circumstances should be established to enable us to draw that only inference. There is no such evidence here.

(14) In these circumstances, the prosecution not having affirmatively and satisfactorily established that the scribe scribed the deed with intent to defraud or with knowledge of the fraud, the conviction and sentence are set aside and the accused is acquitted. The fine amount, if collected, will be refunded.

B/R.G.D. Conviction and sentence set aside.

A. I. R. 1953 MADRAS 943 (Vol. 40, C. N. 374)

GOVINDA MENON AND KRISHNASWAMI NAYUDU JJ.

V. S. Subramania Chettiar and another, Appellants v. State of Madras, represented by the Special Deputy Collector for Land Acquisition, Vellore, Respondent.

Appeal No. 821 of 1950, D/- 10-4-1952.

(a) Land Acquisition Act (1894), Ss. 9, 25(2) — Failure to make claim — Effect.

No claim made under S. 9(2) — Claim, however, not given up — Claimant want-

ing to postpone making claim, in hope that Government would cancel notification — Claimant not represented by counsel — Acquisition officer not informing him that failure to state the amount of the claim would, under the provisions of the Act, disentitle him from having the amount of the award raised in any subsequent reference before the Court — Claimant not aware of provisions of Act — Held that the penal provisions of S. 25(2) should not be strictly applied. AIR 1930 Mad 836; AIR 1945 Bom 49, Rel. on. (Paras 8, 9)

Anno: Land Acquis. Act, S. 9 N. 1; S. 25 N. 1.

(b) Land Acquisition Act (1894), S. 23 — Market value — Potential value for building purposes.

In assessing the compensation the Court may take into consideration not only the present purpose to which the land is applied, but also any other more beneficial purpose to which in the course of events, it might, within a reasonable period, be applied. The special adaptability of land for building purposes is an element to be taken into consideration in fixing the compensation. The potential value cannot be based on any speculation or conjecture as to the likelihood of the use to which the land may be put to at a distant future, but when there is a reasonable possibility of the land being used for purposes other than agriculture, those purposes could not be ignored in assessing its value. Dry lands though they have a potential value as building sites, should not be valued on the basis of capitalisation of the income of these lands. AIR 1924 Mad 252; AIR 1939 PC 98, Rel. on. (Paras 12, 14)

Anno: Land Acquis. Act, S. 23 N. 7, 12, 13.

V. Radhakrishnayya and B. C. Seshachala Ayyar, for Appellants; Govt. Pleader, for Respondent.

CASES CITED:

(A) ('30) AIR 1930 Mad 618: 53 Mad 533
(B) ('11) 9 Ind Cas 423: 33 All 376
(C) ('30) AIR 1930 Mad 836: 60 Mad LJ 410
(D) ('45) AIR 1945 Bom 49: 218 Ind Cas 187
(E) ('49) AIR 1949 Mad 902: 1949-1 Mad LJ 283
(F) ('24) AIR 1924 Mad 252: 45 Mad LJ 339
(G) (1867) 36 LJ QB 322: 2 QB 630
(H) ('39) AIR 1939 PC 98: ILR (1939) Kar 167 (PC)

KRISHNASWAMI NAYUDU J.: This appeal is against the judgment in O. P. No. 51 of 1949 of the Subordinate Judge of Vellore on a reference under S. 19, Land Acquisition Act 1 of 1894 in respect of acquisition of certain lands belonging to the appellants.

(2) The appellants were the owners of lands of the extent of 8 acres and 40 cents in Kalinjur village near Vellore town, North Arcot district. By notifications made in October 1948, and published in the Gazette, the Government notified the land as one which would be acquired. The land is in proximity with the Katpadi Vellore Cement road. Notices under Ss. 9(3) and 10, Land Acquisition Act were issued calling upon the appellants to put in a statement in writing showing the nature of their interest in the lands and the amount of compensation for such interest with particulars and to appeal in person on 30-11-1948 before the Special Deputy Collector for Land Acquisition, Vellore. The appellants acquired the lands sometime in 1946 for the purpose of construction of a bungalow and putting up an oil mill for which necessary licences were issued by the District Board authorities and plans for the construction of factories were also approved by them. On 30-11-1948, appellant 1 made a statement (Ex. B. 3) almost similar in terms to the one made by him earlier before the Revenue Inspector on 17-8-1948. Appellant 1 stated that he wanted the land for constructing a bungalow for his own use & for starting an oil mill and therefore he was not then willing to state anything about the rate for the land. There is a mistake in the English translation of the statement furnished to Court, as the translation reads "Hence I am not willing to state anything about the rate for this land", whereas a reading of the original statement in Tamil would show that the word "now" is omitted in the translation and the translation should be "Hence I am not 'now' willing to state anything about the rate for this land".

(3) On 30-11-1948, the Special Deputy Collector adjourned the enquiry to 21-12-1948 for pronouncing the award. On that date, the Officer pronounced the award fixing the value at Rs. 5088-2-10 including the 15 per cent. solatium assessed at the rate of Rs. 450 per acre. The first appellant presented a petition under S. 18 of the Act asking that the matter of compensation payable may be referred to the determination of the Court. The lower Court held on the evidence adduced before it that the compensation awarded was low, that the property must have been valued at Rs. 4250 per acre instead of Rs. 450, but that the appellants were not entitled to the increase by reason of their having refused or omitted, without any sufficient reason, to make a claim before the Acquisition Officer as required under S. 9, Cl. (2) and that, by reason of such failure, S. 25(2) of the Act was a bar to any increase in their claim. The lower Court on this ground rejected the reference.

(4) Notice under Ss. 9 and 10 has been duly served and the notice requires that the claimant should state the amount and particulars of their claims to compensation, and, admittedly, the amount of the compensation was not given as required, as the statement made by the appellant before the Land Acquisition Officer on 30-11-1948 shows that he did not give any particulars; but he stated that he was not then willing to state anything about the rate for the land. His attitude, as could be seen from the statement, was that he required the land for the purpose of constructing a bungalow and starting an oil mill, for which he had already obtained the necessary sanctions and licences, and in his view the question of going into compensation did not arise at that stage. He also states in the petition under S. 18 of the Act that he was under the impression that no award would be passed before the representation to the Government was finally disposed of and that he should specify the exact amount of compensation payable to him only in the event of an adverse order being passed and communicated to him by the Government on his above representation, and that having thus not been aware, or made aware, of the correct position,

he 'bona fide' contented himself with stating that his land was, in fact, very valuable.

Earlier, appellant 1 sent a communication to the Board of Directors of the Katpadi Co-operative Township Ltd., for whom the Government was acquiring the land for laying out a housing scheme stating that he has already made arrangements for the construction of the factory, that he will be put to heavy loss, if the land was to be acquired, and requesting them to exclude this land from the scheme area. This communication was transmitted to the Special Deputy Collector for Land Acquisition, Vellore, who returned the same with the endorsement dated 16-11-1948 mentioning that the stage of objections was gone, that it was open to the Township to withdraw the acquisition and that it was for the directors to dispose of the request. The Secretary of the Co-operative Society by his endorsement dated 17-11-1948 intimated to the party that the Directors do not propose to give up the location of the scheme including the area belonging to the appellants. Appellant 1 appears to have approached the Government for withdrawing the notification and on 11-12-1948, he sent a petition to the Honourable Minister for Housing, copies of which were sent to the Board of Revenue and other authorities, requesting for a withdrawal of the notification in so far as the appellants' properties were concerned.

(5) It is for consideration whether, in the circumstances, it could be held that the appellants are barred under the provisions of S. 25 (2) from having the benefit of the increased valuation fixed by the Subordinate Judge. S. 25 consists of three parts and we are now only concerned with clauses (2) and (3) and they are as follows :

> Clause 2 : "When the applicant has refused to make such claim or has omitted without sufficient reason (to be allowed by the Judge) to make such claim, the amount awarded by the Court shall in no case exceed the amount awarded by the Collector."
>
> Clause 3 : When the applicant has omitted for a sufficient reason (to be allowed by the Judge) to make such claim, the amount awarded to him by the Court shall not be less than, and may exceed, the amount awarded by the Collector."

The learned Subordinate Judge found that the claimants have not shown that they had any reason, still less sufficient reason, to omit to make their claim or to furnish particulars in their statement before the Acquisition Officer, and relying on two decisions in —'Subbanna v. District Labour Officer', AIR 1930 Mad 618 (A), and the —'Secy. of State v. Bishan Dat', 33 All 376 (B), held that that omission absolutely precluded the claimants from claiming the excess amount, which they would otherwise be entitled.

(6) If the Court is satisfied that the appellants have omitted for sufficient reason to make such claims, the amount awarded may be even exceeded by Court and should not in any event be less than the amount awarded by the Collector. The attitude of the appellants in this case has been to endeavour by making representations to the authorities concerned to retain the property than allowing it to be acquired and their anxiety to so retain it is supported by the fact that the appellants purchased this property for a specific purpose of installing a factory for which they had already obtained the licence and permits, and there is no reason to disbelieve appellant 1 when he stated that he had also acquired the necessary materials and machinery; and in view of that anxiety to retain the property and the hope of their succeeding in their attempts, they have not specified the amount of the claim as required under the notice issued in pursuance of S. 9 of the Act. Appellant 1 therefore stated that he was not then making a claim, making it clear, that he was not giving up mentioning the exact amount which he would be entitled to, but only postponing it in the hope of the Government reconsidering the question regarding acquisition. Excepting receiving the statement, it does not appear that the Acquisition Officer informed the appellants, who it may be stated had not the assistance of any counsel but appeared in person before the Acquisition Officer — that failure to state the amount of the claim would, under the provisions of the Land Acquisition Act, disentitle them from having the amount of the award raised in any subsequent reference before the Court. The appellants are merchants certainly not aware of the provisions of the Act and the implications of the failure on their part to strictly comply with the notice under S. 9 and, in such circumstances, it has to be considered whether the penal provisions of S. 25(2) should be strictly applied.

(7) In —'Venkatarama Iyer v. Collector of Tanjore', AIR 1930 Mad 836 (C), a Bench of this Court consisting of Beasley C. J. and Curgenven J. held that a notice fixing a shorter term is in contravention of the statute and consequently defective and the stringent provisions of S. 25(2) of the Act cannot be applied to the omission of the occupier to make his claim after such a defective notice. Curgenven J. in the course of his judgment observed that, apart from the insufficiency of the notice, there was another sufficient reason for not making the claim and stated as follows :

> "When he, (claimant), appeared, the Labour Officer took an oral statement from him, which, had it comprised the necessary particulars, would have amounted to making a claim. It may be taken, I presume, that the Labour Officer knew what those particulars should be, and in particular that they should have included the applicant's own valuation of his property. The Officer must be taken to have known also the penalty to which the applicant subjected himself by not furnishing this information. Did he explain to the applicant that it was necessary that he should put a price on his land and the consequences to him of the failure to do so? If not, may it not be said that he allowed the applicant to go away in the belief that he had complied with the requirements of the Act, and that the adoption of such a course provided the applicant with sufficient reason for not having complied with them? On this ground too, I think the applicant should not be precluded by the terms of S. 25(2) from questioning the Labour Officer's valuation."

(8) We may ask the Acquisition Officer, as Curgenven J. pointed out in the decision above cited, as to whether he explained to the appellants that it was necessary under the pro-

visions of the Statute that they should put a price on the land and the consequences to him of the failure to do so? This becomes necessary especially when parties, whose lands are acquired against their will have to face an enquiry, where the Acquisition Officer proceeds to value the land, the parties having a wrong but bona fide impression that by making a claim they would lose the chance of having the acquisition proceedings withdrawn in pursuance of their appeals to the higher authorities. It is, therefore, desirable and sometimes even necessary, though it is not so required under the Act, that Acquisition Officers should in a proceeding as to valuation make it clear to the owners of lands that any failure to state the amount of the claim would be a bar to their having a chance of the award being revised in their favour by the Court. In this case, there is no doubt that the appellants were not informed of the implications of a failure to state the amount of the claim at the enquiry before the Acquisition Officer on 30-11-1948. It cannot therefore be a refusal to make such a claim or an omission without sufficient reason. The appellants stated why they were not making a statement as to the claim at that juncture and it could not be taken as a refusal. But would it not be a sufficient reason for the omission to make such a claim? Section 25 being a penal provision must be applied only in cases where there is clear and convincing proof of a deliberate refusal or an omission without justifiable reason, or a failure to make such a claim after having been made aware of the consequences of such a refusal or omission.

(9) In —'Ranchhodlalji v. Acquisition Officer Ahmedabad', AIR 1945 Bom 49 (D), where a notice under S. 9 of the Act was sent by registered post and served on the agent, who happened to be a constituted attorney of the claimant, and where the agent was dismissed on account of mismanagement, it was held that it was probable that the claimant was not aware of the receipt of the notice and it was "sufficient reason" for omitting to make a claim. Though the facts of this case are not similar to that case, we may usefully adopt the tests that were applied by the learned Judges in that case. What was found necessary by the learned Judges in that case was the presence of good faith and the absence of negligence, and we entirely agree with them that these are the two ingredients in "sufficient reason".

We have no hesitation in holding that the appellants acted in good faith throughout and were in no sense negligent, the good faith consisting in their bona fide belief that no award would be passed before the representation to the Government was finally disposed of and that they could thereafter specify the exact amount. There is no negligence in as much as they appeared before the Acquisition Officer and objected to the acquisition and even earlier appeared before the Revenue Inspector and stated their objections. There is neither negligence nor want of good faith. We are satisfied that their omission to state the claim was for a sufficient reason and the view of the learned Subordinate Judge cannot be upheld. They will, therefore, be entitled to the benefit of an enhanced value that may be fixed by the Court.

(10) On behalf of the Government Pleader, it is urged that the valuation put up by the learned Subordinate Judge is excessive and is not in accordance with the principles which should guide in valuing these lands. The property is described by the Acquisition Officer as follows :

"There is a pit measuring (90' x 80') 7 cents in the northern portion. It is about 4' deep. The soil of this portion is 'kalar'. There is a shallow 'kuttai' in the south western corner of the field and also a big round well. The well is very old and requires repairs. It is not in use now. Out of the entire extent of 8.40 acres, only an extent of 2-00 acres is arable. The remaining extent is covered by the pit, 'kuttai', and mamool waste which is of pebbles and 'kalar' soil. In fasli 1356 well paddy was raised on an extent of 2-00 acres. In fasli 1357 paddy was raised on the above extent with the aid of the water from the 'kuttai'."

(11) From this description it will be seen that out of 8-40 acres only a portion is cultivable and paddy was raised in the land. Before the learned Subordinate Judge the only two documents of sales of lands in the vicinity filed were Exs. A. 1 and A. 2. They were sales of February 1947, and in those documents the prices ranged from Rs. 8571 to Rs. 13559 per acre, averaging to about Rs. 10000 per acre. The Government did not adduce evidence of any sales in the vicinity but contented itself with filing a field map of the village. Though in the sale deeds the average price per acre was Rs. 10000, the learned Subordinate Judge, taking into consideration certain factors, fixed the price at Rs. 4250 per acre.

(12) The contention on behalf of the Government is that the lands must have been valued as agricultural lands and this principle should have been adopted by the Acquisition Officer and the potential value of these lands as building sites or for industrial purposes should not have been taken into account. For this contention, they relied on a judgment of Rajamannar C. J. and Panchapakesa Ayyar J. in —'Lakshminarasimha v. Revenue Divisional Officer, Mangalore', AIR 1949 Mad 902 (E), where one of the questions that was considered was about the adequacy of the compensation and there the lands comprised about 25 acres and 10 cents of wet, dry and garden lands in the village of Jeppinamogru adjoining Mangalore town and the acquisition was for the agricultural department to open a paddy breeding station. The question that arose was as to whether the capitalised value at 20 years' purchase or 33-1/3 year's purchase should be arrived at and it was held that for the valuation of lands, no question of a multiple of over 20 has ever been adopted for capitalisation, and with reference to a contention on behalf of the claimant that at least for the dry land, which had been valued as potential building sites, the valuation may be made at more than 20 years' purchase, the learned Judges observed :

"But these lands were ordinary dry lands at the time of the acquisition though they had a potential value as available for building purposes. We do not think that a different rule should be applied to these lands."

Relying on these observations it is contended that the potential value of the lands for build-

ing purposes should not be taken into account. But we consider that it has been established in a number of decisions of our High Court and by the Privy Council that in arriving at the market value, the potential value for building and other purposes may also be taken into account. Venkatasubba Rao J. in —'Thareesamma v. Dy. Collector of Cochin', AIR 1924 Mad 252 (F), following the observation of Cockburn C. J. in the —'Queen v. Brown', (1867) 2 QB 630 (G), viz., that

"A jury ... ... may take into account not only the present purpose to which the land is applied, but also any other more beneficial purpose to which in the course of events at no remote period it may be applied ... ."

held that :

"Where land is acquired under the Land Acquisition Act, its owner is entitled to the value obtainable in open market for the land if put to its most lucrative use. In assessing the compensation the Court may take into consideration not only the present purpose to which the land is applied, but also any other more beneficial purpose to which in the course of events, it might, within a reasonable period, be applied. The special adaptability of land for building purposes is an element to be taken into consideration in fixing the compensation."

(13) In —'Narayana Gajapatiraju v. Revenue Divisional Officer Vizagapatam', AIR 1939 PC 98 (H), Lord Romer considered as to what is the market value of the land under S. 23 of the Act and laid down the principles for determining compensation under the Land Acquisition Act. The principles of English decisions have been held to be applicable to proceedings under the Indian Act. It was observed that the compensation must be determined therefore by reference to the price which a willing vendor might reasonably expect to obtain from a willing purchaser and not the price that would be paid by a "Driven purchaser" to an unwilling vendor. Lord Romer observed:

"It is perhaps desirable in this connection to say something about this expression 'the market price.' There is not in general any market for land in the sense in which one speaks of a market for shares or a market for sugar or any such article at any particular time can readily be ascertained by the prices being obtained for similar articles in the market. In the case of land, its value in general can also be measured by a consideration of the prices that have been obtained in the past for land of similar quality and in similar positions, and this is what must be meant in general by 'the market value' in S. 23. But sometimes it happens that the land to be valued possesses some unusual, & it may be, unique features as regards its position of its potentialities. In such a case the arbitrator in determining its value will have no market value to guide him, and he will have to ascertain as best he may from the materials before him what a willing vendor might reasonably expect to obtain from a willing purchaser, for the land in that particular position and with those particular potentialities. For it has been established by numerous authorities that the land is not to be valued merely by reference to the use of which it is being put at the time at which its value has to be determined (that time under the Indian Act being the date of the notification under S. 4(1), but also by reference to the uses to which it is reasonably capable of being put in the future. No authority indeed is required for this proposition. It is a self-evident one. No one can suppose in the case of land which is certain, & even likely, to be used in the immediate or reasonably near future for building purposes but which at the valuation date is waste land or is being used for agricultural purposes, that the owner, however willing a vendor, will be content to sell the land for its value as waste or agricultural land as the case may be. It is plain that in ascertaining its value, the possibility of its being used for building purposes would have to be taken into account."

(14) The property in appeal has a road front in the Kangayanallore road and it is separated only by one plot of land from the main Katpadi Cement road which connects it with the Kangayanallore road and the land which separates belongs to the Municipality and there are bungalows, oil-mills, decorticators and rice mill of P. W.2 on the other side of the road & by the side of these buildings there are also shops. This will be sufficient, apart from the fact that it is adjacent to a Municipality and has a road front, to hold that the land is being capable of being used as building site and it is also an industrial area. To ignore these facts would be to ignore the real value of the property. It may be that on the relevant date, that is the date of the notification, which is 5-10-1948, the land as such was not used as a building site and no buildings were there and in fact a portion of the land was only used for cultivable purposes. On that ground, it could not be valued only as an agricultural and waste land. The locality in which the land is situated, its adaptability for being used for purposes other than for agriculture, the locality being in proximity to a prosperous town, and the reasonable probability, and, in this case, the reasonable certainty, of its being utilised for building a factory should not be left out of account, if the correct value has to be arrived at for this land. It will be unsafe and unjust to value these lands purely as agricultural lands ignoring the peculiar advantages, which they possess, added to the fact that already in and around the vicinity buildings and some factories have grown up. These must be considered to be what is generally described as the potential value of the land. The potential value could not be based on any speculation or conjecture as to the likelihood of the use to which the land may be put to at a distant future, but when there is a reasonable possibility of the land being used for purposes other than agriculture, those purposes could not be ignored in assessing its value. The potential value could not therefore be ignored. In view of the decisions referred to and our own view as to how lands have to be assessed in order to arrive at the market value, we are unable to agree with the learned Counsel for the Government that dry lands, though they have a potential value as building sites, should be valued on the basis of capitalisation of the income of these lands. We may observe that in —'AIR 1949 Mad 902 (E),' the question that really arose for determination was whether 20 years' purchase or 33-1/3 years' purchase should be adopted in arriving at the capitalised valuation and the decisions now referred to have not been placed

for consideration of the learned Judges in that decision.

(15) A further argument was also advanced that the lower Court should not have placed reliance on Exs. A. 1 & A. 2, which were dated 7-2-1947 and came into existence just sometime before the Government Order 603, Revenue, sanctioning the Katpadi Housing Scheme which was published on 17-2-1947, the suggestion being that coming to know of the Housing Scheme, the prices in the said sales might have been inflated. It is not, however, suggested that these two sale deeds are not genuine transactions. The relevant date being only October 1948, which is the date of the notification, the market value under S. 23(2) has to be fixed as on that date and sales prior to that date would be relevant for consideration in arriving at the correct value. We consider that the lower Court has rightly relied upon the sale deeds as representating the value of the lands in the locality.

(16) But the question still remains for consideration whether the value of Rs. 4250 per acre fixed by the learned Subordinate Judge is not excessive. While accepting the sale deeds as indication of the prices prevailing in the locality, which is one of the accepted basis for valuation, the learned Subordinate Judge differentiates them from the suit properties & arrives at a reduced valuation. While the properties covered by Exs. A-1 & A-2 have a frontage in the Katpadi Cement road, the lands in question have no such frontage, but have a frontage in the Kangayanellore road. Secondly, while the vendors in Exs. A. 1 and A. 2 had already made the lands suitable as building sites incurring the necessary expenses, the lands of the appellants have only a potentiality as building sites, but have not been reclaimed or made fit as building sites. Thirdly, these lands being situated a little interior not all of them would abut the Kangayanellore road. The learned Subordinate Judge has, therefore, taken about 50 per cent. of the value mentioned in Exs. A. 1 and A. 2 as the value of the lands in question. We are of opinion that the learned Judge has, apart from the factors which he has stated, which certainly go to a great extent in treating these lands differently from the lands covered by Exs. A. 1 and A. 2 failed to give due consideration for certain other factors pertaining to these lands. Though the extent is 8 acres and 40 cents, there is a pit (90' x 80') of the extent of about 7 cents and the pit is 4 feet deep, and there is also a shallow 'kuttai' or pond on the south-western corner of the field. These two portions of land require to be filled up and raised, which would involve some cost, when alone the entire extent could be reasonably fit for factory or building sites. If these circumstances are also taken into consideration along with the factors relied on by the learned Subordinate Judge, the market value has still further to be reduced.

Taking all the circumstances into consideration, the locality, the nature of the land, the use to which it is at present put to and the potential value of the land as building sites, we consider that a valuation of Rs. 2000 (Rs. two thousand) per acre would be reasonable. We, therefore, fix the market value of the land at Rs. 2000 (Rs. two thousand) per acre and the appellants would be entitled to be paid at the rate. The appellant will aso be entitled to the 15 per cent. solatium under S. 23 and interest at 6 per cent. per annum from 12-2-1949.

(17) Subject to the modification as to the value, the appeal is allowed with proportionate costs here and the Court below.

B/R.G.D. Order accordingly.

A. I. R. 1953 MADRAS 948 (Vol. 40, C. N. 375)

KRISHNASWAMI NAYUDU J.

Geddam Subba Rao and others, Appellants v. Balantrapu Satyanarayanamurthy, Respondent.

A. A. O. No. 528 of 1949, D/- 9-1-1953.

(a) Civil P. C. (1908), O. 34, R. 11, S. 34(2) — Awarding subsequent interest in mortgage decrees — (Deed — Construction — Decree).

The power to award subsequent interest in mortgage decree has been conferred on Courts specifically under O. 34, R. 11, while prior to the amendment by Act 29 of 1929, Courts were exercising such power under S. 34, Civil P. C. (Para 4)

Section 34, Civil P. C. is a general provision relating to interest. Section 34(2) does not confer on the Court any power to award interest but embodies a rule of construction that where a decree is silent as to interest, it must be deemed that the Court must have refused interest. (Para 5)

Even apart from S. 34, in the absence of any other provision in the decree to justify the Court to come to a conclusion that subsequent interest has been awarded on the other sums such as costs or interest also, applying the ordinary rule of construction, it must be held that the omission must be due to the fact that the Court intended not to award interest on those sums. (Para 5)

Where a mortgage decree for sale does not make any provision for subsequent interest in respect of costs and interest reliance cannot be placed for that purpose on a reference to subsequent interest under R. 11 in other clauses of the decree. (Para 6)

Anno: C. P. C., O. 34 R. 11 N. 2.

(b) Civil P. C. (1908), S. 11 — Principle of constructive 'res judicata' — Application to execution proceedings.

Caution must be exercised in applying the principle of constructive 'res judicata' to execution proceedings. AIR 1937 Mad 511, Rel. on. (Para 7)

The principle of constructive 'res judicata' in execution proceedings is not applicable to cases where the question of the amount for which execution is taken out is in dispute and it is open to the judgment-debtors at any time in any execution proceedings to raise the objection that the amount for which execution is sought for is not the correct amount due under the decree, as by doing so, the judgment-debtor is only bringing to the notice of the Court that it would not be open to the executing Court to go behind the decree in the sense that it could not order execution for an amount which is not provided

under the decree. AIR 1929 Mad 903, Rel. on. (Para 7)

Anno: C. P. C., S. 11, N. 23.

D. Narasaraju and K. B. Krishnamurthy, for Appellants; K. Bhimasankaram and P. Sithikanta Sastry, for Respondent.

CASES CITED:

(A) ('29) AIR 1929 Mad 903: 122 Ind Cas 161
(B) ('37) AIR 1937 Mad 511: 1937-1 Mad LJ 296
(C) ('49) AIR 1949 Mad 238: 1948-2 Mad LJ 28

JUDGMENT: The judgment-debtors in a mortgage decree in O. S. No. 70 of 1939, Sub Court, Amalapuram, are the appellants. The appeal is against the order dismissing the judgment-debtor's application to determine the amounts due by them under the decree and to order restitution of such amount as might have been overpaid by them to the decree-holder in the course of the execution of the decree.

(2) A preliminary mortgage decree was passed by the High Court in App. No. 205 of 1942 on 13-7-1944. The decree directed the judgment-debtors to pay on or before 13-10-1944 or any later date upto which time for payment may be extended by the Court a sum of Rs. 9892-12-9 with further interest on Rs. 5852-3-0 at 6 per cent per annum from the date of decree till the date of payment. The other clauses of the decree are in conformity with form No. 5 of Appendix D, Sch. I, Civil P. C., (the form usually employed for a preliminary mortgage decree for sale). Clauses 2, 3, 4 and 5 of the decree in this case are, in fact, copy of the corresponding clauses provided in form No. 5. In pursuance of the preliminary decree a final decree was passed on 13-3-1945 which provided that as the payment directed by the preliminary decree referred to had not been made the mortgaged property would be sold.

(3) The decree-holder filed E. P. No. 225 of 1947 for sale and in that application the judgment-debtors did not raise any other objection except the contention that the interest provided for at 6 per cent. must be reduced to 5½ per cent. In the present E. A. No. 94 of 1949 filed by the judgment-debtors for determining the amounts, their contention was that the amount for which the property was to be sold does not represent the amount that is really due under the preliminary decree passed by the High Court, and that the decree-holder, in addition to the amount recoverable under the decree, added interest on costs and on interest on the principal amount which, it is urged, was not provided under the preliminary decree and that, therefore, the decree-holder would not be entitled to recover the same. The principal sum as appears from the preliminary decree is only Rs. 5852-3-0 and the amount which was directed to be paid on or before 13-10-1944 namely Rs. 9892-12-9 represents not only the principal of Rs. 5852-3-0 but includes within it the interest on Rs. 5852-3-0 till the date of the preliminary decree and the costs awarded. In so far as subsequent interest is concerned, the decree, therefore, provides only interest at 6 per cent. per annum on the sum of Rs. 5852-3-0 representing the principal sum and there is no specific provision in the decree as to any interest on costs and on interest on the principal.

(4) It is contended on behalf of the appellant that where no provision is made in the decree as to subsequent interest under the provisions of S. 34 cl. (2), Civil P. C., the decree being silent with respect to payment of such further interest, it must be held that the Court must be deemed to have refused such interest and there should therefore be no execution taken out for such additional interest. The power to award subsequent interest in mortgage decrees has now been conferred under Act 29 of 1929 and a provision is incorporated in O. 34, R. 11, Civil P. C., which empowers the Court to award interest in mortgage decrees. Rule 11 of O. 34, Civil P. C. says:

"In any decree passed in a suit for foreclosure, sale or redemption (in this case it is a suit for sale), where interest is legally recoverable, this Court may order payment of interest to the mortgagee..... (the several categories are noted.)

(a) interest upto the date of payment which will comprise interest on the principal amount due and declared on the mortgage, on account of costs awarded to the mortgagee, and on any amount adjudged to be due to the mortgagee as for costs, charges and expenses, if any, incurred in respect of the mortgage security upto the date of the preliminary decree."

Rule 11, cl. (b) deals with subsequent interest, that is, interest upto the realisation or actual payment which may be awarded by the Court if it considers reasonable on the aggregate of all the sums referred to in clause (a) and interest calculated therein. The Court is, therefore, empowered to award interest, such power having been conferred specifically under O. 34, R. 11, Civil P. C., while prior to the amendment by Act 29 of 1929 Courts were exercising such power under S. 34, Civil P. C. But the question for determination here is whether the Court has, in pursuance of the power under O. 34, R. 11, Civil P. C., exercised its power in awarding subsequent interest after the period provided for payment and, if so, to what extent.

(5) Sub-clause (i) of Cl. 2 of the decree is clear and unambiguous and what has been given as subsequent interest is only on the balance of the principal sum of Rs. 5852-3-0 at the rate of 6 per cent. per annum. At any rate sub-cl. (ii) of Cl. 2 is silent as to interest on costs. Any omission to refer to subsequent interest on costs, must be taken to mean that the Court must be deemed to have refused such interest; for this position Mr. Krishnamurthi, the learned counsel for the appellant relies on S. 34(2), Civil P. C. After the enactment of O. 34, R. 4, the question is whether the power of the Court to award subsequent interest is exercisable only under O. 34, R. 11 and not under any other provision of the Civil Procedure Code. In so far as this power is concerned, discretion is vested in Courts to award interest and in what manner that discretion has to be exercised is no doubt provided under O. 34, R. 11, Civil P. C. Section 34, Civil P. C. is a general provision relating to interest and S. 34(2) does not confer on the Court any power to award interest but embodies a rule of construction that where a decree is silent as to interest, it must be deemed that the Court must have refused interest; and, even apart from S. 34, in the absence of any other provision in the decree to justify the Court to come to a conclusion that subsequent interest has been awarded on the other sums also, applying the ordinary rule of construction it must be held that the omission must be due to the fact that the Court intended not to award interest on these sums.

(6) Mr. Bhimasankaram, however relies on subclauses (2) (3) and (4) of the decree which make reference, in the working out of the decree, to any subsequent interest as may be payable under Rule 11 of Order 34, Sch. I, Civil P. C., and contends that where there is a specific reference to subsequent interest that is payable under Rule 11, the Court must have intended to award subsequent interest

under the provisions of Order 34 Rule 11 and the executing Court has only to calculate interest at such rate as it may deem fit and the decree is one which cannot be said to contain no provision for subsequent interest in respect of costs and interest. The mention of subsequent interest in sub-clauses (ii), (iii) and (iv) only refers to "such subsequent interest as may be payable under Rule 11 of Order 34." Order 34, Rule 11, Civil P. C. does not lay down that all mortgage decrees shall provide for subsequent interest at a certain rate, when, in that event, the contention of the learned counsel for the respondent can be understood. The reference to subsequent interest in those clauses is only made to arrive at the exact amounts payable on the occasions mentioned in these clauses in which subsequent interest also has to be taken into account which subsequent interest would be payable under Rule 11 of Order 34, only if the Court had awarded it by virtue of the power which it had at the time of the passing of the preliminary decree & making provision for subsequent interest. Where there has been no such provision as is clear from the language of clause 2, sub-clause (i) reliance cannot be placed on a reference to subsequent interest in the decree to Rule 11 of Order 34, Civil P. C. I have no hesitation in holding on a construction of this decree that the decree-holder has been denied any interest apart from the 6 per cent on Rs. 5852-3-0, till the date of payment.

(7) Objection was taken to the maintainability of the petition as it is contended that the application would not lie and would be barred on the principle of constructive 'res judicata', for the reason that the judgment-debtors have not raised this question as to the exact amount due under the decree in E. P. No. 225 of 1947, the execution petition for sale taken out by the decree-holder, they having confined their objection only to reducing the rate of interest from 6 per cent to 5½ per cent; and by failure to have raised this contention in the execution petition they must be held to have barred by the principle of constructive 'res judicata' in raising it in the present petition. Attention is invited to the decisions reported in — 'Ulaganatha v. Alagappa', AIR 1929 Mad. 903 (A)' — 'Alluri Bapanna v. Inuganti Vengayya', AIR 1937 Mad 511 (B) and — 'Kailas Thevar v. Ramaswami', A. I. R. 1949 Mad. 238 (C) in support of the position that the mere fact that a judgment-debtor does not in a previous execution proceeding object that the amount for which execution is taken out is in excess of the decree itself does not bar the judgment-debtor from raising that objection in subsequent execution proceedings. In short the principle of constructive 'res judicata' in execution proceedings would not be applicable to cases where the question of the amount for which execution is taken out is in dispute and that it would be open to the judgment-debtors at any time in any execution proceedings to raise the objection that the amount for which execution is sought for is not the correct amount due under the decree. Walsh J. in — 'AIR 1929 Mad. 903 (A)' observed as follows at page 906:

> "That the appellants did not then object that the amount for which execution was taken out was in excess of the decree itself does not, we consider, bar them from raising this plea in subsequent execution proceedings. To hold otherwise would imply that the decree is itself superseded by orders in execution which allows more than what the decree granted."

The question that is in dispute is only as to the amount that will ultimately be payable under the decree which should depend upon a construction of the decree itself. In — 'AIR 1937 Mad. 511 (B)' Horwill J. observed 'at p. 514' that the principle of constructive 'res judicata' must be applied with caution to execution proceedings and that it can only be applied to cases where the Court could not have acted as it did if the judgment-debtor had successfully raised the points which are sought to be held by this principle against him. In general, the learned Judge enumerated four classes of cases where the Court cannot order execution unless it was satisfied that the petitioner has a right to execute, that the judgment-debtor is liable to satisfy the decree, that the decree is executable and that it is not barred by limitation; and since these are matters that should necessarily be considered by a Court before it orders execution and if the Court orders execution to proceed, it must be presumed that the Court has considered these aspects and as the conditions were found to be satisfied, execution was ordered. As further observed by the learned Judge,

> "The mere fact, that the sum for which the decree is sought to be executed is not the correct amount due by the judgment-debtor to the decree-holder would not prevent execution from proceeding, ..."

The fact, therefore, that execution was ordered would not amount to an adjudication that the correct amount due under the decree was ascertained as the amount for which execution was ordered. Further, especially as Section 11, Civil P. C. is not made in terms applicable to execution proceedings it will be inequitable to extend and apply the principle of Section 11 in toto to execution proceedings as the application of Section 11 with all its implication to execution proceedings will result in hardship, in particular to judgment-debtors. With respect, I agree with the observations of Horwill J. in the case above referred to that caution must be exercised in applying the principle of constructive 'res judicata' to execution proceedings. There can be no doubt that what is raised in E. A. No. 94 of 1949 is only an objection as to the exact amount due under the decree. In E. P. No. 225 of 1947 the objection was not raised but that did not prevent the Court executing the decree as the decree was executable otherwise. It will be open always to judgment-debtors at any stage in the execution proceedings, so long as the decree is not satisfied, to contest the correctness of the amount for which execution is sought for. The judgment-debtor is only bringing to the notice of the Court that it would not be open to the executing Court to go behind the decree in the sense that it could not order execution for an amount which is not provided under the decree. As in the present case the ascertainment of the amount would depend upon a construction of the decree and it is contended — which contention I accept — there is no provision for subsequent interest it cannot be said that execution for a larger amount than that provided in the decree could be permitted. The objection on the principle of the application of constructive 'res judicata' cannot, therefore, stand.

(8) In the result the appeal is allowed with costs and E. A. is remanded to the lower Court for disposal in the light of the observations herein.

B/D.R.R. Appeal allowed.

A. I. R. 1953 MADRAS 950 (Vol. 40, C. N. 376)

RAGHAVA RAO J.

Commr., Hindu Religious and Charitable Endowments Board, Appellant v. Gangamma and another, Respondents.

A. A. O. No. 425 of 1949, D/- 30-10-1952.

Madras Hindu Religious Endowments Act (2 of 1927), S. 9 (12) — Temple — Evidence of dedication.

Where the evidence shows that the lands at the place of disputed shrines and the houses surrounding them stand registered in the names of the deities concerned and that for ordinary purposes of worship in the shrine any Hindu member of the locality irrespective of his caste or creed could very well visit it, without any restriction or interruption from any party, the place must be held to be a temple within the meaning of S. 9 (12) of the Act. AIR 1940 PC 7, Ref. (Paras 4, 8)

Further, the fact that there are 'utsava vigrahas' inside the shrines which are taken out in procession for the worship of the public in the streets is important as showing facilities for public worship by means of processions given to the residents of the locality by those in management of the shrines. (Para 6)

Where dedication is asserted by one side and denied by the other one, such act of interruption by the party disputing the dedication would be a more conclusive kind of material than any amount of assertion of right on the part of the party claiming the dedication. (In this case there was no evidence of such interruption). (Para 7)

M. Seshachalapathy, for Appellant; C. Kondayya, for Respondents.

CASES CITED:

(A) ('16) AIR 1916 Mad 78: 2 Mad LW 853
(B) ('20) AIR 1920 Mad 42: 1919 Mad WN 899 (FB)
(C) ('38) AIR 1938 Mad 209: 175 Ind Cas 738
(D) ('40) AIR 1940 PC 7: 15 Luck 1 (PC)

JUDGMENT : There are three temples situated in Adoni with reference to which a declaration was sought by the respondent before me that they were not temples as defined by S. 9 sub-cl. 12 of the Madras Hindu Religious Endowments Act but private institutions for private worship for the benefit of herself and to all the members of the families to which she (P. W. 1) belongs — the Hyati family as it is described in the records and the court family with which the Hyati family was connected by marital ties. The respondent before me succeeded in her application to the District Court under S. 84 of the Madras Hindu Religious Endowments Act although she had failed before the Hindu Religious Endowments Board in the enquiry which preceded the petition in the District Court.

(2) The entire material relevant to the decision of the matter before me lies in a short and narrow compass. The oral evidence given before the District Court consisted of the petitioner before it as P. W. 1 and seven witnesses on the opposite side. The report of the Assistant Commissioner of the locality for the Endowments in question was also put before the Court as a document which came into existence as a result of the enquiry by the Inspector in which several persons of the locality were examined by him. The documentary evidence, further consisted of Ex. B. 2 series, certain receipts for payment of municipal taxes.

(3) On these materials which have been very carefully canvassed by learned counsel on both sides before me at very great length I have come to the distinct conclusion that the only possible view to take of this matter is that the places of worship in question are temples as defined by the Madras Hindu Religious Endowments Act.

(4) Mr. Kondayya the learned advocate for the respondent has emphasised the following considerations as supporting the view taken by the District Court: (1) that the temples were constructed long long ago about a century back not out of the funds from the public but presumably from out of the funds contributed by the ancestors of his client, (2) that for marriages performed within the precincts of the temples or for bhajanas conducted therein the permission of the members of his client's family used to be taken, (3) that the expenses for the worship in the temples inclusive of all the food preparations and other preparations were found only by the members of the families of her ancestors, and (4) that the poojari of the temples would after worship was over handover the keys of the temples to one or other persons in the management of the temples who were persons belonging either to the Hyati family or the court family. Learned counsel has also urged that but for some spite and illwill that arose between R. W. 7 and P. W. 1 there would not have been the slightest attempt on the part of the Endowments Department to claim these places of worship as temples under the Act. It is not disputed before me by the learned counsel for the respondent that the lands at Rampur and the houses round about the shrines stand registered in the names of the deities concerned. Nor could it be disputed by him as the evidence on record on both sides is all one way to that effect, that for ordinary purposes of worship in the shrine any Hindu member of the locality irrespective of his caste or creed could very well visit. All the seven witnesses on the side of the respondent before the Court below have definitely sworn that there is absolute freedom of worship for such people in the shrines. It is significant to notice that there is no statement in the deposition of P. W. 1 herself that there were any restrictions on such worship. Relying on these facts which have been practically found by the Court below in its judgment, Mr. Seshachalapathi for the appellant has argued that the character of the shrines must be regarded as that of temples according to the definition of the Act.

(5) He has also relied on a number of decisions of this Court — amongst these I may mention —'Vasudevan Atisseripad v. Konarupettamanna', AIR 1916 Mad 78 (A), — 'Subramania Aiyar v. Lakshmana Goundan', AIR 1920 Mad 42 (FB) (B) and —'Narayanan v. Hindu Religious Endowments Board Madras', AIR 1938 Mad 209 (C) in support of his submission that if the user of these shrines as places of worship is established there is the presumption that the user is as of right and that unless the presumption stands rebutted by the evidence on record the places must be regarded as temples within the meaning of the Act. As against these decisions Mr. Kondayya the learned advocate for the respondent has drawn my attention to a decision of the Privy Council reported in — 'Bhagwan Din v. Gir Har Saroof', AIR 1940 PC 7 (D) which goes to show that the dedication of a private shrine to the public ought not to be readily inferred but its historical background

must, when a question of dedication has to be decided, be taken into account. In this submission, Mr. Kondayya is, in my opinion, perfectly correct. The question however, is whether there is anything in the historical background regarding the origin of the shrines with which we are now concerned which goes to show that there was an original creation of these shrines as private institutions. If such material existed, undoubtedly the burden of proving that what was a private institution at the inception became a public institution subsequently would lie heavily on the party alleging it. Likewise, if, as was the situation in the reported case of the Privy Council the question arose whether certain lands granted to an individual were granted to him in his capacity of the holder of the shrine or in his own individual capacity, the origin of the grant would have to be investigated with reference to appropriate facts which may bear on the question whether the properties in dispute are properties belonging to the shrine or the individual claiming them. I may also state what I consider to be a guiding factor for me in the present case that if the evidence on record left any doubt with reference to the user as of right or of dedication inferable therefrom I should dismiss this appeal as the burden lying upon the appellant cannot in my opinion stand discharged by his pointing to nicely balanced considerations derived from the evidence on record showing the equal possibility of the judgment appealed against being wrong as well as right.

(6) After the careful consideration I have bestowed on the matter, the first thing which I have to mention is regarding the practice of worship. As the learned advocate for the appellant rightly emphasised, the ordinary religious worship associated with the shrines in question is open to all the Hindu residents of the locality and without any sort of restriction from any body whatsoever. With reference to the construction of another shrine within the same precincts at a later date, namely, the shrine of Kasi Visweswaraswami and with reference to other kinds of worship than the usual worship associated with the shrines with which we are concerned there is the evidence of permission from some people belonging to the Hyaty family or the court family. There is no such restriction talked of by P. W. 1 with reference to the usual worship in the shrines. The fact that bhajanas, marriages and upanayanams are not done in the shrines except with permission of the persons in charge of the management of the shrines does not in my view affect the determination of the question now before me. What I may refer to as one other material factor for my decision is not so much the circumstances or fact referred to in the decisions cited before me as constituting relevant tests to be applied as the exact language of the statutory definition which I consider to be the paramount if not exclusive factor for consideration. Bearing this in mind I may leave out of consideration a number of details adverted to before me for the appellant, namely, that there is a dwajasthambam, in front of the shrine, that there are bells ringing there in and that the size of the idols installed in the shrines is fairly big and such as one would expect only in the case of public temples. There is, however, one feature adverted to by the learned advocate which is of some significance in the context of my discussion and to which I must refer, namely, that there is evidence on record which points out unequivocally that there are 'utsava vigrahas' inside the shrines which are taken out in procession for the worship of the public in the streets. This feature is important as showing facilities for public worship by means of processions given to the residents of the locality by those in management of the shrines.

(7) It is true that if notwithstanding the evidence of user which have in one voice and to one effect, on record there was evidence of any kind of interruption afforded on any particular occasion to the usual mode of worship by the residents of the locality, that would be a very important matter which I must take into account on the side of the respondent before me but of such interruptions by the members of the Hyati family or the court family there is no evidence at all on record. Where dedication is asserted by one side and denied by the other one such act of interruption by the party disputing the dedication would as the Privy Council pointed out be a more conclusive kind of material than any amount of assertion of right on the part of the party claiming the dedication. Mr. Kondayya has pointed out relying upon Privy Council decision reported in 'AIR 1940 PC 7 (D)' that in case of shrines or places of religious worship founded even by a private individual for the benefit of himself and the members of his family it is not uncommon in this country for persons in management to take offering from the public as such offering might tend to augment the resources of the shrine and to infer a dedication from such a fact is certainly not within the competence of the court. There is more evidence on record in support of the statutory definition as being applicable to the present case than mere making of such offerings by the public at large and there is no evidence at all whatsoever of any permission asked for with reference to ordinary mode of worship associated with the shrines by anybody who was a member of the public and sought to visit the shrines for darshan or worship of the deities. In fact P. W. 1 has not spoken of any such permission as I have already stated.

(8) Learned counsel for the respondent has also urged that P. W. 7 who was at the bottom of the mischief which has culminated in the present dispute has in his report submitted to the Board adverted to the reports taken by him from the residents of the locality which are in favour of the respondent. P. W. 7's evidence is before the court and unless anybody from whom the statement was taken by him has gone into the witness box either for purposes of corroboration or for the purposes of contradiction of the material placed by the Inspector in his testimony before the Court I do not think that the argument that the report is based on the material furnished by the residents of the locality can be of any help to the respondent's counsel in the disposal of this appeal. Owing to all these circumstances I come to the irresistible conclusion that the shrines in question were rightly declared by the Board to be within the scope of the definition of temple in the Act.

(9) For these reasons this appeal must stand allowed with costs.

B/D.R.R. Appeal allowed.

A. I. R. 1953 MADRAS 953 (Vol. 40, C. N. 377)

SOMASUNDARAM J.

In re Ramanath Bholgothra (of Jammu), Petitioner.

Criminal Revn. No. 206 of 1953 and Criminal M. P. No. 371 of 1953, (Criminal Revn. Petn. No. 188 of 1953), D/- 17-3-1953.

(a) Criminal P. C. (1898), S. 6 — 'Court' — Meaning — (Words and Phrases — Court).

There is no definition of 'Court' in the Criminal Procedure Code. But a "Court" is ordinarily understood as "a place where justice is judicially administered." For the sake of brevity the Code uses the term 'Court' and 'Magistrate' generally if not always, as convertible terms. 39 Cal 953 (PC), Rel. on. (Para 6)

Anno: Cr. P. C., S. 6 N. 1.

(b) Criminal P. C. (1898), S. 18 — Commissioner of Police, Madras — (Madras City Police Act (3 of 1888), S. 7).

In the Code wherever there is reference to the Presidency Magistrate it can only mean and refer to the Presidency Magistrate appointed under S. 18 of the Code. The Commissioner of Police, Madras and his deputies who are Presidency Magistrates by virtue of their office are not Presidency Magistrates appointed under S. 18. Though they may have the powers of Presidency Magistrates by virtue of S. 7 of the Madras City Police Act, they are not Courts of Presidency Magistrates under the Code. (Para 6)

(c) Criminal P. C. (1898), S. 93A — Application to Commissioner of Police, Madras — Warrant of arrest from Jammu and Kashmir addressed to Police Commissioner — Executability.

There are no provisions in the Madras City Police Act making S. 93A apply to the Commissioner of Police. Nor is there any notification of the Government under S. 1, Cl. (2) proviso of the Code. Hence S. 93A does not apply to the Commissioner of Police.

Section 93A is the only provision under which warrants received from external Courts can be executed. A warrant of arrest of a person forwarded to the Commissioner of Police, Madras, by the Inspector-General of Police, Jammu and Kashmir Government, cannot therefore be executed by the Commissioner of Police, both for the reason that the Commissioner of Police is not a Court and that S. 93A of the Code does not apply to him. (Para 8)

Anno: Cr. P. C., S. 93A N. 1.

(d) Criminal P. C. (1898), S. 93A — Warrant of arrest for detention in Jammu and Kashmir — Execution in Madras.

If a person is arrested in one State because he is wanted by another State for detention in that State such an arrest is illegal. If this is so, in the case of State 'inter se' within the Union, a 'fortiori' a person cannot be arrested in Madras for the purpose of detention in the State of Jammu and Kashmir. If the person is wanted for an offence, it must be clearly stated in the warrant, with necessary particulars and descriptions and S. 93A must be strictly followed. AIR 1951 Mad 583, Rel. on. (Para 9)

V. V. Srinivasa Aiyangar and M. V. Ganapathi, for Petr. (in No. 206/53) and for Respondent (in No. 371/53); State Prosecutor, for the State.

CASES CITED:

(A) ('12) 39 Ind App 163: 39 Cal 953 (PC)
(B) ('51) AIR 1951 Mad 583: 1951 Mad WN Cr 21: 52 Cri LJ 294

Order: The above two petitions relate to the arrest of one Ramanath Bholgothra of the State of Jammu and Kashmir. He was taken into custody by the Madras Police on 6-2-1953 and released on bail by an order of this Court dated 11-2-1953. At the time of the arrest the only information which the Madras Police had was a communication from the Hyderabad Police to the Madras Police that the person was wanted by the Jammu and Kashmir Police. The Madras Police arrested him under Section 54, Cr. P. C. and, as already stated, he was released on bail on order of this Court dated 11-2-1953. After the release he made an application to the Chief Presidency Magistrate on 26-2-1953 for cancellation of the bonds executed by him and the sureties. As bail was granted by this Court, the Chief Presidency Magistrate declined to cancel the bonds holding that he had no power to do so and referred the petitioner to this Court. Against this order the petition Crl. R. C. No. 206 of 1953 is preferred for cancellation of the bonds. In the meantime, a warrant for the arrest of Ramanath Bholgothra issued by the Additional District Magistrate of Jammu in Kashmir State has been received by the Commissioner of Police, Madras city. The State Prosecutor has made an application in Crl. M. P. No. 371 of 1953 for the cancellation of the bail granted to the said person and for permission to arrest. After notice to the other side both the applications were heard together.

(2) The warrant that has been issued by the Additional District Magistrate of Jammu is in Urdu and a translation of it was furnished by the State Prosecutor. I had it translated in English by the Court translator also, and according to the Court translation the warrant reads as follows:

"Judicial 315/1

For the arrest of accused

Warrant for the arrest of accused

In the Court of the Additional District Magistrate, Jammu

The State
Vs
Ramnath and others.

Offence under Section 40 (7) of the Public Security Act, 1934 (?) Jammu-Kashmir Defence Act.

To
Court Inspector, Jammu

One Mussamath Ram Nith Bhalgotra, Advocate, son of Amarnath, Khatri by caste, resident of Jammu is charged for the aforesaid offence. Therefore, you are hereby ordered to cause the arrest of the said Ramnath Bholgothra, Advocate, Jammu, and to produce him before me.

You are hereby warned to carry out this.

Dated 2nd Bhogi ....

(?)—
Signature

From
The Commissioner of Police, Jammu
The original is retained for the purpose of keeping on the file

2—11

Sd.
(in English)"

It is clear from the terms of the warrant that it is addressed to the Court Inspector, Jammu. This has been forwarded to the Commissioner of Police, Madras, by the Inspector General of Police, Jammu and Kashmir Government with a covering letter. The Commissioner of Police thereupon entrusted it to the Inspector of Police for execution. The warrant is now sought to be executed after getting the bail granted to Ramanath Bhoigothra cancelled.

(3) The procedure which governs the execution of such warrants is laid down in Section 93-A, Cr. P. C. Clause (3) of Section 93-A relates to warrants issued by an external Court and it is as follows:

"(3) Where an internal Court has received for service or execution a summons to, or a warrant for the arrest of, an accused person, issued by an external Court, it shall cause the same to be served or executed as if it were a summons or warrant received by it from another internal Court for service or execution within the local limits of its jurisdiction; and

Where any such warrant of arrest has been so executed the person arrested shall, so far as possible, be dealt with in accordance with the procedure prescribed by Sections 85 and 86."

That the Court of the Additional District Magistrate, Jammu and Kashmir is an external Court within the meaning of the Criminal Procedure Code is not disputed. Such a warrant can be executed only by the internal Court when it is received by it for execution. The warrant shows that it is addressed only to the Court Inspector, Jammu, and it is not addressed to any internal Court within the meaning of that term contained in S. 93-A.

(4) It is contended by the State Prosecutor that by the covering letter of the Inspector General of police, Jammu and Kashmir Government the warrant has been received by the Commissioner of Police and as under Section 7 of the City Police Act, he is a Presidency Magistrate, he must be considered to be a Court within the meaning of Section 93-A of the Code, and therefore, the Commissioner of Police in his capacity as a Presidency Magistrate can execute the warrant.

(5) The question to be considered is whether the Commissioner of Police who by virtue of his office is a Presidency Magistrate, is a Court to which the Criminal Procedure Code applies.

(6) There is no definition of "Court" in any of the Acts, and certainly, there is none in the Criminal Procedure Code. But a "Court" is ordinarily understood as "a place where justice is judicially administered". (See Stroud's Judicial Dictionary). In — 'Clarke v. Brojendra Kishore Roy', 39 Cal. 953 (P. C.) (A) their Lordships of the Privy Council have stated that

"For the sake of brevity the Code uses the term 'Court' and 'Magistrate' generally if not always, as convertible terms."

Under the Code, apart from the High Court only five classes of criminal Courts are constituted and they are mentioned in Section 6 of the Code. The Court of the Presidency Magistrate is one of them. Sections 9 to 12, Cr. P. C. deal with the establishment of Courts and appointment of Magistrates. Section 18 deals with the appointment of Presidency Magistrates. Section 18(1) is as follows:

"The Provincial Government shall from time to time appoint a sufficient number of persons (hereinafter called Presidency Magistrates) to be Magistrates for each of the presidency towns and shall appoint one of such persons to be Chief Presidency Magistrate for each such town."

Presidency Magistrates appointed under the above section are the Courts of Presidency Magistrates mentioned in Section 6 and the Presidency Magistrates mentioned in Section 6 are appointed under Section 13. In the Code wherever there is reference to the Presidency Magistrate it could only mean and refer to the Presidency Magistrate appointed under Section 18 of the Code. The Commissioner and his deputies who are Presidency Magistrates by virtue of their office are not Presidency Magistrates appointed under Section 18. Though they may have the powers of Presidency Magistrates by virtue of S. 7 they are not Courts of Presidency Magistrates under the Code.

(7) In Section 93-A the expression "internal Court" is defined as "any court in the territories to which this Code extends". Section 1 clause (2) defines the scope and extent of the Code and it is as follows:

"It extends to the whole of India except the States of Jammu and Kashmir & Manipur; but in the absence of any specific provision to the contrary, nothing herein contained shall affect any special or local law now in force, or any special jurisdiction or power conferred, or any special form or procedure prescribed by any other law for the time being in force, or shall apply to—

(a) the Commissioners of Police in the towns of Calcutta, Madras and Bombay, or the Police in the towns of Calcutta and Bombay;
(b) heads of villages in the State of Madras or
(c) village police officers in the State of Bombay;

Provided that the Provincial Government may, if it thinks fit, by notification in the Official Gazette, extend any of the provisions of this Code, with any necessary modifications, to such excepted persons."

(8) According to the above clause, unless there is a specific provision to the contrary the Code does not apply to the Commissioners of Police in the City of Madras. It is needless to mention that a specific provision to the contrary must be made in the Code itself. In fact, wherever the Code is extended to the Police at Calcutta, it is specially mentioned. See Sections 54, clause (2), 55 (2), 56 (2), 83, 84 (4) & 85 of the Code. The above sections are special provisions to the contrary to clause (2) of Section 1. Unless, therefore, there is a special provision making Section 93-A applicable to the Commissioner of Police, it will fall within the general prohibition, and the Code will not apply to the Commissioner of Police. It is not contended that there is any notification by the Provincial Government extending the provisions of this Code to the Commissioner of Police. There is no provision in the Madras City Police Act by which the Code is made applicable to the Commissioner of Police. By section 31 of the Madras City Police Act, certain sections of the Criminal Procedure Code such as Sections 523, 524 and 525 have been made applicable to the Police in the City. Similarly by Section 51-A clause (3) of the Act, the Commissioner or the Deputy Commissioner has been empowered to exercise all or any of the powers of Court under Sections 75 to 77, Cr. P. C. This shows that the Madras City Police Act may provide for the application of any of the provisions of the Criminal Procedure Code to the Commissioner of Police. In the absence of such a provision the alternative is that there should be a notification as required by the proviso to Section 1 clause (2) of the Code. There are no provisions in the City Police Act making Section 93-A apply to the Commissioner of Police. Nor is there any notification of the Government un-

der Section 1 clause (2) proviso. In these circumstances apart from the fact that the Commissioner of Police, though he may be a Presidency Magistrate by virtue of Section 7 of the Madras City Police Act cannot by any means be called a Court on account of the prohibition contained in clause (2) of Section 1. The provisions of the Code do not apply to him. Hence Section 93-A does not apply to the Commissioner of Police, and Section 93-A is the only provision under which warrants received from external courts can be executed. If it does not apply to the Commissioner of Police, he cannot execute the warrant. Both for the reason that the Commissioner of Police is not a court and that Section 93-A of the Code does not apply to him, the warrant that is now sought to be executed by him cannot be executed against the person for whose arrest the warrant has been issued.

(9) There is one other reason which stands in the way of the warrant being executed against the respondent in Cr. M. P. No. 371 of 1953. It is clear from the warrant issued by the Additional District Magistrate, Jammu and Kashmir Government that the person sought to be arrested is wanted under the Public Safety Act, No. 32, Jammu and Kashmir Government rules. The section of the Act under which he is sought to be arrested is Section 29 according to the copy given by the State Prosecutor and Section 49 according to the Court translation. The warrant as already stated is in Urdu. Whether it is Section 29 or 49 there is nothing to indicate what that offence is. The particulars of the offence are not mentioned, nor is there any description of the offence. But it is apparent that the person sought to be arrested is wanted under the Public Safety Act of that State. Generally under the Public Safety Act persons are arrested for detention and not for trial for any offence. In such cases, it has been held by a Bench of this Court consisting of Govinda Menon and Basheer Ahmed Sayeed JJ. in — 'Mohan Kumaramangalam In re', AIR 1951 Mad. 583 (B) that if a person is arrested in one State because he is wanted by another State for detention in that State such an arrest is illegal. If this is so, in the case of State 'inter se' within the Union 'a fortiori' the respondent in Crl. M. P. No. 371 of 1953 cannot be arrested in Madras for the purpose of detention in the State of Jammu and Kashmir. If the person is wanted for an offence, it must be clearly stated in the warrant, with necessary particulars and descriptions and Section 93-A must be strictly followed.

(10) For the above reasons, I am of opinion that the warrant that has been sent by the Additional District Magistrate, Jammu and Kashmir Government under which Ramanath Bhalgothra is now sought to be arrested cannot be executed against him in this State. The petition preferred by the State Prosecutor, Crl. M. P. No. 371 of 1953 is therefore dismissed.

(11) In view of the order in Crl. M. P. No. 371 of 1953 I must allow the petition Crl. R. C. No. 206 of 1953. The bail bonds executed by the petitioner and by the sureties will be cancelled.

B/D.R.R. Order accordingly.

A. I. R. 1953 MADRAS 955 (Vol. 40, C. N. 378)

MACK J.

G. Ramachandra Gupta and another, Appellants v. Pandurangam Chetty and others, Respondents.

A. A. O. No. 352 of 1950 and Civil Revn. Petn. No. 1621 of 1950, D/- 17-4-1953.

(a) Civil P. C. (1908), S. 151, O. 41, R. 27 — Invoking of S. 151.

Section 151 can, under no circumstances, be invoked in a case covered by O. 41, R. 27 which by itself confers on an appellate Court ample discretion to have produced before it any evidence it requires to do justice in a case. (Para 2)

Anno: Civil P. C., S. 151 N. 2; O. 41, R. 27 N. 1.

(b) Civil P. C. (1908), O. 41, R. 27 — Remand for fresh disposal.

Order 41, R. 27 does not contemplate an appellate Court remanding a suit to the trial Court for fresh disposal with a direction to admit any fresh evidence before it. This provision makes it obligatory on the appellate Court itself to admit additional evidence and take it into consideration although, it may, under O. 41, R. 28, direct the trial Court, or any other subordinate Court, to record such evidence and send it to the appellate Court to assist it in arriving at a final decision. (Para 2)

Anno: Civil P. C., O. 41, R. 27 N. 12, 15.

(c) Civil P. C. (1908), O. 41, R. 27 — Remand for fresh disposal.

The appellate Court cannot admit further evidence in appeal and then remand the suit for a fresh disposal to the trial Court on the footing of such evidence to be taken before it, thereby incidentally embarrassing also the trial Court very considerably, which had come to its own conclusion to the best of its ability on the material placed before it. (Para 2)

Anno: Civil P. C., O. 41, R. 27 N. 12, 15.

C. Vasudevan, for Appellants; K. S. Desikan and K. Raman, for Respondents.

JUDGMENT: A. A. O. 352/50:—This is an appeal by the plaintiffs against an order of remand by the learned District Judge of Salem which cannot possibly be supported. In the suit a will executed by one Narasimha Chetty was propounded by the defendants. The learned Subordinate Judge found that it was not genuine. In appeal, it would appear, after the arguments began, an application I. A. No. 124 of 1950 was filed on behalf of the defendants to send the Will to the examiner of questioned documents or any other accredited hand-writing expert and for the admission of such additional evidence. The learned District Judge thought it necessary in the interests of justice to do so and remanded the whole suit for fresh disposal allowing the prayer in I. A. No. 124 of 1950.

(2) The procedure adopted by the learned District Judge as it appears to me, is repugnant to O. 41, R. 27, Civil P. C., which forbids parties to an appeal to produce additional evidence whether oral or documentary in the appellate Court except on certain stringent conditions.

Mr. Desikan would seek to bring the application for admission of additional evidence filed on behalf of the defendants under O. 41, R. 27 (1) (c), Civil P. C. This provision only operates when the appellate Court requires any documents to be produced, or any witness to be examined to enable it to pronounce judgment or for any other substantial cause. I. A. No. 124 of 1950 was rather strangely not filed under any provision of O. 41 but under the omnibus S. 151, Civil P. C. which can, in my view, under no circumstances, be invoked in a case covered by O. 41, R. 27, Civil P. C., which by itself confers on an appellate Court ample discretion to have produced before it any evidence it requires to do justice in a case. In any event O. 41, R. 27, Civil P. C. does not contemplate an appellate Court remanding a suit to the trial Court for fresh disposal with a direction to admit any fresh evidence before it. This provision makes it obligatory on the appellate Court itself to admit additional evidence and take it into consideration although, it may, under O. 41, R. 28, Civil P. C., direct the trial Court, or any other subordinate Court, to record such evidence and send it to the appellate Court to assist it in arriving at a final decision. If the learned District Judge felt that the interests of justice required the opinion of a hand-writing expert there was no legal impediment to his obtaining that assistance by way of additional evidence under O. 41, R. 27 (1) (c), Civil P. C. and utilising it for a final disposal of the appeal. One thing he cannot do, and that is, admit further evidence in appeal and then remand the suit for a fresh disposal to the trial Court on the footing of such evidence to be taken before it, thereby incidentally embarrassing also the trial Court very considerably, which had come to its own conclusion to the best of its ability on the material placed before it.

The learned District Judge appears to have felt very strongly that the interests of justice required the expert evidence of an examiner of questioned documents or an accredited hand-writing expert, without any consideration of the failure of the defendants to apply for this evidence being made available in the trial Court. A remand of this kind has the effect of protracting litigation indefinitely and starting a fresh cycle from the trial Court upwards. Far from being able to agree that the interests of justice require a reference to a hand-writing expert, I am clearly of opinion that the interests of justice require as speedy a decision as possible of this litigation, this suit having been filed in 1946. Justice delayed like this is justice denied. The appeal will be restored to the file of the District Judge with a direction to him to give it as expeditious a disposal as possible on the merits and on the evidence already recorded in the trial Court. Costs of this appeal will abide the result and be provided for in the ultimate decree.

(3) C .R. P. No. 1621 of 1950: This revision petition against the order of the District Judge allowing I. A. No. 124 of 1950 is allowed with costs irrespective of the result.

B/D.H.Z. Order accordingly.

A. I. R. 1953 MADRAS 956 (Vol. 40, C. N. 379)

SOMASUNDARAM J.

Bondalapati Thatayya, Petitioner v. Gollapudi Basavayya and others; Respondents.

Criminal Revn. Nos. 195 and 208 of 1953 and Cri. Revn. Petn. Nos. 180 and 190 of 1953, D/- 26-3-1953.

(a) Criminal P. C. (1898), Ss. 144 and 4(1) (m) — Nature of order.

Not only is the order of a Magistrate under S. 144 of the Code a judicial order but he also acts as a Court when he files a complaint under S. 188, Penal Code when there is a disobedience of that order. Case law discussed. (Para 4)

Anno: Cr. P. C., S. 144 N. 12, 13, 16; S. 4(1) (m) N. 5.

(b) Criminal P. C. (1898), Ss. 144, 195, 10, 17, 528 and 476 — Withdrawal of complaint for disobedience of order under S. 144 — Competency of Additional District Magistrate. AIR 1951 All 828, Dissent.

A First Class Magistrate is subordinate to the District Magistrate and not to the Additional District Magistrate. AIR 1944 Nag 84, Foll. (Para 6)

Where a First Class Magistrate has filed a complaint under S. 188, Penal Code for the disobedience of his order under S. 144, Criminal P. C., the Additional District Magistrate has no jurisdiction to withdraw it whether the First Class Magistrate is considered to have filed the complaint as a Court or purely as a public servant. On the former view it is the Sessions Court and on the latter view it is the District Magistrate that has power to withdraw the complaint. (Para 7)

In this view of the matter the effect of S. 476 of the Code on the question whether the First Class Magistrate acted as a Court or as purely a public servant when filing the complaint under S. 188, Penal Code does not arise as that consideration can arise only when the Court is called upon to decide which of the clauses of S. 195 of this Code applies for the withdrawal of that complaint. (Para 5)

Anno: Cr. P. C., S. 10 N. 5, 6, 7; S. 17 N. 5; S. 528 N. 1, 9; S. 476 N. 1; S. 144 N. 12; S. 195 N. 3.

T. Veerabadrayya, for Petitioner; in Crl. R. C. No. 195 of 1953 & for Respondent in Crl. R. C. No. 208 of 1953; A. Rama Rao, for Respondents in Crl. R. C. No. 195 of 1953 and for Petitioner in Crl. R. C. No. 208 of 1953; Public Prosecutor, for the State.

CASES CITED:

(A) ('19) AIR 1919 Mad 610: 42 Mad 64: 20 Cri LJ 78
(B) ('23) AIR 1923 Mad 473: 1923 Mad WN 240: 24 Cri LJ 424
(C) ('83) 2 Weir 77: 6 Mad 203 (FB)
(D) ('34) AIR 1934 Mad 473: 1934 Mad WN Cr 83: 35 Cri LJ 1134
(E) ('45) AIR 1945 Mad 58: 1944 Mad WN Cr 135 (2): 46 Cri LJ 421
(F) ('51) AIR 1951 All 828: 52 Cri LJ 1508
(G) ('44) AIR 1944 Nag 84: 45 Cri LJ 296
(H) ('48) AIR 1948 Mad 474: 1948 Mad WN 69: 49 Cri LJ 711

ORDER: The above two petitions arise out of an order passed by the Addil. First Class Magistrate Masulipatam, under S. 144, Criminal P. C. On a petition filed on 2-7-1952 by one Bondalapati Thatayya against one Gollapudi Basavayya and 13 others an order was passed under S. 144, Cl. (2), Criminal P. C. by the Additional First Class Magistrate on 7-7-1952. Before 7-7-1952 the Additional First Class Magistrate called for a report from the police on the petition filed by the said Thatayya. Before the report was sent, the Court was again moved by the said Thatayya for an emergent ex parte order. It was then the ex parte order was passed on 7-7-1952 restraining the respondents in that petition, who are also respondents here (in Cr. R. C. No. 195 of 1953) from interfering with the bodi through which the petitioners were said to have been taking water to their lands. The respondents thereupon presented a petition to rescind that order on 17-7-1952. While that petition was pending Thatayya reported to the Station House Officer on 21-7-1952 that the order under S. 144, Criminal P. C. has been violated by the respondents by completely obliterating the entire bodi. On 23-7-1952 the said Thatayya filed a petition before the Additional First Class Magistrate making the same allegations as in the petition to the police and requesting the Court to take action for the disobedience of the order. On a report by the police on 25-7-1952 that the order has been disobeyed, a complaint was filed on 7-8-1952 by the Additional First Class Magistrate before the Stationary Sub Magistrate, Avanigadda for an offence under S. 188, Penal Code. This case was numbered as C. C. No. 661 of 1952. The respondents thereupon preferred a petition on 25-8-1952 before the Additional District Magistrate for withdrawal of the complaint. The Additional District Magistrate withdrew the complaint and it is against that order Cr. R. C. No. 195 of 1953 has been filed. The order by the Additional District Magistrate was passed on 9-9-1952.

(2) While the petition for withdrawal of the complaint before the Additional District Magistrate was pending the Circle Inspector of Police registered a case against these respondents for offences under Ss. 143, 186 and 430, Penal Code, alleging that these respondents have formed themselves into an unlawful assembly, and obstructed a public servant, to wit a police constable, and caused resistance to him, and also stated that they caused diminution of supply of water. This according to the charge-sheet, happened on 28-8-1952. The charge-sheet was filed on 27-11-1952 in C. C. No. 1006 of 1952 in Stationary Sub Magistrate's Court, Divi. The accused therein filed a petition stating that the Court could not proceed with the case and the petition was dismissed and, it is against the order Cr. R. C. No. 208 of 1953 has been filed.

(3) I will take up first Cr. R. C. No. 195 of 1953. Two points are raised in the above revision. The first is that the Additional First Class Magistrate, Masulipatam, when he passed an order under S. 144, Criminal P. C. did so as a Court and the complaint filed by him for the offence under S. 188, Penal Code is by a public servant acting as a Court and the only authority that could withdraw the complaint is the authority to whom an appeal ordinarily lies from the Court of the Additional First Class Magistrate; that is to say, the only authority that could withdraw the complaint is the Sessions Judge of Masulipatam. The second point is, that even if it is held that the Additional First Class Magistrate, Masulipatam was not acting as a Court, still the authority who could withdraw the complaint is the District Magistrate, and not the Additional District Magistrate, as the Additional First Class Magistrate is subordinate only to the District Magistrate and not to the Additional District Magistrate.

(4) In support of his contention that the Additional First Class Magistrate was acting as a Court, when he passed an order under S. 144, Criminal P. C. the learned advocate Mr. Veerabadrayya relied on — 'Arunachalam Pillai v. Ponnuswami Pillai', AIR 1919 Mad 610 (A), a decision of a Division Bench of this Court. In that case the Bench has held that the order under S. 144, Criminal P. C. is a judicial and not an administrative order, and that the Magistrate was acting as a Court. In — 'Nataraja Pillai v. Rangaswami Pillai', AIR 1923 Mad 473 (B), another Bench of this Court has held following the Full Bench ruling of this Court in — 'Sundaram v. The Queen', 6 Mad 203 (FB) (C), that a Magistrate in passing an order under S. 144, Criminal P. C. is not acting as a Court and that the order is passed only as a public servant and not as a Court. They referred to — 'AIR 1919 Mad 610 (A)', and they differed from that ruling, and they pointed out that the previous decision of this Court in — '6 Mad 203 (FB) (C) is a decision by a Full Bench of this Court in which it has been held that the proceedings under S. 144 (same as S. 518 of 1872 Code) are not judicial proceedings. The decision of the Full Bench in — '6 Mad 203 (FB) (C)', was under the Code of 1872. Section 518 of the Code of 1872 corresponds to S. 144 of the present Code. Section 435 of the present Criminal P. C. corresponds to Ss. 294, 295 and 520 of the Code of 1872. In the Codes of 1872, 1882 and finally of 1898, there was a provision in S. 435 that the orders under S. 144 and proceedings under Chap. 12 and S. 176 are not proceedings within the meaning of S. 435 (Vide cl. 3 of Act 1898 prior to its amendment in 1923). Section 435, Criminal P. C. provides for the calling for an examination of the records of any proceedings before any inferior Criminal Court. Section 435(2) (before the amendment of 1923) makes it quite clear that the proceedings before the Magistrate under S. 144 are not judicial proceedings and the order is not liable to be revised by the High Court in its revisional jurisdiction. Neither the decision in — 'AIR 1923 Mad 473 (B) nor the decision in — 'AIR 1919 Mad 610 (A)', refers to this. I may say that the decision in — 'AIR 1923 Mad 473 (B)', which was given prior to the amendment of 1923 was good law then, and the decision in — 'AIR 1919 Mad 610 (A)', was not good law then. But now that cl. (3) has been repealed and it is not disputed that the orders under S. 144 are subject to the revisional jurisdiction of the High Court, it seems to me the reasoning in — 'AIR 1919 Mad 610 (A)'; applies to orders now passed under Section 144 and — ' A. I. R. 1923 Mad 473 (B)' cannot be held to be good law now. In my opinion, these proceedings are judicial proceedings, and it is reasonable as pointed out in — 'A. I. R. 1923 Mad 473 (B) to hold that "if the order under Section 144 is passed by a person acting as a Court that person must also be treated as a Court when he has sanctioned the prosecution for the disobedience of the same". This later decision in — 'AIR 1923 Mad 473 (B)' is an authority for holding that if the order under Section 144 is passed by an authority, it must be treated as a Court when it sanctions prosecutions also. Coming to a later decision in — 'Nagu Servai v. Emperor', AIR 1934 Mad 473 (D) Bardswell J. sitting as a single Judge without noticing the decision in — 'A. I. R. 1923 Mad 473 (B)' follows — 'AIR 1919 Mad 610 (A)' and holds that the filing of the complaint by the

joint Magistrate for disobeying the orders under Section 145, Criminal P. C. was a judicial act. In this decision also there is no reference to the repeal of clause (3) of Section 435, Criminal P. C. In — 'Vijayaranga Reddiar v. Muthuswami', A. I. R. 1945 Mad 58 (E) there was an order under Section 144 promulgated by the Sub Magistrate, and for disobedience of the same a complaint was filed by him under Section 188, Penal Code. There, Kuppuswami Aiyar J. refers to the decision in — 'AIR 1934 Mad 473 (D)' and comes to the conclusion that the act of filing a complaint by the Magistrate was a judicial act. It is, therefore, clear from the decisions cited above and from the repeal of clause (3) of S. 435, that the order was not only judicial, but that he must be acting as a Court.

(5) It may be mentioned that Section 476 Criminal P. C. is restricted now only to clauses (b) and (c) in Section 195 and does not alter (apply?) to clause (a), though prior to amendment of 1923, it was not so restricted and applied to whole of Section 195. It is, therefore, contended that a public servant when he filed a complaint for an offence under Section 188 cannot be acting as a Court. What exactly is the scope of Section 476, Criminal P. C. and what its bearing is on the question as to whether the Sub Magistrate, when passing an order is only a public servant or is a public servant acting as a Court, I do not propose to discuss and give a decision in this case, as this case can be decided on the second point that is raised by the learned advocate for the petitioners. The question will arise only when we are called upon to decide as to which clause of Section 195 applied for the withdrawal of a complaint filed by the Magistrate, whether it is clause (3) or cl. (5). As in either view the Additional District Magistrate has no jurisdiction, it is unnecessary for me to decide that point.

(6) Now the question is whether the Additional First Class Magistrate is subordinate to the Addl. District Magistrate within the meaning of Section 195 (5), Cr. P. C. Under Section 10, Criminal P. C. an Additional District Magistrate has got all the powers of a District Magistrate, and therefore it is contended that when the First Class Magistrate is subordinate to the District Magistrate, he is subordinate to the Additional District Magistrate also. This view is upheld in — 'Jaswant v. State', AIR 1951 All 828 at page 829 (F). That is a decision by a single Judge. The learned Judge states as follows:

> "The public servant whose order was disobeyed had passed it as a Sub Divisional Magistrate, and in that capacity he was subordinate to the District Magistrate. An Additional District Magistrate has got the powers of the District Magistrate. Even otherwise, a Sub Divisional Magistrate as a public servant, is subordinate also to the Additional District Magistrate. Consequently the complaint was rightly filed by the Additional District Magistrate."

There is no discussion and it proceeds on the assumption that the Sub-Divisional Magistrate is subordinate to Additional District Magistrate. A contrary view is expressed in — 'Prabhulal Ramlal v. Emperor', A. I. R. 1944 Nag 84 at p. 87 (G). That is a decision by a Bench of that Court. At page 87 this is what they say,

> "The fact that the Additional District Magistrate may have all the powers of the District Magistrate does not make him a District Magistrate inasmuch as there can be only one person in the district who can be a District Magistrate."

Earlier they referred to sub-section (3) of Section 10 under which the Additional District Magistrate is held as subordinate to the District Magistrate in certain respects. I agree with the reasoning in — 'A. I. R. 1944 Nag 84 (G). The fact that under certain circumstances and for certain purposes mentioned in clause (3) of Section 10 an Additional District Magistrate is considered as a subordinate to the District Magistrate clearly shows that the Additional District Magistrate does not enjoy the same status as that of a District Magistrate and by virtue of Section 17 all Magistrates are subordinate to the District Magistrate. The Additional First Class Magistrate is, therefore, subordinate to the District Magistrate and not to the Additional District Magistrate.

(7) Whichever view is taken, either the First Class Magistrate acting as a Court or purely as a public servant, the Additional District Magistrate is certainly not the authority who can withdraw the complaint filed by the First Class Magistrate. In one view it would be the Sessions Court and in another view the District Magistrate. The order of the Additional District Magistrate, therefore, is without jurisdiction, and it is hereby set aside. I may in passing observe that the Additional District Magistrate was not quite justified in stating that it was improper on the part of the Additional First Class Magistrate to file a complaint. There was an order under Section 144 and whether it was rightly passed or wrongly passed, it was disobeyed according to the report of the police and the allegations contained in the petition, and disobedience is an offence. If the First Class Magistrate was satisfied that his order was disobeyed, the proper thing for him to do was to file a complaint, and not sit silent without taking action for the disobedience. The Additional District Magistrate in my opinion was not justified in passing such remarks against the Additional First Class Magistrate. The order of the Additional District Magistrate in Cr. R. P. 16 of 1952 is hereby set aside and the order which was sent by him to the Stationary Sub Magistrate, Avanigadda is withdrawn. The result is that the parties are relegated to the position of a complaint being filed by the Additional First Class Magistrate, Masulipatam, against the respondents in Crl. R. C. No. 195 of 1953 for an offence under Section 188, Penal Code. It is open to the respondents to take such steps as they may deem fit either by way of appeal or by way of revision to such authorities to whom the right of appeal lies, or who has the power to withdraw complaint. Criminal R. C. No. 195 of 1953 is allowed.

(8) As regards Cr. R. C. No. 208 of 1953 the main contention is that the charge-sheet is an attempt to evade the sanction provisions. It is clear from the charge-sheet that the offence was on a different date, and also the offence is under Section 186 and not under Section 188, Penal Code. The ruling in —'Chinnayya In re', AIR 1948 Mad 474 (H), will not apply to the facts of this case. Criminal R. C. No. 208 of 1953 is therefore dismissed.

A/M.K.S. Order accordingly.

A. I. R. 1953 MADRAS 958 (Vol. 40, C. N. 380)

GOVINDA MENON AND BASHEER AHMED SAYEED JJ.

Shaik Masthan Sahib, Appellant v. Palayani Balarami Reddi, Respondent.

Second Appeal No. 162 of 1949, D/- 21-11-1952.

(a) High Court Rules and Orders — High Court Rules (Mad.) — Appellate Side Rules,

Part II, Chap. I, R. (1) — Standing orders, R. 183 — Posting of appeal of value of over Rs. 10,000 before Bench of two Judges.

Per Subba Rao J.: (In order of reference): The Standing Orders of the High Court, requiring a second appeal involving a subject-matter of the value of more than Rs. 10,000 to be posted before a Bench of two Judges is inconsistent with Rule (1) of Chapter I, Part II of the Appellate Side Rules. When a rule of the Appellate Side Rules which has statutory force says that all second appeals shall be posted before a single Judge the office cannot and shall not post a second appeal under certain circumstances before a Bench. It is, therefore, necessary, if it is held that second appeals involving a subject-matter of the value of more than Rs. 10,000 shall be posted before a Bench of two Judges, and that the Appellate Side rules should suitably be amended.

Appeal was posted by the Single Judge before Division Bench in his discretion under R. (1), since it involved value of over Rs. 50,000. (Para 1)

(b) Civil P. C. (1908), O. 41, R. 23 — Suit dismissed on one of issues — Dismissal set aside by second appellate Court and suit remanded to lower appellate court for disposal according to law on other questions involved in appeal — Lower appellate Court held could not in its turn remand case to trial Court. (Para 14)

Anno: Civil P. C., O. 41 R. 23 N. 32.

(c) Civil P. C. (1908), O. 6, R. 17 — Scope.

Points raised in amendment sought to be introduced already covered by original written statement — Proposed amendment in direct negative of admission contained in written statement — Amendment cannot be allowed. (Para 16)

Anno: Civil P. C., O. 6, R. 17, N. 4.

(d) Muhammadan Law — Wakf — Mutavalli when can appoint his successor — Wakif reserving power to take over management of wakf, taking over management — He can appoint his successor.

The wakif has the power to appoint the first Mutavalli and also to provide for succession to the office of Mutavalli. The wakif also may nominate his successors by name, or indicate the class together with their qualifications, from whom the mutavalli may be appointed and may also invest the mutavalli with a power to nominate a successor after his death or relinquishment of office. If any person appointed as mutavalli dies or refuses to act or is removed by the court or if the office of mutavalli otherwise becomes vacant and there is no provision in the deed of wakf regarding succession to the office, a new mutavalli may be appointed either by the founder of the wakf or by his executor if any; if there be no executor, the mutavalli for the time being may appoint a successor 'on his death-bed' or if no such appointment is made, the court may appoint a mutavalli. He cannot, however, do so while he is in good health as distinguished from death illness. The same will be the position if the office goes by hereditary right. (Para 18)

In Islamic law, there is nothing illegal for the founder to constitute himself as mutavalli when he creates a wakf and also to determine the mode of succession to the office of mutavalli in the deed of endowment executed by him.

It is lawful for the wakif to reserve the management of the endowment for himself; and once he has reserved to himself the right of such management of the trust, it follows that he has the power of appointing a mutavalli during his lifetime whenever he likes.

When the founder has reserved to himself the power to assume the management of the wakf, which he creates, on finding that the committee of supervision, or other managers, or office bearers, have not discharged their duties, he has the unfettered right to assume the management of the trust himself or to appoint another trustee in his discretion for the proper management of the trust. (Paras 25, 26)

(e) Muhammadan Law — Wakf — Mutavalli — Removal of.

A mutavalli may be removed by the court on proof of misfeasance or breach of trust or if it is found that he is otherwise unfit to hold the office, even though the founder may have expressly directed that he should not be removed in any case. The 'founder' has no power after delivery of possession to remove a mutavalli in any case, unless he has expressly reserved such a power in the original deed of wakf, or in the subsequent deed which he executes in favour of the mutavalli. (Para 28)

(f) Muhammadan Law — Wakf — Mutavalli — Non-Muslim and women.

Obiter: The Islamic Jurisprudence does not ban either women or non-Muslims being appointed or acting as trustees or mutavallis for Muslim endowments so far as the management pertains only to the secular administration of the wakf and its properties and does not involve the discharge of duties relating to religious or spiritual services or obligations. (Para 30)

(g) Muhammadan Law — Wakf — Title to wakf properties.

In so far as the properties of a wakf are vested in God for the benefit of the mosque or any such institution no person, either a trustee or a mutavalli, or a manager, can ever claim title to the properties which are vested in God. Any trustee or mutavalli holds the properties endowed for the purpose of the mosque only for and on behalf of the institution and cannot, therefore, be deemed to be a person in whom the properties are vested. The vesting is actual vesting in God for the benefit of the institution which functions for furthering the spiritual advancement of the worshippers in the mosque. (Para 31)

K. Umamaheswaram, for Alladi Kuppuswami, for Appellant; O. Chhinnappa Reddi, for Respondent.

CASES CITED:

(A) ('18) AIR 1918 PC 35: 45 Cal 909 (PC)
(B) ('47) AIR 1947 All 261: ILR (1946) All 661

ORDER OF REFERENCE

SUBBA RAO J.: Learned counsel appearing for the parties in the second appeal agree that this appeal may be posted before a Bench of two Judges. The only ground for the joint request is that the value of the property involved in the second appeal is more than Rs. 50,000. If the appeal is heard by a single Judge and leave to prefer the Letters Patent appeal is refused they are afraid that they will not have an opportunity to take up the matter to the Supreme Court. The relevant rule of the Appellate Side Rules is rule (1) Chapter I, Part II which reads thus:

"The following matters may be heard and determined by one Judge; provided that the Judge before whom the matter is posted for hearing may at any time, adjourn it for hearing and determination by a Bench of two Judges:

The rule does not lay down the circumstances under which a single Judge is empowered to post the case before a Bench of two Judges. Therefore, a single Judge may, in his discretion refuse to post a case before a Bench if in his opinion the value of the subject-matter of the appeal is not a relevant circumstance for posting it before a Bench. But it is represented to me that under the Standing Orders of the High Court a second appeal involving a subject-matter of the value of more than Rs. 10,000 will have to be posted before a Bench of two Judges. . Rule 183 of the Standing Orders says:

"All second appeals from decrees in which appeals may lie to the Privy Council by reason of the amount of value of the subject-matter (S. 110. C. P. C.) shall be posted before a Bench of two Judges. When on examining a second appeal the Appeal examiner has reason to believe that the second appeal is one of this kind, he will make the necessary note on the docket sheet fortifying himself, if necessary, by making a reference to the appellant or his advocate and bring the second appeal to the notice of the Deputy Registrar and of the posting clerk."

The Standing Order is inconsistent with R. (1) of Chapter I Part II of the Appellate Side rules. When a rule of the Appellate Side rules which has statutory force says that all second appeals shall be posted before a single Judge, I cannot hold that the office can and shall post a second appeal under certain circumstances before a Bench. It is, therefore, necessary, if it is held that second appeals involving a subject-matter of the value of more than Rs. 10,000 shall be posted before a Bench of two Judges, that the Appellate Side rule should suitably be amended. In this case, I direct this second appeal to be posted before a Bench of two Judges in exercise of my discretion under R. (1) of Chapter I of Part II of the Appellate side rules.

JUDGMENT OF THE DIVISION BENCH

(2) BASHEER AHMED SAYEED J.: The plaintiff is the appellant in this second appeal, which is preferred against the judgment and decree of the learned Principal Subordinate Judge, Nellore, in A. S. No. 215 of 1947 against O. S. No. 201 of 1936 on the file of the District Munsif's Court of Kavali.

(3) The plaintiff brought the suit against the respondent in the District Munsif's Court of Kavali for a declaration that the deed dated 12-12-1933, executed by Rahamatullah Saheb in favour of the respondent was null and void, for a declaration that the appellant was the validly appointed trustee of the "Mohideenia Mosque" in the village of Damaramadugu, Kovur taluk, Nellore district, for a direction against the respondent to deliver to the appellant possession of all the properties included in the schedules to the plaint as well as all the account books and vouchers and receipts etc. and other effects and things belonging to the said Mosque, for a direction that the respondent should handover the management of the mosque to the appellant, for an injunction restraining the respondent or his agents or servants or employees from interfering with the appellant in the management of the mosque or of the properties thereof, for an account to be rendered by the respondent to the appellant for the income derived or ought to have been derived from the properties described in the schedules to the plaint from 1-1-1933 up to date and to pay the balance of the amounts that may be found to be due by the respondent to the appellant on such accounts being taken and also for the appointment of a receiver for the properties of the "Mohideenia Mosque" pending the disposal of the suit.

(4) The respondent contested the suit on various grounds. In his written statement, the respondent admitted the execution deed Ex. III in favour of his wife by Rahamatulla Sahib and the appointment of Rahamtullah Sahib in 1923 as trustee, but contended that the appellant was not appointed a hereditary trustee, under the deed dated 1-5-1926, that at the time the deed was executed, the appellant was a minor and the appointment was therefore invalid. The respondent further contended that the appellant did not take charge and did not function as a hereditary trustee and that even otherwise, the appellant had been properly removed from the office under powers validly reserved in that behalf of the late Rahamatullah Sahib, the founder of the trust. The further points taken by the respondent in his written statement were that the appellant was not a member of the committee referred to in the plaint and that the late Rahamatulla Sahib did not acknowledge the appellant's rights as a trustee of the mosque and that the appellant did not continue to be a trustee after the notice issued by the committee dated 6-5-1933, that the document dated 12-12-1933 which was executed in favour of the respondent himself was a valid document and an operative one and that there was no fraud or collusion in respect thereof and that the respondent was the proper person appointed and entitled to be the trustee of the mosque.

(4a) The learned District Munsif, after framing the necessary issues on the pleadings, and after taking into consideration the oral and documentary evidence adduced in the case, dismissed the suit of the appellant holding that the appointment of the appellant as a hereditary trustee by the late Rahamatullah Sahib under the deed dated 1-5-1926 was not true nor valid, that though the appellant acted as a trustee for some time the question of his removal from the trusteeship did not arise for consideration in view of his finding that he was not validly appointed as trustee and that the question as to whether the respondent was truly and validly appointed a trustee also did not arise.

Similarly, the learned District Munsif thought that there was no need to give any finding on the question as to whether the suit was barred by limitation or whether the respondent was liable to render an account of the properties in his management from 1-1-1933 as alleged by the appellant. The main ground on which the suit would appear to have been dismissed was that the appointment of the appellant at a time when he was a minor was void though he might have acted as a trustee for some time. The learned District Munsif held that he was not clothed with the legal character of a trustee and did not have any rights as a trustee.

(5) Against this judgment and decree, the appellant preferred an appeal before the Additional Subordinate Judge of Nellore in A. S. No. 119 of 1943. The learned Subordinate Judge, who heard the appeal concurred with the learned District Munsif and held that the appellant had not proved that he was a major on the date, namely 1-7-1928, when he took charge of the trusteeship, in pursuance of Ex. C dated 1-5-1926, and that the finding of the learned District Munsif that the appointment of the appellant as a trustee was invalid, was correct. The learned Subordinate Judge also rejected the argument that the appellant had to be considered a 'de facto' trustee as against the respondent, who was a trespasser and held that if the appellant was to be considered as a 'de facto' trustee under an invalid appointment, the same would be the case with the respondent as well. He also held that the appellant could only succeed in ousting the respondent from his possession on the strength of his office as a trustee and that since he was not a trustee, he had no right to oust the respondent from the possession of the properties. On that ground also, the learned Subordinate Judge held that the suit was rightly dismissed by the learned District Munsif and even the request to remand the suit to the lower Court was rejected.

(6) Against this decree and judgment of the learned Subordinate Judge, a second appeal (S. A. No. 155 of 1945) was preferred in this Court and when it came on for disposal before Lakshmana Rao J. on 27-2-1946, the learned Judge held that the onus of proving the minority of the appellant (appellant in this second appeal also) on 1-7-1928 was on the respondent who asserted it, relying upon the decision in — 'Jagannath Prasad Singh (Raja of Deo) v. Abdullah', AIR 1918 PC 35 at p. 36 (A) and that no evidence was adduced about it on his behalf, that the appellant was not even cross-examined on the point and that the dismissal of the suit on the ground that the appellant was a minor on 1-7-1928 could not be upheld. The learned Judge accordingly set aside the decree and judgment of the learned Subordinate Judge for disposal according to law on the other questions involved in the appeal and directed the respondent to pay costs to the appellant in this Court and in the Court below.

(7) When this matter went to the learned Subordinate Judge's Court, the second Additional Subordinate Judge at Nellore took up the appeal for final hearing on 22-9-1946 and passed the following judgment:

"The High Court has now found that the settlement deed in favour of plaintiff is not invalid on the ground of his minority. The trial Court in dealing with issues 1 and 2 has considered other grounds on which the deed is invalid. These grounds were not specifically raised in the written statement. The respondent wants to raise them by filing a petition for amendment. He will be at liberty to do so before the District Munsif who will deal it on its merits. The other questions raised in the issues were not determined by the District Munsif. It is necessary to give findings on them, viz., issues 3 to 6 before the suit is finally decided. The decree of the trial Court is set aside and the suit remanded for fresh disposal on all the issues after hearing such further evidence as the parties may let in. Costs of this appeal will be costs in the cause. The court-fee will be refunded to the appellant."

(8) In pursuance of this judgment of the learned Second Additional Subordinate Judge, the decree of the trial Court was set aside and the suit was remanded for fresh disposal on all the issues after hearing such further evidence as the parties might let in.

(9) When the suit went down to the learned District Munsif, Kavali, for trial on the remand order referred to above, the respondent filed I. A. No. 1119 of 1946 praying that he might be permitted to amend his written statement by adding an additional paragraph as paragraph 5(a). In the new paragraph sought to be introduced in the written statement, the respondent pleaded to the following effect:

"Even otherwise, the appointment of the plaintiff as trustee was even in the inception invalid, as on a proper construction of the trust deed, dated 12-7-1917 and the events that happened subsequently, the right to make the appointment of trustee did not accrue to Rahamatullah Saheb, the contingency for the exercise of such power as contemplated in the said document had not arisen and Rahamatulla Sahib was incompetent, to make any such appointment. Also it was a condition precedent to the taking effect of the appointment or of the plaintiff holding to the office, or being competent to hold the office of trusteeship in question that he should be a resident of Dhamaramadugu. The moment he showed a clear intention of not residing in Damaramadugu if even otherwise, he could claim to be a trustee (which the defendant denies), the plaintiff did and must be deemed to have forfeited his right to the said office."

(10) The appellant filed a counter petition in which he contended that the remand order of the High Court did not entitle the respondent to the amendment asked for and that the application for the amendment was itself filed at a late stage, that no grounds at all had been alleged in the affidavit to justify the amendment at that stage, that the amendment sought for had the effect of pleading a new case which was thoroughly inconsistent and contrary to the position taken up by the respondent in his original written statement and that the respondent was trying to go back upon his admission of an allegation made by the appellant and referred to by the respondent in paragraph 3 of his written statement and that in view of the admission contained in paragraph 3 of the written statement there was no controversy between the parties as to the power of Rahamatulla Sahib to appoint the plaintiff as the trustee. The learned District Munsif, in an elaborate order, dated 6-1-1947 allowed the amendment rejecting the contentions raised by the appellant and the written statement was accordingly amended and the suit was heard 'de novo' by the learned District Munsif of Kavali. No fresh issues however were framed by the learned District Munsif as he was satisfied that the issues framed already in the suit covered all the points raised in the plaint and the amended written statement.

(11) After examining once again the documentary and oral evidence in the case, the learned District Munsif held that the appellant failed to prove that Rahamatulla Sahib had power to appoint him by reason of his alleged authorisation by the committee. The learned District Munsif was also of the opinion that it was a salutary principle of law that a trustee cannot delegate his duties or transfer his office during his life time and that the appellant could not be heard to urge that Rahamatullah Sahib had the power as trustee at least to appoint him, irrespective of any authorisation and that it would be delegation by a delegate and in that view also the appointment of the appellant could not be upheld. The learned District Munsif also held that the appointment of the appellant as a hereditary trustee by the late Rahamatulla Sahib under the deed dated 1-5-1926

though true, was not valid, that he held that office for about 5 years and it was futile for the respondent to contend that the appellant never acted as trustee. On the question of removal of the appellant from office, he held that the appellant could not be deemed to have been validly removed from the office of trustee if it were once to be held that he was validly appointed. He did not find it necessary to decide the issue as to whether the appointment of the respondent as trustee was true and valid. On the question of limitation, the learned District Munsif held that the suit was not barred by limitation and that the appellant was not entitled to ask for any accounts from the respondent. The suit was consequently dismissed.

(12) Against this dismissal the appellant preferred an appeal to the Principal Subordinate Judge of Nellore. The learned Subordinate Judge found that Rahamatulla Sahib was validly appointed as a trustee and that he had the right to exercise his rights as trustee and therefore Rahamatullah's right to appoint the appellant as trustee could not be questioned and that the respondent himself admitted in his written statement that Rahamatullah was appointed by the committee as a trustee in place of his wife and that it empowered him also to appoint a person as trustee in his place. After having said so much, the learned Subordinate Judge however held that the appointment of the appellant under Ex. C during the lifetime of Rahamatulla as a trustee was not valid for the reason that the appellant did not come within the definition of the persons who are to work as trustees. There have been contradictions between what the learned Subordinate Judge has observed in paragraph 5 and what he has stated in paragraphs 6 and 7 as pointed out by the learned counsel for the appellant. He also held that the fact that the appellant acted for five years or even more as a trustee could not give him any right and that Rahamatullah, the founder of the mosque in question, had no power to appoint strangers like the appellant, who was only a foster son. At the same time, the learned Subordinate Judge held that the document under which the respondent claimed trusteeship, namely, Ex. I, dated 12-12-1933 also was not valid and therefore the appointment of the respondent could not also be upheld. A further ground relied on by the learned Subordinate Judge for dismissing the appeal was, that the appellant had no residential qualification as laid down in the original document creating the trust itself Ex. III and that therefore the appellant was nobody in the eye of the law and that he could not ask for any relief against the respondent. Against this decree and judgment of the learned Subordinate Judge, the present second appeal has been preferred.

(13) The common ground between the parties in this second appeal is that under Ex. III the late Rahamatulla Sahib from whom both the appellant and the respondent claim their trusteeship founded the trust, Ex. III is dated 12-7-1917. It is a deed of trust executed in favour of Moideenia Masjid (mosque named after Mohideen) in Damaramagudu Village, in Kovvur taluk, Nellore district. The document is a fairly long one drawn up in Telugu.

The first paragraph of the deed sets out the properties possessed by the founder and the reasons for his creating the endowment in favour of the Masjid. The third paragraph is the operative portion where the dedication is made in favour of 'God' for the benefit of the mosque. The fourth paragraph sets out the constitution of the committee of supervision as well as its powers and the appointment of servants and office bearers of the mosque including the trustee. While appointing under this paragraph his senior wife Ghose Bibi as trustee and the various other servants of the mosque including the 'Khathib' and the manager, who are all said to be relations of the founder, provision is made that the founder himself shall be the first member for carrying out the duties of the committee member on behalf of the 'Khathib'. In case of lapses on the part of the servants, power is given to the committee to remove these people & to appoint others in their stead. Vacancies in the membership of the committee are also to be filled up by the remaining members from among the relations of the founder. If the committee members failed to carry out their duties properly, provision is made that the other relations of the founder shall have the power to stop remission of their salaries and the amounts settled to be paid to their descendants. It is also provided in the deed of trust in paragraph 4 that the committee members should obtain from the trustee a surety bond for Rs. 500 as the properties of the trust and the income thereof would all be in the possession of the trustee.

In the various sub-paragraphs under the main paragraph 5 and in paragraph 6 the duties of the various servants of the mosque including those of the trustee, the manager and the committee of supervision, details of expenses of the mosque, scales of salaries of members of the committee etc., have all been set out. In paragraph 7, directions for the maintenance of accounts and for the discharge of duties etc., and the retention of the income derived from the properties are given. Paragraph 8 contains other directions as to how the lands have to be leased on cowles etc.

Paragraph 9, which is the main paragraph relevant for the purpose of this second appeal, sets out that the entire properties have been delivered over to the trustee who should preserve the same, that the servants should do service to the mosque and that the committee members should supervise the same. It further provides that if they fail to duly carry out the duties and thereby damage is caused to the aforesaid properties, the founder reserves to himself the right to become the trustee during his lifetime and without having any committee members to take possession of the entire properties and carry out the duties himself. If any issue are born to him in future, the deed says, his descendants only shall be the trustees and they shall perform all duties without the assistance of a committee. There is a further provision in paragraph 9 that in the event of damage being caused to the above-mentioned property after his lifetime or there after when no issue is born to him, there should be no objection whatever for any of his relations or Mohammadans belonging to that village or other villages or any other persons who are devotees of God to intervene, duly take possession of the entire wakf properties and see that all the duties are performed as mentioned in the trust deed.

(14) Before the significance and the bearing of the recitals in this document on the various issues raised in this second appeal are considered, it is desirable that a few minor points raised by the learned counsel for the appellant should be disposed of.

Mr. Umamaheswaram, the learned counsel for the appellant contended that when this court remanded the suit by its judgment dated 27-2-1946 in S. A. No. 155 of 1945 it was not intended that the learned Subordinate Judge should in his turn remand the suit to the trial court permitting the respondent to amend his written statement so as

to raise the plea that the founder of the trust had no reserve power to appoint the appellant as the trustee. The learned counsel argues that the learned Subordinate Judge should have applied his mind and dealt with the appeal himself in pursuance of the directions given in the order of remand of the High Court and should not have sent it back to the District Munsif's court with an order of remand, that the order of remand passed by the learned Subordinate Judge does not set forth any proper grounds for remanding the suit to the Munsif's court. We have perused the order of remand made by this court. It expressly says that the dismissal of the suit on the ground that the appellant was a minor is set aside and that the case is remanded to the learned Subordinate Judge for disposal according to law on the other questions involved in the appeal. If any amendments were to be considered, it would have been appropriate and within the province of the learned Subordinate Judge himself to consider those amendments and either allow or disallow the same after giving opportunities to the parties to be heard. Instead of doing so, the learned Subordinate Judge has actually remanded the suit to the learned District Munsif. We do not think that he has acted in accordance with the directions of the order of remand of this court in having done so.

(15) The learned counsel for the appellant has further raised the point that when the suit went before the learned District Munsif he acted improperly in allowing the amendment which was in direct contravention of the respondent's admission in paragraph 3 of his written statement. In the plaint originally filed, reliance has been placed on Ex. 3 as well as on the subsequent act of the committee in appointing Rahamtullah Sahib as trustee in place of his wife, Ghose Bibi, who was originally appointed by him and the further power given to him to appoint a person as a trustee in his place. In paragraph 7 of the plaint there is an averment to the effect that the relationship between the appellant and Rahamtulla Sahib was very amicable and the said Rahamatulla in pursuance of his power reserved in him in that behalf, executed a deed dated 1-5-1926 in favour of the appellant whereby he appointed the appellant as the hereditary trustee of the mosque from 1-7-1928. In paragraph 8 also there is an averment that under the deed executed by Rahamatullah in favour of the appellant, the said Rahamatullah and his heirs and representatives had no manner of right whatever of removing the plaintiff from his office as trustee, or of appointing any one in his place. It is also urged in paragraph 14 that the appellant was never validly removed from his office as trustee, as Rahamatulla Sahib had no power to so remove the appellant; nor did the committee expressly or validly remove the appellant at any time. As against these averments, in the plaint, paragraph 3 of the written statement, which alone is material for the purpose of this second appeal, is to the following effect:

> "This defendant admits the execution of the deed of 12-7-1917 by Shaik Rahamatulla Sahib but as regards the contents thereof he begs leave to refer to the document itself in preference to the allegations contained in paragraph 5 of the plaint. The said Rahamatullah Sahib was appointed trustee in the year 1923 or thereabout as mentioned in plaint paragraph 6."

(16) It is also averred in paragraph 12 of the written statement that the appellant had been removed from his office, that it was incorrect to contend that the appellant could not be removed from the office and that it was not true that Rahamatullah Sahib was not entitled to remove him from office. On a proper reading of the amendment, which has been allowed by the learned District Munsif it would be clear that the respondent having admitted the execution of the deed of endowment, dated 12-7-1917 and having placed reliance upon the contents of the document itself in preference to the allegations contained in paragraph 5 of the plaint and having also said that Rahamatullah Sahib was appointed as a trustee in the year 1923 or thereabouts as mentioned in paragraph 6 of the plaint, it was not open to the respondent to go back upon the admission contained in his written statement and contest that Rahamatullah, the founder had no power either under the original document, or under the subsequent documents, to appoint a trustee in his place. We do not think that the learned District Munsif was right in having allowed the amendment. The points raised in the amendment having already been pleaded in the plaint and also in the written statement in the manner shown above, it was not proper on the part of the learned District Munsif to have allowed the respondent to raise an amendment which was a direct negation of his own admission in the written statement. We do not think that we can uphold the amendment that has been allowed by the learned District Munsif in these circumstances. However that be, in the view we have taken of the matter as would appear hereinafter we do not think that there is any material prejudice caused to the appellant by the amendment having been allowed.

(17) After the execution of Ex. III, it transpires that the founder of the trust had himself furnished security in the sum of Rs. 500 in favour of the committee on his wife's behalf, whom he had appointed trustee and in respect of whose trusteeship Ex. III had stipulated that security should be taken for the said amount. It is, however, the case of the appellant that sometime after the creation of the trust the wife of the founder, namely, Ghouse Bibi, was not in a fit position to carry on her duties as trustee, that thereupon, in or about 1923 the committee of supervision appointed the founder Rahamatulla himself as a trustee in place of his wife and that he was also given the power to appoint a trustee in his place if it became necessary. No document has been produced in support of what exactly was done by the committee consequent upon Ghouse Bibi, the founder's wife having ceased to be in a position to discharge the duties of a trustee. The respondent admitted that the founder was appointed a trustee in place of his wife, but did not admit that the said founder was authorised to appoint a trustee by the committee in the year 1923. For supporting this contention, the appellant relied upon the minutes book of the committee which according to him contained the resolution appointing Rahamatullah Sahib as a trustee and also authorising him to appoint a trustee in his place as and when he felt it necessary. That minutes book was in the possession of the respondent. It appears that the appellant took necessary steps to compel the production of this minutes book by the respondent by issuing the necessary notices but it was of no avail. The respondent admitted having had the custody of the records including the resolution book for sometime, but he pleaded that the book of resolutions which was filed into Court in another suit, namely, O. S. No. 137 of 1935, was not taken return of by the respondent though he applied for it as early as 1944. This, the respondent sought to substantiate by production of Ex. VI which is a certified copy of D. R. P. No. 103 of 1944 in O. S. No. 137 of 1935 on the file of the District Munsif's Court, Kavali, with the endorsement of the District Mun-

sif's Court thereon. This exhibit shows that the respondent's application for return of the resolution book was rejected on the ground that it was filed by a witness into Court and that he was not entitled to claim a return of it.

(18) The relevancy of this minutes book, irrespective of the fact that it has been suppressed by the respondent or that the appellant did not himself take steps to secure it from the Court by necessary process of law, after having come to know that it was filed in O. S. No. 137 of 1935, arises only in regard to the point as to whether the founder, who was admittedly appointed a trustee had or had not the power to appoint another trustee in his place. The appellant wants to rely upon the minutes book for the purpose of showing that the founder had the power to appoint a trustee and the respondent contends that the founder was not authorised by the committee to appoint any successor to him in the office of trusteeship. It is a well known proposition of Islamic Law that the wakif has the power to appoint the first Mutavalli and also to provide for succession to the office of Mutavalli. The wakif also may nominate his successors by name, or indicate the class together with their qualifications, from whom the mutavalli may be appointed and may also invest the mutavalli with a power to nominate a successor after his death or relinquishment of office (Vide paragraph 204 of the "Principles of Mahomedan law" on page 190 by Mulla).

In this case the founder made provision that a mutavalli or the trustee as, it is loosely called, should be appointed by the committee of supervision in case the mutavalli appointed by the founder refused to act and he also indicated that in making such appointment, the choice should be confined in the first instance to the relations of the founder. In accordance with this provision when Ghouse Bibi was not in a fit condition to discharge the duties of the mutavalli or the trustee, the committee of supervision, as admitted by both the parties, appointed the founder himself as the mutavalli or the trustee in succession to Ghouse Bibi. It is also a well accepted principle of Muslim law that if any person appointed as mutavalli dies or refuses to act or is removed by the Court or if the office of mutavalli otherwise becomes vacant and there is no provision in the deed of wakf regarding succession to the office, a new mutavalli may be appointed either by the founder of the wakf or by his executor if any; if there be no executor, the mutavalli for the time being may appoint a successor 'on his death-bed' or if no such appointment is made, the Court may appoint a mutavalli (vide paragraph 204 of Mullah's "Principles of Mahomedan law" 13th Edn.). Thus, it is clear that when a present mutavalli appoints a successor in the absence of the founder or his executor and in the absence of any provision in the wakfnama for succession to the office, the mutavalli for the time being may appoint a successor only 'on his death-bed'. He cannot, however, do so while he is in good health as distinguished from death illness. The same will be the position if the office goes by hereditary right (vide paragraph 205 at page 193 of Mullah's Principles of Mahomedan law). This proposition has been uniformly accepted by all authors on Islamic Jurisprudence. That is to say, except on his death-bed, i.e., when he is suffering from Mar-zulmaut, the mutavalli for the time being cannot appoint a successor.

At page 620 in paragraph 492 of his book "Mahomedan law" (1950 Edn.) Tyabji observes as follows:

"In the absence of any express or implied provision in the dedication for the appointment of successive mutavallis — (1) the wakif is entitled to make the appointment; (2) After the death of the wakif, the executor of the wakif or the survivor of several executors, is so entitled; (3) on the death of the said executor or surviving executor, the court may appoint the mutavalli."

In paragraph 492-A the learned author observed thus:

"Subject to Ss. 492 and 492-F it will generally be presumed that the mutavalli is empowered under the dedication to appoint a successor to himself. There is no such power of appointment in the congregation or devotees as such".....

In paragraph 492-F, the learned author observed:

"The mutavalli may, in accordance with S. 492-A, appoint a successor to succeed him at his death, but cannot validly transfer his office to another during his lifetime. An appointment or nomination made during the lifetime of the mutavalli is revocable like other testamentary dispositions."

So also in paragraph 328 on page 355 of Wilson's Anglo Mahomedan law (5th Edn.) the learned author observes as follows:

"The mode of succession to the office of mutavalli is usually defined in the deed of endowment. If it has not been so defined, and if the intention of the founder cannot be inferred from usage, the right of appointing a successor when a vacancy occurs in (1) the founder, if still living; (2) his executor if any, then, except as provided in the next section, i.e., S. 329; (3) the court (other than a Small Cause Court) which exercises ordinary civil jurisdiction over the local area within which the dedicated property is situated."

In paragraph 329, the same author states:

"After the death of the founder, and of his executor, if any, and if no order of succession has been indicated in the deed of endowment, the Mutavalli, for the time being may appoint his own successor by will. But an order of the court is necessary in order to complete the title of the testamentary successor to the emoluments enjoyed by his predecessor.

A mutavalli has no power to transfer the office to another person while he is himself alive and in good health, unless such a power was expressly conferred upon him by the founder or by the court that appointed him."

(19) The learned counsel for the respondent places reliance upon the passages quoted above and urges that in so far as Rahamatullah Sahib has been himself a mutavalli appointed by the committee of supervision under Ex. III, he could not have validly appointed the appellant as mutavalli during his lifetime and that there is no evidence that when the appointment of the appellant was made, the late Rahamatullah Sahib, the outgoing trustee-mutavalli was on his death-bed. Both the courts below have concurred with this position taken up by the respondent and have held that the appointment of the appellant as mutavalli or trustee was not valid as Rahamatullah Sahib could not delegate the authority to another during his lifetime. While accepting this position of the respondent, both the Courts below have also held at the same time that the claim of the respondent himself that he was the validly appointed mutavalli by the same outgoing mutavalli as his successor namely by Rahamatullah Sahib could not also be upheld, as the mutavalli had not the power to appoint his successor while he was in good health. The result is that the wakf is left without a mutavalli to manage its affairs.

(20) So far as the legal position goes, it cannot be disputed that a mutavalli as such cannot appoint his successor unless he is on his death-bed or there

is a provision in the wakfnama as to how the office of the mutavalli should be filled up when vacancies arise or the wakfnama expressly authorises the mutavalli to appoint his successor. But in this second appeal, both the courts below have ignored a very important aspect of the case, namely, that in the present case, Rahamatullah Sahib, under whom both the appellant as well as the respondent have claimed a right to the office of mutavalliship has been himself the founder and had vested the power of appointing a mutavalli in the committee of supervision and had at the same time reserved to himself the power as founder to appoint a trustee overriding the powers given to the committee. Therefore when he was appointing either the appellant or the respondent as mutavalli, he must be deemed to be acting as such founder, irrespective of the fact that the committee had earlier appointed him as a trustee with or without power to appoint his successor in or about 1923, when Ghouse Bibi, the first appointed trustee or mutavalli, was not in a position to discharge her duties. The question is as to whether at the time when the said Rahamatullah Sahib appointed the appellant in the first instance under Ex. C and later on the respondent under Ex. I the said Rahamatullah had ceased to be the founder and whether he was in any way prevented from exercising his rights as a founder as and when certain contingencies arose which justified in his opinion his acting as a founder in respect of the mutavalliship of the trust. As long as the founder was alive, it cannot be argued so long as he had reserved to himself the power if any to act himself as the mutavalli, that he could not exercise such power simply because the committee of supervision had intervened or that he was himself appointed as a mutavalli by the said committee for a time.

(21) The question which arises then is whether, when the founder created the endowment in favour of the mosque, he had reserved to himself or not the power to appoint any trustee for administering the wakf and its properties as and when he felt it necessary to do so, notwithstanding the vesting of such a power in a committee of supervision. Reference in this connection has to be made to the relevant recitals of Ex. III which have already been referred to and in particular to paragraph 9 thereof. The recitals contained in that paragraph which it is not necessary to quote once again clearly indicate that the founder, when he was creating the wakf and making arrangements for the administration of its properties, had clearly envisaged that whenever the contingency arose he should have the right to become himself the trustee during his lifetime dispensing with any committee of supervision and to take possession of the entire property and carry out all the duties of administration himself thereby exercising all the powers of a founder including those of appointing his successors to the office of mutavalli as such founder.

It has been contended by the learned counsel for the respondent that paragraph 9 of the said Ex. III cannot be so construed as to import any such reserve power. We do not think that we can agree with this contention. In our opinion, a proper construction of the said recitals in paragraph 9 of Ex. III would lead to no other conclusion than that the wakif as such had reserved to himself the necessary power to appoint himself as mutavalli or appoint other trustees in case the administration of the wakf needed such resumption of the management and fresh appointment of trustees.

(22) Even apart from Ex. III, the document Ex. C dated 1-5-1926, which is relied upon by the appellant as being a deed under which he was himself appointed as the mutavalli after the founder had resumed the management of the trust himself for a short period, throws abundant light on what exactly the founder himself had in mind when he set out the recitals contained in paragraph 9 of the Ex. III. The best indication of his such intention and purpose is to be found in what he himself has stated in the recitals contained in Ex. C. In the earlier part of Ex. C he has stated to the following effect:

> "Giving away my lands and other properties to Muhideenia Musjid in the village of Damaramadugu, I have reserved to myself in the deed of settlement executed on 12th July 1917 and registered on 17th July 1917 in the office of the Sub-Registrar of Butchireddipalem, the right to look after the work remaining as the trustee of the said property and to appoint a trustee to look after the work in my stead. I am by virtue of it the present trustee of the Mohideenia Masjid estate in the village of Damaramadugu."

(23) The document then goes on to set out the reasons why he is appointing the appellant as trustee in his place and they are to the effect that he the founder, is wanting in ability to attend to the work of management as a trustee and that among his relations there is none who is capable of doing the work of a trustee, that as the appellant is under his supervision being educated at his cost and as he is helping him in his work and learning the duties of a trustee and as he possesses good behaviour and character, the founder has, on his own security, appointed him as the trustee in his place from 1-7-1928. This document also purports to give the power to the appellant to appoint another manager in consultation with the committee of supervision in his place for a period of three years if he thinks necessary and the conditions justified the same. In our opinion, in the face of the recitals in Ex. III, and those contained in Ex. C, it is futile for the respondent to contend that the founder, having appointed a committee and a trustee, had exhausted his rights as founder or, in the alternative, having reserved the power to become himself the trustee, he could not appoint a further trustee in his place. If it were the case that Rahamatullah Sahib was merely a trustee appointed by the committee without any other capacity left in him, and without power to appoint any successor to him, there might be some semblance of force in the argument that he having been appointed the trustee by the committee, cannot himself delegate his power to another trustee. But it cannot be ignored that the committee of supervision derives its authority from the founder and that the founder had by no means obliterated himself from intervening at the right moment in the interests of the wakf.

(24) In actual fact, we find that the founder Rahamatullah Sahib has reserved for himself even to dispense with the committee and also to dispense with all other formalities when he finds that the management of the trust or those persons who were entrusted with the management and ministerial duties have failed to carry out their duties. Therefore, when the said Rahamatullah Sahib was appointed the trustee in 1923 by the committee and within 3 years thereafter, he found that it was necessary for him to intervene and assume the powers reserved by him in paragraph 9 of Ex. III, and when he mentions in such clear terms as are found in Ex. C that he had assumed such powers reserved by him, we do not think that there is any point in the contention that Rahamatullah Sahib was merely a trustee appointed by the committee that he did not have the power to appoint his successor and did not

possess the powers of a founder when he executed Ex: C in favour of the appellant. There is nothing placed before us to show in contradistinction to paragraph 9 of Ex. III that he had ceased to be the founder and had lost his powers as such, simply because he had appointed a committee and that the committee had in turn appointed him as a trustee in 1923. It is clear to our mind that in spite of the committee having appointed him as trustee in 1923, assuming that that was the case, in the absence of production of the minutes book, which alone could have supported the actual terms of the appointment, his action, as evidenced by Ex. C in 1926 in having assumed for himself the powers of the founder, points only to the fact that he had exercised such powers as a founder which powers he had reserved for himself in Ex. III paragraph 9.

(25) The Islamic law is clear on the question that when a founder has reserved to himself the power to assume the management of a wakf, which he creates, on finding that the committee of supervision, or other managers, or office bearers, have not discharged their duties, he has the unfettered right to assume the management of the trust himself or to appoint another trustee in his discretion for the proper management of the trust. Paragraph 204 at page 190 of Mullah's "Principles of Mohamedan law" already referred to above, sets out the position of Muslim law on this point. Even so, paragraph 495 B of Tyabji's Mohamedan Law, 1940 Edn. states as follows:

> "The wakif or his executor on appointing himself as the mutavalli or acting as such, retains the power of transferring office to another under Ss. 492 and 495."

In Islamic law, as already observed, there is nothing illegal for the founder to constitute himself as mutavalli when he creates a wakf and also to determine the mode of succession to the office of mutavalli in the deed of endowment executed by him. Though the mutavalli has no power to transfer the office to another person while he is himself alive and in good health, still, if such a power is expressly conferred upon him by the founder or by the court that appoints him, such a mutavalli has himself the power to appoint his successor. This position has been clearly set forth by all the original authorities on Islamic jurisprudence referred to in the text books of Muslim law and it is unnecessary to cite them in this judgment.

(26) In addition to these, the decision on the question whether the founder of an endowment could reserve to himself the power to resume the management and appoint a mutavalli if he thinks fit and proper to do so as reported in — 'Ali Aghar v. Farid Uddin', AIR 1947 All 261 (B) cited by the learned counsel for the appellant is in point. In that decision, the learned Judges have reviewed the entire original and later authorities on Islamic law relating to wakfs and the powers of wakifs and mutavallis, and we are in entire agreement with the opinion expressed therein. We should like to emphasise in particular the passage quoted from the Rt. Honourable Amir Ali's Mohamedan law in the said judgment. The passages quoted therein clearly lay down that it is lawful for the wakif to reserve the management of the endowment for himself; and once he has reserved to himself the right of such management of the trust, it follows that he has the power of appointing a mutavalli during his lifetime whenever he likes. In this case, in our opinion, this is exactly what the founder Rahamatullah had done when he appointed the appellant, under the document Ex. C.

The present is not the case where the wakif did not appoint a mutavalli; nor is it the case where he had in the first instance constituted himself as the mutavalli; nor is it even the case that he had left the office of mutavalli without being filled up. On the other hand, this is a case where the wakif had expressly reserved to himself the power to resume the management of the trust whenever the need arose and to appoint a mutavalli either in himself or any other person when he thought it necessary in the best interests of the wakf. Therefore it follows that when he was executing the document in 1926 in favour of the appellant, whereby he appointed the appellant to be the trustee to function from 1928 onwards, it was a clear case where the wakif was exercising the powers which he had reserved to himself under the original document creating the endowment, viz., Ex. III and there can be no valid objection to his having exercised such power, in the interests of the wakf as would appear from Ex. C. In such circumstances, we are of opinion that the appointment of the appellant by the said Ráhamatullah Sahib, the founder cannot, by any means, be disputed to be invalid or improper. On the other hand, we think that the appointment of the appellant as a mutavalli in succession to the wakif under document Ex. C is a valid and a proper appointment. The appellant would consequently be entitled to a declaration in that behalf as prayed for.

(27) It is in evidence and has been found by the Courts below that the appellant, after his appointment as a mutavalli assumed charge of the office from 1928 onwards and continued to be in management and possession of the properties belonging to the wakf for a considerable number of years without any protest or objection from the committee of supervision. This might mean either that the committee, if then in existence, had acquiesced in the appointment of the appellant or that the committee had become defunct by then. Whatever that be, there is no reason why the finding of the Courts below that the appellant has been in such possession of the properties and has exercised the duties of a trustee or mutavalli of the mosque should not be upheld as correct.

(28) When once it is held that the appellant was the legally appointed mutavalli in place of the founder himself and that he was functioning as such trustee by virtue of the said appointment, the question then arises as to the circumstances in which the appellant could be held to have ceased to be such mutavalli or trustee if such was ever the case. The evidence does not show that he has at any time or in any manner abandoned or refused to perform the duties of a mutavalli having been appointed under the said document Ex. C. On the other hand, his claim is that he has been continuing in possession of the management of the mosque and its properties until 1933 when the wakif executed another document, Ex. I, in favour of the respondent appointing him as the trustee. If the appellant has been in possession of the properties belonging to the wakf and has been in such management having entered into the office by a valid and legal appointment and if he has neither abandoned nor refused to perform the duties of such trusteeship, the question that arises for consideration is whether another trustee could be appointed when the appellant himself was the trustee.

The learned counsel for the respondent would contend that by appointment of the respondent under the document Ex. I it must be presumed that the appellant had been removed from his office as trustee and that the respondent had been validly appointed in his stead. If it is a question

of removal of the appellant from his office as trustee, then it must be proved that the wakif had the right to remove the appellant from his office as trustee and that he had been actually so removed in a proper and legal manner. As has been observed in paragraph 213 of Mulla's Mohamedan law at page 200, a mutavalli may be removed by the Court on proof of misfeasance or breach of trust or if it is found that he is otherwise unfit to hold the office, even though the founder may have expressly directed that he should not be removed in any case. The 'founder' has no power after delivery of possession to remove a mutavalli in any case, unless he has expressly reserved such a power in the original deed of wakf, or in the subsequent deed which he executed in favour of the appellant, viz., Ex. C. Our attention has not been drawn to any recitals in the original deed, Ex. III or in the subsequent deed, Ex. C that such a power existed enabling the wakif to remove the mutavalli who had been validly appointed and who had been performing his duties as such. Nor has there been any evidence let in to show that there has been any breach of trust or any misfeasance or malfeasance on the part of the appellant to justify his removal.

The feeble point that was raised by the learned counsel for the respondent was that the appellant did not claim that the appointment of the appellant was under the powers which Rahamatulla Sahib had reserved to himself in Ex. III. He urged that the appellant's case was that the committee of supervision, in exercise of the powers bestowed in that behalf appointed Rahamatullah Sahib in October 1923 or thereabouts to be a trustee in place of his wife Ghouse Bibi and that being the case even though he might have been empowered to appoint a person as a trustee in his place, the power offended against the principle of 'delegatus non-potest delegare'. It is no doubt true that in paragraph 6 of the plaint there is an averment that the appellant was appointed in pursuance of the powers bestowed in that behalf by the committee on Rahamatullah Sahib to be a trustee in place of his wife and to appoint another person as a trustee in his place. But a reference to paragraph 7 of the plaint would show that there is an averment that the appointment of the appellant as a trustee under Ex. C was in pursuance of the powers reserved for him in that behalf, and this reservation referred in that paragraph has reference only to the powers originally reserved by the said Rahamatullah Sahib in the document Ex. III whereby he as founder, could exercise the powers of appointing not merely himself as a trustee but also appointing another person as his successor. Therefore, there is no point in the contention of the learned counsel for the respondent that the plaint did not aver that the original founder assumed the reserved power and exercised it because the committee did not administer the trust and its properties in a proper and satisfactory manner.

(29) In these circumstances, it must be held that the appellant, who has been validly appointed by the founder as a successor in the office of mutavalli cannot be removed from office and in fact has not been removed from such office which he has been holding ever since 1928. A perusal of Ex. I of 1923 executed in favour of the respondent does not disclose that the appellant has been removed from office, nor does it disclose any valid reasons for such removal even if any such removal is to be inferred by implication or otherwise from the said document. This document on which the respondent relies, therefore, in our opinion, is not a valid document and could not become operative in favour of the respondent so long as the appellant remained legally in office as mutavalli appointed by the founder in exercise of his powers as such founder. The findings of the learned Subordinate Judge to the effect that the respondent cannot be considered to have been validly appointed as a mutavalli have to be upheld and the respondent cannot claim any right to the mutavallishiip of the trust in question.

(30) In so far as this mutavalliship does not involve the performance of any religious duties, it is unnecessary for us to consider the point raised as to whether a non-Muslim could be a mutavalli of a wakf in favour of the mosque. The Islamic law is liberal enough to permit the appointment of competent non-Muslim as mutavallis in the absence of suitable Muslims so long as such mutavallis are not called upon to perform any religious duties in respect of the wakf. It is a peculiar feature of Islamic Jurisprudence that it does not ban either women or non-Muslims being appointed or acting as trustees or mutavallis for Muslim endowments so far as the management pertains only to the secular administration of the wakf and its properties and does not involve the discharge of duties relating to religious or spiritual services or obligations.

(31) We should also observe that it is quite unnecessary for the appellant to prove title for claiming possession of the properties involved in the suit. In so far as the properties of a wakf are vested in God for the benefit of the mosque or any such institution no person, either a trustee or a mutavalli, or a manager, could ever claim title to the properties which are vested in God. Any trustee or mutavalli holds the properties endowed for the purpose of the mosque only for and on behalf of the institution and cannot, therefore, be deemed to be a person in whom the properties are vested. The vesting is actual vesting in God for the benefit of the institution which functions for furthering the spiritual advancement of the worshippers in the mosque. The contention therefore advanced on behalf of the respondent that the appellant has failed to prove title to the property in order to enable him to obtain a decree for possession of the properties has therefore no force. It is sufficient if the appellant has succeeded in proving that he has been the validly appointed mutavalli in respect of the endowment properties and he has been put in possession by the wakif of such properties and their management on behalf of the mosque for whose benefit the endowment has been created. In this view, the appellant will be entitled to a decree for possession of the properties mentioned in the schedules to the plaint. The respondent would, therefore, be considered to be a trespasser and he cannot retain possession of the said properties, and he will have no right or claim in respect of the same. On the other hand, he having been in possession of the said properties and having been receiving the rents and profits therefrom, he will be liable to render a true and proper account to the apellant who is held to be the validly appointed mutavalli or trustee for the suit endowment and its properties as claimed in the plaint.

(32) There is no point in the argument of the learned counsel for the respondent that simply because the respondent is in possession and is functioning as a trustee, he should be left in possession without being disturbed in any manner. For being in possession of properties belonging to a trust, it is incumbent upon the respondent to prove his claim thereto and in so far as he has not established any such claim, it cannot be held that he can be allowed to continue in possession of the properties which should legally be handed over to the appellant, who has asked for a declara-

tion of his right to be the mutavalli and also for possession of the same and for accounts.

(33) In the result, we find that the appellant has succeeded in establishing his rights to the reliefs he prayed for against the respondent in his plaint, and this second appeal will have therefore to be allowed while setting aside the decisions of the Courts below. In the circumstances each of the parties will bear his costs throughout. Any costs already recovered by any party will be refunded to the party from whom the same has been recovered.

B/R.G.D. Appeal allowed.

A. I. R. 1953 MADRAS 968 (Vol. 40, C. N. 381)

GOVINDA MENON AND BASHEER AHMAD SAYEED JJ.

Palagani Balarami Reddy, Petitioner v. Shaik Masthan Saheb, Respondent.

Civil Misc. Petn. No. 1440 of 1953, D/- 18-3-1953.

Constitution of India, Art. 133(1)(a) — Civil P. C. (1908), S. 110(1) — Value of subject-matter of dispute.

Where in a suit for a declaration that the plaintiff is a validly appointed trustee of certain mosque and that the appointment of the defendant was void and inoperative, there is an ancillary prayer for recovery of possession of properties and sums of money on a rendition of accounts, and a prayer for a permanent injunction restraining the defendant and his men from interfering with the plaintiff's right to manage the mosque and its endowments, the essential subject matter of the suit is the post of trusteeship of the mosque and nothing more. If it is found that the plaintiff is the validly appointed trustee, then automatically the other reliefs follow. As the subject matter of the dispute is clearly the trusteeship and not any property and it is incapable of valuation, para (1) of S. 110, Civil P. C. and sub-cl. (a) of Art. 133(1) of the Constitution do not apply. AIR 1916 Mad 985, Rel. on; Case law referred. (Paras 1, 2, 3)

Anno: C. P. C., S. 110 N. 8, 11.

O. Chinnappa Reddi, for Petitioner; K. Umamaheswaram, for Alladi Kuppuswami, for Respondent.

CASES CITED:

(A) ('16) AIR 1916 Mad 985: 39 Mad 843
(B) ('30) AIR 1930 PC 44: 53 Mad 167 (PC)
(C) ('18) AIR 1918 Mad 632: 6 Mad LW 12
(D) ('35) AIR 1935 Rang 113: 13 Rang 123
(E) ('51) AIR 1951 Mad 723: 1951-1 Mad LJ 210
(F) ('49) AIR 1949 Pat 448: 27 Pat 237
(G) ('49) C M P No 9899 of 1949 (Mad)

GOVINDA MENON J.: There is no dispute that the wakf in question relates to property worth more than Rs. 50,000 as the same has been conceded by both the parties. But the question that has been decided in the second appeal is with respect to the trusteeship of the Mohideenia mosque in the village of Damaramadugu, Kovur taluk, Nellore district. We have found that the plaintiff-respondent is entitled to the trusteeship and the subject matter of the appeal to the Supreme Court is whether the plaintiff has the right to function as such. Such being the case, it cannot be said that the subject matter of the suit is capable of valuation and as such para (1) of S. 110, Civil P. C. and Cl. (I)(a) of Art. 133 of the Constitution cannot, in strict terms, apply. But what is contended for the petitioner is that in the plaint the relief asked for includes, in addition to the prayer for a declaration that the plaintiff is a validly appointed trustee of the Moheedeenia mosque and that the appointment of the defendant was void and inoperative, another prayer for the recovery of possession of the properties endowed to the mosque and the sums of money which may be found due from the defendant on a proper rendition of accounts by him for the period of his possession of the properties. Under these circumstances we are asked to say that the possession of property worth about Rs. 50,000 is the value of the subject matter of the proceedings and since the judgment and decree of the High Court have reversed the judgment and decree of the lower appellate Court, the petitioner is entitled to a certificate for leave to appeal to the Supreme Court of India.

(2) In our opinion this contention cannot be accepted for, though there is an ancillary prayer for recovery of possession of properties and sums of money on a rendition of accounts, and a prayer for a permanent injunction restraining the defendant and his men from interfering with the plaintiff's right to manage the mosque and its endowments, still the essential subject matter of the suit is the post of trusteeship of the mosque and nothing more. If it is found that the plaintiff is the validly appointed trustee, then automatically the other reliefs follow. If, on the other hand, the plaintiff's title as trustee is negatived, then the other reliefs cannot be granted. Therefore we have to take it that the real relief asked for is with respect to trusteeship and if that is so, cl. (I) (a) of Art. 133 of the Constitution cannot be invoked. But it is contended that the judgment, decree or final order involves directly or indirectly some claim or question respecting property of that value and since there is a reversing judgment even if the appeal does not involve any substantial question of law, still the appellant is entitled to be granted leave. Clause (I) (b) of Art. 133 of the Constitution is in 'pari materia' with para 2 of S. 110, Civil P. C. and that statutory provision has been the subject of construction in this Court. The trend of decisions of this Court has been to the effect that para (1) applies to cases where the decree awards a particular sum, or property of a particular value or refuses that relief. That is, where the subject matter of the dispute is of a particular value. In — 'Subramania Aiyar v. Sellammal', AIR 1916 Mad 985 at p. 988 (A), Srinivasa Ayyangar J. observes as follows:

"In my judgment the first clause applies to cases where the decree awards a particular sum, or property of a particular value or refuses that relief (i.e.) to cases where the object matter in dispute is of a particular value. In fact the words 'objects in dispute' are used in the provisions relating to appeals from Guernsey. If the operation of the decision is confined only to the particular object matter, cl. (2) does not apply, and unless the case satisfied the conditions in cl. (1) there is no right of appeal. If the decision beyond awarding relief in respect of the particular object matter of the suit affects rights in other properties, cl. (2) would apply; also if the matter in dispute is one

which is incapable of valuation as in the case of easements, cl. (2) may apply."

(3) This decision has been approved by the Privy Council in — 'Mangamma v. Mahalakshmamma', AIR 1930 PC 44 (B). Where the plaintiffs brought a suit for declaration of their right to have their lands irrigated from certain tank and from a channel and the finding of the lower Courts was that the detriment or injury caused to the plaintiffs by their being deprived of this source of irrigation was negligible and was less than the amount fixed in S. 110, Civil P. C. though the lands irrigated were worth more than that sum, it was held in — 'Appala Raja v. Rangappa Naicker', AIR 1918 Mad 632 (C), that the case did not satisfy the requirements either of the first or the second clause of S. 110, Civil P. C. as regards the value of the subject matter of the suit and hence no leave shall be granted. Sadasiva Aiyar J.'s observations at page 14 of the report are also pertinent. He says:

"But in construing the word 'property' in para 2, we cannot lose sight of para 1 of S. 110 to which the second is an alternative. I think 'property' in para 2 of S. 110 means rights in property inferior to full ownership where such inferior rights alone are the subject matter in dispute. Hence para 2 means that the suit must, to satisfy its conditions, involve rights and claims to property which rights and claims are worth Rs. 10,000 and upwards."

We may also refer to the observations of Page C. J. in — 'U Ba Oh v. M. A. Razak', AIR 1935 Rang 113 (D), where the learned Judge is of opinion that if it is impossible to estimate in money or by any pecuniary standard, the loss or detriment which the applicant has suffered by the passing of the decree from which it is sought to obtain leave to appeal, then S. 110 would not apply. Though our attention was invited to cases where the discussion centred round the question as to whether in suits for redemption the subject matter of the dispute is the value of the property which had been mortgaged or whether it is the amount of the mortgage money, and the decision was that the subject matter is the mortgage money for which the security was given and not the value of the property, we think that it is only by analogy that the principles laid down in such cases can be applied here. See — 'Venkataswami v. Manikyam', AIR 1951 Mad 723 (E) and — 'Sati Bala Dasi v. Chota Nagpur Bank Association Ltd.', AIR 1949 Pat 448 (F). A Bench of this Court consisting of Satyanarayana Rao and Chandra Reddi JJ. in C. M. P. No. 9899 of 1949 (Mad) (G) has discussed AIR 1916 Mad 985 (A) and other cases which followed the same and a similar conclusion was arrived at. It is clear that the subject matter of the dispute is the trusteeship and not any property and therefore para (1) of S. 110, Civil P. C. and sub-cl. (a) of Art. 133(1) of the Constitution also would not apply. We do not think that the case involves any substantial question of law.

(4) This petition is not maintainable and is therefore dismissed.

A/D.R.R. Petition dismissed.

A. I. R. 1953 MADRAS 969 (Vol. 40, C. N. 382)

VENKATARAMA AYYAR J.

Selva alias G. Sarangapani Chettiar, Petitioner v. C. L. Aravamudha Iyengar and another, Respondents.

Writ Petn. No. 92 of 1953, D/- 1-5-1953.

(a) Municipalities — Madras District Municipalities Act (5 of 1920), Ss. 12(7) and 303 (2)(b) — Election of Vice-Chairman.

Section 12(7) in terms confers on the Revenue Divisional Officers a power to convene meeting only for the election of chairman and on its true construction it does not confer any power on him to convene a meeting for the election of vice-chairman. Rule 1(2)(b) of the Rules framed under the Act does not abridge any of the rights conferred on him by S. 12(7) and therefore there is no conflict between the two provisions. Hence a notice issued by him to convene a meeting to elect a vice-chairman contravenes the provisions of R. 1(2)(b). (Para 6)

(b) Municipalities — Madras District Municipalities Act (5 of 1920), R. 10 of Election Rules framed under Act — (Constitution of India (1950), Art. 226).

Non-compliance with election rules would be a ground for setting aside an election only if the result of the election had been materially affected thereby irrespective of whether the rules not complied with are mandatory or directory: AIR 1936 Mad 669, Rel. on; (1905) 91 LT 94; (1910) 2 KB 165; AIR 1923 Mad 254 and AIR 1925 Mad 877, Ref. (Para 11)

The question whether the result of any particular election has been materially affected must be determined with reference to the facts and circumstances as they stood on the date of the election and it is not sufficient to set aside the election on it being shown that if the election had been held at a later date the applicant for setting aside the election would have been returned. (Para 10)

Where the Election Commissioner, without adverting to the question whether the non-compliance with a rule affected the results of the election, set aside the election on the ground that there was a non-compliance with a mandatory rule it was held that there was an error affecting the jurisdiction of the matter and the order passed by him required to be quashed in the proceedings for a writ of certiorari. (Para 11)

Anno: C. P. C., App. III; Constitution of India, Art. 226 N. 13.

M. K. Nambiyar and B. Punyakoti Chetti, for Petitioner; K. Rajah Aiyar, K. S. Ramamurthi and A. S. Raman and Govt. Pleader, for Respondents.

CASES CITED:

(A) (1876) 44 LJ CP 293: (1876) 10 CP 733
(B) ('36) AIR 1936 Mad 669: 71 Mad LJ 199
(C) (1905) 91 LT 94
(D) (1910) 79 LJ KB 692: (1910) 2 KB 165
(E) ('23) AIR 1923 Mad 254: 46 Mad 123
(F) ('25) AIR 1925 Mad 877: 48 Mad LJ 696

ORDER: This is an application for the issue of a writ of certiorari for quashing the decision of the Subordinate Judge of Kumbakonam in O. P. No. 93 of 1952. On 16-9-1952 there was a general election of members to the Municipality of Kumbakonam and in that election both the petitioner and respondent 1 were returned as Councillors. The term of the new Councillors was to commence on 1-11-1952. On that date the office of both the Chairman and the Vice-Chairman of the Municipality was

vacant and accordingly the Revenue Divisional Officer, acting under the provisions of S. 12(7), District Municipalities Act, issued a notice, Ex. A convening a meeting of the Councillors for election of Chairman at 4 p. m. on 12-11-1952. At the same time he issued another notice, Ex. A-2 convening a meeting of the Councillors at 6 p. m. on the same date for the election of Vice-Chairman. The Councillors duly met on 12-11-1952 at 4 p. m. and elected a Chairman. At 6 p.m. all of them again met and proceeded to elect a Vice-Chairman. This meeting was presided over by the Councillor who had been elected as Chairman at the meeting held at 4 p. m. There were two candidates for election to the office of Vice-Chairman, the petitioner and respondent 1. It must be mentioned that all the Municipal Councillors, 32 in number were present at this meeting, that the two candidates refrained from voting and that 4 other members did not record their votes. Out of the 26 who voted, 13 were in favour of the petitioner & 13 in favour of respondent 1. There being a tie, there was a drawing of lots & therein the petitioner was declared elected. Respondent 1 then filed O. P. No. 93 of 1952 for setting aside the election on the ground that the Revenue Divisional Officer had no authority to convene a meeting for the election of Vice-Chairman and that the election held at 6 p. m. on 12-11-1952 was accordingly void. On an examination of the relevant provisions, the Subordinate Judge came to the conclusion that the Revenue Divisional Officer was not authorised to convene a meeting for the election of Vice-Chairman and he accordingly set aside the election. A question having been raised as to whether respondent 1 was not estopped by his conduct from disputing the validity of the election, he held that the provision of law relating to the convening of the meeting was mandatory, that there could be no estoppel against a statute and that the respondent was entitled to a declaration that there was no meeting in the eye of law and that there was no election. In the result, he set aside the election of the present petitioner as Vice-Chairman and ordered a fresh election. The present application has been taken out for quashing this order.

(2) The first question that arises for determination in this petition is whether the Revenue Divisional Officer had authority to convene a meeting for the election of Vice-Chairman. The statutory provisions bearing on the question are these : S. 12(7), District Municipalities Act runs as follows :

"When the office of Chairman is vacant or the chairman has been continuously absent from jurisdiction for more than fifteen days or is incapacitated and there is either a vacancy in the office of vice-chairman or the vice-chairman has been continuously absent from jurisdiction for more than fifteen days or is incapacitated the revenue divisional officer shall, after giving notice of not less than seven clear days to the councillors, convene a meeting for the election of a chairman if there is a vacancy in that office and until a new chairman or vice-chairman is elected and assumes office or either the chairman or the vice-chairman returns to jurisdiction or recovers from his incapacity as the case may be, the Revenue Divisional Officer shall, notwithstanding anything contained in this Act or in the rules or notifications thereunder, be ex-officio member and chairman of the council."

Section 13(a) enacts that "The chairman of the municipal council shall make arrangements for the election of the vice-chairman". In exercise of the powers conferred by S. 303(2)(b), the Government have framed rules for the conduct of election of chairman and vice-chairman. Rule I of these Rules is as follows :

I. (i) The election of Chairman or vice-chairman shall be held in the municipal office by the councillors at a meeting specially convened for the purpose.

(ii) Such meeting shall be convened as soon as possible after the occurrence of the vacancy ——

(a) in the case of the election of chairman —

(i) by the Revenue Divisional Officer, in cases falling under sub-s. (7) of S. 12 of the Act; and

(ii) by the Vice-Chairman in other cases; and

(b) in the case of the election of vice-chairman, by the chairman. Notice of the day and hour of meeting shall be given at least seven clear days previous to the day of meeting.

(3) Such meeting shall be presided over—

(a) If held for the election of Chairman,

(i) in cases falling under sub-s. (7) of S. 12 of the Act, by Revenue Divisional Officer, and

(ii) in other cases, by the Vice-chairman, or if the vice-chairman himself intends to stand as a candidate at the election, or in his absence, by a councillor, not intending to stand as a candidate at the election, chosen by the meeting to preside for the occasion, and

(b) if held for the election of vice-chairman by the chairman or in his absence, by a councillor, not intending to stand as a candidate at the election chosen by the meeting to preside for the occasion."

Section 304(c) provides "that all the rules made under S. 303 shall be published in the official gazette and upon such publication shall have effect as if enacted in this Act". These are the material provisions bearing on the question.

(3) The contention of Mr. M. K. Nambiar on behalf of the petitioner is that on 1-11-1952 there was a vacancy in the office of both the chairman and the Vice-chairman of the municipality, that S. 12(7) provides that in that event the Revenue Divisional Officer is to be the ex-officio chairman and that accordingly the notice issued by that officer on 1-11-1952 was in accordance with S. 13(a) which provides that the chairman shall make arrangements for the election of a vice-chairman. With reference to R. I, he argued that S. 12(7) provides that the Revenue Divisional Officer shall be the chairman, notwithstanding anything contained in the rules and that therefore R. I cannot prevail as against the positive provisions of S. 12(7).

(4) The contention of Mr. K. Rajah Aiyar for the respondent is that the power that is conferred on the Revenue Divisional Officer under S. 12(7) is only to convene a meeting for the election of a chairman; that where the election is of a vice-chairman, S. 12(7) has no operation; that under R. I, the meeting for the election of a chairman is to be convened by the Revenue Divisional Officer when there is a vacancy in the office of both the chairman and vice-chairman under S. 12(7) and by the

vice-chairman in other cases; and that the meeting for the election of a vice-chairman must be convened only by the chairman.

(5) It is argued by Mr. M. K. Nambiar that S. 12(7) is in two parts, that the first part has reference to the matters that are dealt with in the earlier portions of the section i.e., the election of chairman and the vice-chairman and that the second part is general in its scope and under that provision the Revenue Divisional Officer could exercise all the powers of a chairman including the power to convene a meeting for the election of a vice-chairman. But if the second part is a general provision, it can have no application in respect of matters for which special provision has been made. 'Generalia specialibus non derogant.' With reference to the right to convene a meeting of councillors for the purpose of election, the governing provision is the first part and as that authorises the convening of a meeting only for the election of a chairman, it must be taken that no power is conferred on the Revenue Divisional Officer to convene a meeting of councillors for the election of a vice-chairman 'Expressio unius est exclusio alterius'. If the construction contended for by Mr. Nambiar is to be adopted, the words "election of chairman" will serve no purpose and will be without significance.

(6) Rule I makes a clear distinction between chairman and the Revenue Divisional Officer acting as a statutory chairman under S. 12(7) and therefore under R. I(2)(b) the person competent to convene a meeting for the election of a vice-chairman is not the Revenue Divisional Officer acting as chairman under S. 12 (7), but the chairman. Mr. Nambiar does not seriously dispute that the chairman contemplated by R. I is different from the Revenue Divisional Officer who is authorised to exercise the powers of a chairman. But he argues that as S. 12(7) enacts that the Revenue Divisional Officer is to exercise the powers of a chairman notwithstanding anything contained in the rules, R. I(2)(b) cannot abridge the rights conferred on him by S. 12(7) and cannot affect his rights to convene a meeting for the election of a vice-chairman. That would have been so, if S. 12(7) had conferred a right on the Revenue Divisional Officer to convene a meeting for the election of a vice-chairman. But in terms it confers on the Revenue Divisional Officer a power to convene meeting only for the election of chairman and on its true construction it does not confer any power on him to convene a meeting for the election of vice-chairman. Thus, there is no conflict between S. 12(7) and R. I(2)(b). In this view, it is unnecessary to refer to the authorities cited by Mr. Rajah Iyer that a statute and the rules made thereunder should be read together as forming one enactment and that the section should be interpreted in the light of the rules and so as not to render it inoperative. I agree with the Subordinate Judge that the Revenue Divisional Officer had no authority to convene a meeting for the election of a vice-chairman and that the notice, Ex. A. 2 is in contravention of R. I(2)(b) of the Rules.

(7) The next question for determination is whether the result of the election has been, as required by R. 10, materially affected by the fact that the meeting was convened not by the Chairman but by the Revenue Divisional Officer. The outstanding facts to be borne in mind with reference to this aspect of the matter are that at the meeting which was actually held on 12-11-52 it was the chairman who presided and not the Revenue Divisional Officer, that all the Councillors were present and participated in the meeting and the election was held without any protest, respondent 1 himself taking an active part, consenting to stand for election as vice-chairman and taking the chance of his being returned as the vice-chairman. It is difficult on these facts, to see how the result of the election would have been materially affected.

(8) Mr. K. Rajah Aiyar contends that while the question whether the result of the election had been materially affected was capable of proof when the objection is that the nomination paper had been erroneously received or that votes had been irregularly recorded, when the charge is that the meeting which was held on a particular day was illegal, it would be impossible, in the very nature of the objection, to prove that the results of the election had been affected. In such a case, it is argued, it would be necessary to take into account the position which might conceivably exist at the notional point of time when a meeting convened in accordance with the rules will proceed to hold an election. It was stated that in the present case the election was being fought on party lines, that after 12-11-1952 three of the neutrals joined the party to which respondent 1 belonged and that if election had been held at a later date, the result would have been in his favour. Reliance was placed on the statement of the law in Halsbury's Laws of England, Vol. 12, page 304, Para 592; Parker on Election Agent page 129; and the decision in —'Woodward v. Sarsons', (1876) 10 CP 733 (A), as supporting the position that what the law has regard to is the possibility that the result of the election might be affected and not proof that it was in fact so affected. On this last point, Mr. M. K. Nambiar points out that the law on the subject is different in India and relies on the statement of the law in Doabia's Law of elections page 155. In 'the Bulandshahr case' (Hammond's election cases, pages 219 at p. 321) it was observed as follows :

> "We have now to form an opinion whether the result of the election was materially affected by this non-compliance with the rules. It was argued for the petitioner that he had only to show that it is possible that the result might have been affected. We are unable to accept this position. S. 42 directs us to report that the election is void if in our opinion the result of the election was materially affected. It does not say that we are to declare the election void because the result of the election might conceivably have been affected."

In the 'Lahore City case' (Hammond's Election cases p. 469 at page 474) it was observed :

> "Herein lies the difference between the English Common Law, if it could be applied, as we have shown, it cannot — and the Indian Statute law, which we must apply; the former only requires the creation of a presumption that the result may have been affected; the latter requires the creation of a presumption that it has been affected."

Vide also 'Patna case' (Hammond's election cases page 535 at page 537 and Bengal Legis-

lative Council case (Indian Election cases by Doabia page 368 at page 378).

(9) On these authorities, it would be necessary for the respondent to establish that the result of the election had been materially affected by reason of the fact that the meeting was convened not by the chairman but by the Revenue Divisional Officer. Mr. Rajah Aiyar, practically concedes that what all it might be possible for him to show is that if the election had been held at a later date, he would have been returned and argues that that should be sufficient to set aside the election.

(10) I am unable to agree that in deciding whether the result of the election has been affected, it is permissible to take into account what might happen if the election were to be held at a future date. No authority has been cited in support of that proposition. On the other hand, the language of R. 10 is that an election shall be declared void on account of non-compliance with the provisions of the Act or the rules made thereunder if the result of the election has been materially affected thereby. The election referred to in this rule is the election which has been actually held and is under challenge; and it would be opposed to the language and to the spirit of the provision to hold that it could be set aside on a consideration of the possibilities of a hypothetical election to be held at a future date. In my opinion, the question whether the result of a particular election has been materially affected must be determined with reference to the facts and circumstances as they stood on the date of the election. In that view, there are absolutely no grounds for holding that the result of the election which was held on 12-11-1952 has been materially affected by reason of the meeting having been convened by the Revenue Divisional Officer. The evidence which the petitioner gave on this point makes interesting reading. He stated that at the time of the election the party to which he belonged had a strength of 17 in the council, in which case, excluding himself, he should have got 16 votes, whereas he got only 13 votes. This makes it difficult to accept the theory that the party of the respondent acquired fresh accession of strength after the date of the meeting and that therefore he would have succeeded if the election were held on a later date. On the materials, the respondent has failed to prove that the result of the election has been materially affected by non-compliance with R. 1.

(11) It was argued by Mr. Rajah Ayyar that even if the Subordinate Judge had taken an erroneous view on the construction of R. 10 and its application, this Court should not interfere in proceedings by way of writ under Art. 226 of the Constitution. It is no doubt well-settled that mere errors are not grounds for interference. But in the present case the Subordinate Judge has nowhere discussed R. 10 and its bearing on the question. He has no doubt referred in passing to the question whether the result of the election has been materially affected but there is no discussion of the evidence of the petitioner already referred to and a reading of the judgment as a whole shows that he was of the opinion that R. 1 was mandatory and that its non-compliance rendered the election void without more. But it is well-settled that non-compliance with Election Rules would be a ground for setting aside the election only if the result of the election had been materially affected thereby and this is so whether the rules in question are directory or mandatory. The real point for decision, therefore, is not whether the rules are directory or mandatory but whether non-compliance thereof has affected the result of the election. The Subordinate Judge deals with this matter only casually and that in my judgment is an error which goes to the jurisdiction of the matter and calls for interference in these proceedings. In — 'Mahabaleswarappa v. Ramachandra Row', AIR 1936 Mad 669 (B), an Election Commissioner had set aside an election on the ground of irregularities without determining whether the result of the election had been materially affected, by reason of such irregularities. Venkatasubba Rao and Cornish JJ. issued a writ of certiorari quashing that decision on the ground that the jurisdiction of the Election Commissioner to set aside the election depended on his finding that the result of the election had been materially affected by the irregularities. The decisions in — 'Rex v. Commissioner of Income-tax', (1905) 91 LT 94 (C) and — 'Rex v. Board of Education', (1910) 2 KB 165 at p. 179 (D), were followed. Vide also — 'Ahmad Thambi v. Basava', AIR 1923 Mad 254 (E) and — 'Palaniappa Chettiar v. Krishnaswami Chettiar', AIR 1925 Mad 877 (F) wherein on the same principle this Court interfered under S. 115, Civil P. C. I must accordingly hold that the election of the petitioner is not liable to be set aside.

(12) In the result, the order of the Election Commissioner is quashed. The petitioner will get his costs throughout from respondent 1. Advocate's fee Rs. 100.

A/M.K.S. Petition allowed.

A. I. R. 1953 MADRAS 972 (Vol. 40, C. N. 383)

SUBBA RAO J.

Sethuraja Gounder, Petitioner v. Board of Revenue, Chepauk, Madras, represented by the Commissioner of Land Revenue, Madras and another, Respondents.

Writ Petn. No. 468 of 1952, D/- 31-7-1952.

(a) Limitation Act (1908), S. 5 — Applicability — Suit under S. 14 of Madras Hereditary Village Offices Act — S. 5 has no application for excusing delay in filing suit — (Madras Hereditary Village Offices Act (3 of 1895), S. 14). (Para 2)

Anno: Limitation Act, S. 5 N. 4.

(b) Constitution of India, Art. 226 — Writ of Certiorari — Error apparent on face of record — (Madras Hereditary Village Offices Act (3 of 1895), S. 14).

Where the Board of Revenue in an appeal against an order in a suit under S. 14, Madras Hereditary Village Offices Act wrongly assumed that S. 5, Limitation Act applied and therefore the delay in filing the suit could be excused:

Held that the judgment of the Board was vitiated by an error apparent on the face of the record and as such was liable to be quashed. (Paras 2 and 3)

(c) Constitution of India, Art. 226 — Petitioner registered as headman under S. 10, Madras Hereditary Village Offices Act — Respondent filing suit to set aside order and to get himself registered in his place — Respon-

dent succeeding before first tribunal but failing before second tribunal — Revenue Board restoring order of first tribunal — Petitioner held had personal interest in applying under Art. 226 — Judgment in AIR 1953 Mad 94, Distinguished. **(Para 5)**

(d) Constitution of India, Art. 226 — Order under Madras Hereditary Village Offices Act — High Court has jurisdiction to issue writ of Certiorari in respect of such order — AIR 1952 SC 64, Foll. **(Paras 4 and 7)**

(e) Constitution of India, Art. 226 — Suit under S. 14, Madras Hereditary Village Offices Act — Order — Appeal to Revenue Board — Order of Revenue Board is judicial act liable to be quashed in appropriate cases — (Madras Hereditary Village Offices Act (3 of 1895), S. 14). **(Para 8)**

T. S. Vaidyanath Aiyar, for Petitioner; V. P. Sarathi, for Govt. Pleader, for the State; S. Venkatakrishnan and K. Arunachala Sastri, for Respondent No. 2.

CASES CITED:

(A) ('53) AIR 1953 Mad 94: (W. P. No. 244 of 1952)

(B) ('52) AIR 1952 SC 64: 1952-1 Mad LJ 775 (SC)

ORDER: This is an application for issuing a writ of certiorari to quash the order of the Board of Revenue dated 28-4-1952. One Kalappa Gounder was the last 'Miras' Headman of Kilaveneri village, Thirumangalam taluk, Mathurai district. He resigned his post on 16-10-1945. The petitioner, the grandson of the said Gounder and who was alleged to be the adopted son of the said Kalappa Gounder, was registered to the office. In regard to the question whether the petitioner was the adopted son of Kalappa Gounder, there was litigation which finally ended in the High Court. The High Court held that he was not the adopted son of Kalappa Gounder. Respondent 2, who is a minor, filed a regulation suit No. 1 of 1950 claiming himself to be next heir of Kalappa Gounder and for his being registered as Headman. On 20-4-1951, the Revenue Divisional Officer set aside the order registering the petitioner and passed orders that respondent 2 should be registered in his place.

The petitioner preferred an appeal to the Collector of Mathurai. The Collector allowed the appeal holding that the suit filed by respondent 2 was time barred as the cause of action arose on 31-12-1945, when the petitioner was registered as headman and as the suit was not filed within three years from that date. Against the order of the Collector, respondent 2 preferred an appeal to the Board of Revenue. The Board of Revenue set aside the order of the Collector and restored that of the Revenue Divisional Officer, and held that the delay in filing the suit must be deemed to have been excused under S. 5, Limitation Act. The petitioner filed the aforesaid writ for quashing that order.

(2) Learned counsel for the petitioner contended that the judgment of the Board of Revenue is vitiated by an error apparent on the face of the record. A perusal of the judgment shows that the Revenue Board assumed that S. 5, Limitation Act would apply and therefore the delay in filing the suit could be excused. It is not contended that S. 5, Limitation Act applies. Indeed, it is conceded that S. 5, Limitation Act has no application for excusing delay in filing a suit under S. 14, Madras Hereditary Village Offices Act.

(3) In the circumstances I must hold that there is an error on the face of the record. The Revenue Board applied a provision, which admittedly has no application.

(4) Realising this difficulty learned counsel appearing for the respondent 2 attempted to sustain the order of the Revenue Board on the following three grounds. (1) The petitioner has no personal and present interest and therefore cannot maintain the application. (2) This Court has no jurisdiction to issue a writ of 'certiorari' under Art. 226 of the Constitution of India in respect of an order made under the Madras Hereditary Village Offices Act. (3) The act of the Revenue Board is not a judicial act.

(5) The first contention was based upon a judgment of Rajamannar C. J. and Venkatarama Aiyar J. in — 'Ramamoorthi In re', AIR 1953 Mad 94 (A). There, the petitioner, who is a member of the Legislative Assembly, applied for quashing the order of the Governor in nominating another person to the Madras Legislative Council. The learned Judges, after citing relevant authoritative decisions given on the subject in America and England, came to the conclusion that it was fundamental that in an application for writ of certiorari, the petitioner must establish his personal and present right. I am bound by the decision. But, in my view, that decision has no relevancy to the question to be decided in this case.

The facts in this case are: The petitioner was registered as a headman under S. 10, Madras Hereditary Village Offices Act. Respondent 2 filed a suit to set aside that order and to get himself registered in his place. He succeeded before the first tribunal, but failed before the second tribunal. The Revenue Board restored the order of the first tribunal. The result is that respondent 2 was directed to be registered in the place of the petitioner. On these facts, it is impossible to say that the petitioner has no personal interest in the matter within the meaning of the aforesaid judgment. The mere fact that in collateral proceedings he was held to be not the adopted son of his deceased maternal grandfather would not really affect the question to be decided.

(6) I cannot agree with his second contention either. Learned counsel's argument is that under Art. 225 of the Constitution of India, the jurisdiction of, and the law administered in, any existing High Court, shall be the same as immediately before the commencement of the Constitution, and as under the Madras Hereditary Village Offices Act, the jurisdiction of the civil Court in respect of the subject matter in question is barred, the High Court under Art. 226 cannot question the order of the Revenue Board. A similar question was raised before a Bench of this Court, of which I was a member, in regard to a legislation that was made subsequent to the Constitution and was repelled by us. In — 'Ponnuswami v. Returning Officer, Namakkal', 1952-1 Mad L J 775: (AIR 1952 SC 64) (B), the following observations of mine are found at page 782:

"The content of the power now conferred under Art. 226 is different and more extensive than the limited power exercised before. This extraordinary jurisdiction, which, I may, for convenience, call power to issue constitutional writs is not dealt with by Art. 225.

It cannot be treated as part of the jurisdiction of the law administered in any existing High Court, for if so held, it may mean that in the case of Courts, which had no power to issue a writ previously, fresh power had been given and in the case of Courts, which had some power previously, it was an extension of that power. It is, therefore, a new power conferred on the High Courts to be exercised subject to the territorial jurisdiction. It is not a power which is an appendage only to the subject matter dealt with under Art. 225. That the High Court has territorial jurisdiction over the entire State within which it is situated, is also clear from the provisions of Art. 227. It says that every High Court shall have superintendence over all Courts and tribunals throughout the territories in relation to which it exercises jurisdiction. The only tribunals which are excluded from its superintendence are Courts or tribunals constituted by or under any law relating to armed forces.

Article 225 is subject to the provisions of the Constitution and therefore subject to the provisions of Arts. 226 and 227. The construction suggested by the learned counsel for the respondents would make Art. 226 subject to Art. 225 which the framers of the Constitution did not purport to do. The total quantum of power of the Parliament to enact laws is dealt with in Art. 245 and distribution in Art. 246. Article 245 clearly says that the power of the Parliament to make any laws for the whole or any part of the territory of India is subject to the provisions of the Constitution and is, therefore, subject to the provisions of Arts. 226 and 227. The Parliament cannot, therefore, make a law in derogation of the provisions of Art. 226."

(7) Later on I observed:

"It is, therefore, clear that the power confined to the territorial jurisdiction of the High Court cannot be taken away by the Parliament by enacting laws, removing a particular subject matter from the jurisdiction of the High Court. So long as the territorial jurisdiction subsists, its unlimited power lasts."

Venkatarama Ayyar J. also agreed with me. Following that judgment, I reject the contention of the learned counsel.

(8) In my view, there are no merits either in the third point. The argument is that the order of the Revenue Board in second appeal is not a judicial act. The connotation of the word "judicial" has been laid down in innumerable decisions. Two of the important tests are: (1) whether the order affects the rights of a party and, (2) whether there is a duty on the part of the tribunal to dispose of the case judicially. Applying these two tests, I find it very difficult to say that the order of the Revenue Board is not a judicial act. Respondent 2 filed a suit under S. 13, Madras Hereditary Village Offices Act for getting himself registered as a headman.

Under the Act there are a heirarchy of tribunals. There is an appeal from the Revenue Divisional Officer to the Collector and from him to the Revenue Board. The Act also prescribes a period of limitation. The procedure for disposing of the suit is similar to that in other suits. Oral and documentary evidence could be adduced. The tribunal, on considering the evidence, comes to the conclusion whether the plaintiff has established his right. This decision is subject to appeal and second appeal. It is therefore clear that the Revenue Board is bound to follow judicial procedure and its decision affects the right of parties. I must, therefore, hold that the order of the Revenue Board is a judicial act liable to be quashed in appropriate cases.

(9) It is then contended by learned counsel that though it is not possible for him to sustain the judgment of the Revenue Board on the ground given by them, he could sustain it on a different ground. He argues that the suit was filed within three years from the date when the cause of action accrued and the date of the cause of action is the date when the High Court finally held that the petitioner was not the adopted son. I do not propose to express my opinion on this question. It should not be understood that I have decided this point even impliedly.

(10) The order of the Revenue Board is hereby quashed and the Board is directed to dispose of the appeal in accordance with law. Respondent 2 will pay the costs of the petitioner.

A/V.R.B. Order quashed.

A. I. R. 1953 MADRAS 974 (Vol. 40, C. N. 384)

RAMASWAMI J.

In the matter of S. R. No. 8238 of 1953.

S. R. No. 8238 of 1953, D/- 1-5-1953.

Drugs Act (1940), S. 12 — Drugs Rules (1945), R. 29 — Order of Drugs Controller cancelling import license — Appeal to High Court — (General Clauses Act (1897), S. 3 (15)).

In view of S. 3 (15), General Clauses Act the High Court is a District Court within the meaning of the Drugs Rules and hence an aggrieved party has a right to prefer a civil miscellaneous appeal in the High Court against an order of the Drugs Controller of India cancelling the import licence granted to him. (Paras 1, 4 and 6)

Anno: General Clauses Act, S. 3 N. 4.

T. T. Srinivasan and A. N. Rangaswami, for Appellant.

CASES CITED:

(A) ('30) AIR 1930 Mad 779: 59 Mad LJ 17

(B) ('89) 16 Ind App 156: 13 Bom 520 (PC)

JUDGMENT: The main question that arises for consideration in this matter is whether under the Drugs Act 23 of 1940, an aggrieved party has a right to prefer a civil miscellaneous appeal in the High Court against an order of the Drugs Controller of India cancelling the import licence granted to him.

(2) Rule 29 of the Drugs Rules, 1945, framed under S. 12 of the Drugs Act (Central Act 23 of 1940) empowers the licensing authority to suspend or cancel in certain cases the import licence granted, provided that the person aggrieved by such cancellation or suspension may within three months from the date of the order appeal to the District Judge of the District in which the right of appeal accrues or if there is no District Judge of the District such judicial officer as the Central Government may appoint in this behalf having jurisdiction and his decision shall be final.

(3) The appellant has chosen the High Court as the proper forum for preferring the civil miscellaneous appeal. But as the rule does not expressly provide for an appeal being presented

to the High Court under the Act, an objection was raised by the office as to how the civil miscellaneous appeal can be maintained. The advocate for the appellant submits in reply that the High Court is a District Court within the meaning of the Drugs Rules and that S. 3 (15) of the General Clauses Act amply justifies his position.

(4) Section 3 (15), General Clauses Act defines the "District Judge" as meaning the Judge of a principal civil Court of original jurisdiction but shall not include a High Court exercising its ordinary or extraordinary original civil jurisdiction. This would mean that the term applies either to the Principal City Civil Judge or the Judge of a High Court not exercising ordinary or extraordinary original civil jurisdiction. The explanation of the term "District Judge" is elaborately dealt with in a Bench decision of Wallace and Ananthakrishna Ayyar JJ. reported in — 'Kuppuswami Nayagar, in the matter of', AIR 1930 Mad 779 (A), following — 'Gandas Narromdas Navivahu v. C. A. Turner', 13 Bom 520 (PC) (B) as lending support to the view that the High Court is a District Court when it does not exercise its ordinary or extraordinary civil jurisdiction conferred on it by the amended Cls. 11 to 18, Letters Patent (Madras). In other words, the High Court will be a "District Court" when it does not exercise its ordinary or extraordinary civil jurisdiction under Cls. 11 to 18, Letters Patent. It is this interpretation of the term "District Judge" that is sought to be applied to the term "District Judge" in R. 29 of the Drug Rules for preferring a civil miscellaneous appeal to the High Court. It is also stated that the appellant has taken alternative steps in the City Civil Court by way of abundant caution though he has expressed a doubt whether such proceedings under the Drugs Rules can be maintained in the City Civil Court.

(5) I need not point out that the City Civil Court does not exercise any appellate jurisdiction unlike a District Judge.

(6) In these circumstances I direct that the S. R. be entertained as civil miscellaneous appeal under R. 29 of the Drug Rules, 1945, stamped with a fixed fee of Rs. 2.

B/V.R.B. Order accordingly.

A. I. R. 1953 MADRAS 975 (Vol. 40, C. N. 385)

RAJAMANNAR C. J.

Garimella Mallikharjuna Rao, Appellant v. Mangipudi Tripura Sundari, Respondent.

Second Appeal No. 1157 of 1949, D/- 27-3-1953.

Negotiable Instruments Act (1881), S. 44 — Promissory note — Failure of consideration — (Debt Laws — Madras Agriculturists Relief Act (4 of 1938), S. 7).

Where a promissory note is executed for an amount in excess of what was due on the basis of Madras Agriculturists Relief Act, there is failure of consideration in so far as the excess amount is concerned and the plaintiff would not be entitled to more than what would be due to him after applying the provisions of that Act to the original debt and its renewals. (Para 4)

Anno: Negotiable Instruments Act, S. 44 N. 1.

C. Rama Rao, for Appellant; K. Bhimasankaram, for Respondent.

CASES CITED:

(A) ('35) AIR 1935 Mad 769: 58 Mad 841
(B) ('44) A. S. No. 290 of 1944 (Mad)

JUDGMENT: This second appeal arises out of a suit brought by the respondent in the court of the District Munsif of Amalapuram to recover a sum of Rs. 1072-5-3 being the amount due for principal and interest on a promissory note executed by the appellant defendant in his favour on 6-4-1945. Admittedly, this promissory note was in respect of the amount of principal and interest due under a prior promissory note dated 8-4-1942 which again was for the amount due under a still prior promissory note of 1939. The origin of the defendant's liability in fact can be traced to the first promissory note of 30-4-1936. Though by the date of the suit promissory note the Madras Agriculturists Relief Act had come into operation, the amount for which the promissory note was executed represented the amount due under the prior promissory note for principal and interest without taking into account the provisions of the Madras Agriculturists Relief Act, which it is common ground applies to the case inasmuch as the defendant is an agriculturist.

The plea of the defendant was in the main that the plaintiff and her husband promised to collect only that amount which would be found due on a proper scaling down of the debt under the provisions of Madras Act 4 of 1938. It was also incidentally pleaded that the defendant had to execute the promissory note because of a threat by the plaintiff and her husband that they would at once file a suit. In the alternative, there was a further plea that as the promissory note was taken for an amount higher than what was due in accordance with the provisions of Madras Act 4 of 1938, there was failure of consideration in so far as the excess amount was concerned. The defendant therefore prayed that a decree may be passed only for the amount of the debt as scaled down under Act 4 of 1938.

Both the learned District Munsif and on appeal the learned Subordinate Judge of Amalapuram decreed the suit as prayed for by the plaintiff. Both the courts found against the specific plea of the defendant that there was an agreement by the plaintiff and her husband to collect only the amount due after scaling down. The learned Subordinate Judge refused to accept the plea of failure of consideration on the ground that the plaintiff stayed her hands from filing the suit and gave time to the defendant and this forbearance on her part to sue would be sufficient consideration for the excess amount of interest. Hence this second appeal by the defendant.

(2) I agree with Mr. Rama Rao that there is nothing in the plaint or in the evidence of the plaintiff's husband even suggesting the case on which the learned Subordinate Judge rested his decision, namely that there was such a forbearance to sue on the part of the plaintiff as could be treated as sufficient consideration for an agreement to pay the excess amount. The learned Subordinate Judge was therefore wrong in overruling the plea of the defendant as to failure of consideration on this ground which was not set up by the plaintiff.

(3) It was next contended by Mr. Bhimasankaram, learned counsel for the plaintiff-respondent that the bargain between the par-

ties should be considered to be that the amount lawfully due in accordance with the Madras Act 4 of 1938 was sufficient consideration for the promise to pay the larger amount. It was argued that there was nothing in law which would render invalid a promise to repay a larger amount on receipt of a smaller amount. For this position, he relied upon the decision of a Division Bench of this court in A. S. No. 26 of 1927 referred to by Varadachariar J. in — 'Narasamma v. Veerraju', AIR 1935 Mad 769 (A) at p. 774. But it is not the plaintiff's case that the defendant in consideration of a smaller amount actually due deliberately consented to pay a larger amount. I do not think that the principle of the decision in A. S. No. 26 of 1927 which was rendered on very peculiar facts applies to the present case.

(4) In my opinion, this case is covered directly by the unreported decision of a Division Bench of this Court (Patanjali Sastry and Shahabuddin JJ.) in A. S. No. 290 of 1944 (Mad) (B). In that case too a promissory note was executed for an amount in excess of what was due on the basis of Madras Act 4 of 1938. The main plea of the defendant in that case, as well as in this case, was that there was an agreement between the parties that the creditor should only receive an amount due after scaling down under Madras Act 4 of 1938 and not the amount mentioned in the suit note. That plea was not accepted. Alternatively it was also pleaded there, as here, that the suit promissory note was not supported by consideration to the extent of the excess over the sum that was payable under the earlier note after scaling down. The learned Judge accepted the latter plea and held that there was a failure of consideration in respect of the excess amount.

After observing that a plea that the promissory note sued on was not supported by consideration to the extent of a payment made under the earlier note but not taken into account at the time of the execution of the new note in renewal was open to the debtor under S. 44, Negotiable Instruments Act, the learned Judges held that the same principle applies in the several cases under Madras Act 4 of 1938, where promissory notes executed prior to the commencement of the Act were renewed subsequent to the Act for the full amounts due under the earlier notes without taking into account the statutory reduction of the liability thereunder. Following that principle, the learned Judges held that the plaintiffs were not entitled to recover anything more than what would be found due and properly payable under the prior note after applying the provisions of Act 4 of 1938. This decision is binding on me and I am also in respectful agreement with it. Following it, I must hold that the plaintiff in this case would not be entitled to more than what would be due to her after applying the provisions of Madras Act 4 of 1938 to the original debt and its renewals.

(5) The plaintiff will therefore have a decree for Rs. 650-2-11 with subsequent interest at 5½ per cent from 6-11-1947 till date of payment. The plaintiff will have costs on the amount allowed to him in the trial court. In the lower appellate court, the defendant will have the costs of his appeal. There will be no order as to costs in this second appeal. No leave.

B/V.R.B. Order accordingly.

A. I. R. 1953 MADRAS 976 (Vol. 40, C. N. 386)

SATYANARAYANA RAO J.

Pyda China Venkatramanna and another, Appellants v. Gummididala Gopala Rao Garu and another, Respondents.

Second Appeals Nos. 949 and 950 of 1949, D/- 29-1-1953.

Tenancy Laws — Madras Estates Land Act (1 of 1908), S. 3(15), Expln. and S. 4 — Person in adverse possession of land for more than 12 years without payment of rent — Liability to pay rent.

A person who was in continuous adverse possession for a period of 12 years, of land which was neither private land nor falling under S. 3(16) of the Act, became a ryot by virtue of explanation to S. 3(15) of the Act, and therefore became liable to pay rent to the landholder under S. 4 of the Act. The land continues to be part of a permanently settled estate and is undoubtedly a ryoti land and the mere fact that the person kept the land without any payment of rent to the Zamindar could not affect that character. The right to recover rent being a recurring right could not be extinguished by non-payment of rent for a period of 12 years and the zamindar would be entitled to recover rent for any period which is within limitation.

(Paras 2, 3)

P. Somasundaram, for Appellants; D. Narasaraju and K. B. Krishnamurthy, for Respondents.

JUDGMENT: These two second appeals arise out of suits instituted by the land-holder under S. 77, Madras Estates Land Act for recovery of rents from the defendants. The item of property in respect of which rent was claimed was in the occupation of the defendants for a long time. There was an earlier litigation between the zamindar and the tenant in respect of this land and other items in O. S. No. 49 of 1906 on the file of the Peddapur District Munsif's Court. In that suit it was pleaded by the predecessors of the present defendants that this land was in their occupation for over the statutory period and that they were enjoying it without payment of rent of the zamindar. The zamindar attempted to claim this land in that suit as part of a grant which he made to one Bhavayyammaraogaru. The finding was that this land was not included in the zamindari jeroyti lands granted under the gift deed of Bhavayyammaraogaru. It was also further found that there was no evidence to show that the defendants or any of them were let into possession of the lands either by Bhavayyamma or her agents on her behalf or even by the plaintiff in that action. It was, therefore, found that the defendants' possession was adverse to the plaintiff and having continued for over 12 years without payment of rent to the landholder the plaintiff's claim was barred by limitation. This decision was affirmed on appeal.

(2) In the present suit the contention raised by the defendants was that the issue in the prior litigation would operate as 'res judicata' and that he would be entitled to hold the land rent free. The finding, no doubt, in that suit would operate as 'res judicata' between the parties and the case must, therefore, proceed on the footing that the occupation of the land by this defendant was unauthorised and that he was in continuous possession of the land

without payment of rent to the landholder. But this finding is not sufficient to enable the defendant to escape from his liability to pay rent to the landholder. If the Madras Estates Land Act stood without any amendment in 1934 the defendant would have escaped from his liability because as the law then stood, he was not a "ryot" who held the land for the landholder for purposes of agriculture and therefore he could not be made liable to pay rent in respect of ryoti land in his occupation under S. 4, Madras Estates Land Act. The position, however, was altered by the Amending Act of 1934 (Act 8 of 1934) which introduced an explanation to sub-cl. 15 of S. 3, "Definition of ryot". That explanation is "A person who has occupied ryoti land for a continuous period of 12 years shall be deemed to be a ryot for all the purposes of this Act." Under this explanation, a person who is in continuous possession of a ryoti land for a period of 12 years is deemed to be a ryot even if the occupation was adverse to the landholder. If he became a ryot by virtue of the explanation his liability to pay rent in respect of the land in his possession is undoubted because S. 4 of the Act declares

> "Subject to the provisions of the Act a landholder is entitled to collect rent in respect of all ryoti land in 'the occupation of a ryot'." (Italics (here into ' ') are mine).

The right, therefore, of the landholder to collect rent cannot be extinguished by non-payment of rent for a period of 12 years. It is a recurring right and so long as the ordinary period of limitation for institution of a suit for recovery of rent for a particular year had not expired, he is entitled to recover the rent for that year from the ryot. The defendant, therefore, under the Act as now amended is liable to pay rent to the landholder notwithstanding the finding in the earlier litigation that he was holding the land adversely to the landholder without payment of rent.

(3) It was contended by Mr. Narasaraju, learned counsel, for the respondent that I should presume a grant and that a rent free grant in favour of the defendant as the defendant was for a long time keeping the land in his possession without paying any rent to the landholder. This contention is intended to enable the debtor to invoke the provisions in S. 26 (3), Madras Estates Land Act, but it is difficult to accept the position for the reason that in the earlier litigation no such plea was raised and it was definitely found that his title was founded upon adverse possession and not upon possession whose origin could not be traced. The further attempt of the learned counsel for the respondent was to contend that the land in the possession of the defendant for continuous period of over 12 years even before the Madras Estates Land Act came into force excluded it from the category of "ryoti land" or at any rate should not be treated as part of the permanently settled estate. Both these contentions proceed, in my opinion on the erroneous view of the provisions of the Act and the effect of the permanent settlement. The division of the lands under the Estates Land Act before the Amendment of 1934 was broadly into private land and ryoti land. Ryoti land was again subdivided into ryoti land which was old waste and which was not old waste. Under the present Act after the Amendment of 1934, the distinction between ryoti land which was old waste and which was not old waste is abolished and there exists only the broad division of ryoti land and private land. Section 3 (16) excludes from the category of ryoti land certain items of communal lands & lands granted on service tenure. The suit land not being private land and not being land falling within S. 3 (16) of the Act must necessarily be deemed to be ryoti land and the presumption is also in favour of so holding. Merely because the defendant kept the land without payment of rent to the zamindar it does not thereby cease to be a part of a permanently settled estate and it continues to be liable for payment of peishkush along with other lands comprised in the estate. It is not possible under law to exclude or to add to the land in a permanently settled estate by act of parties. The land, therefore, continues to be part of a permanently settled estate and is undoubtedly ryoti land. The defendant who is in occupation of the land continuously for more than 12 years became a ryot, by virtue of Explanation to S. 3 (15) of the Act and therefore became liable to pay rent to the landholder under S. 4 of the Act. The Courts below have not determined the rate of rent and, therefore, it is not possible to grant a decree in favour of the plaintiff for rent. The suit must, therefore, be remanded to the trial Court for determination of other issues, in the case. The second appeals are allowed. The decrees of the Courts below are vacated and the suits are remanded to the trial Court for fixing the rate of rent. The appellant is entitled to his costs throughout and the further costs will be provided for by the trial Court. No leave.

B/K.S.B.

Appeals allowed.

A. I. R. 1953 MADRAS 977 (Vol. 40, C. N. 387)

SUBBA RAO J.

Lakshmi Ammal and others, Appellants v. Thangavel Asari, Respondent.

Second Appeal No. 531 of 1949, D/- 5-1-1953.

(a) Hindu Widows Remarriage Act (1856), Ss. 2, 5 — Scope of.

A combined reading of Ss. 2 and 5 indicates that the forfeiture of the property by a widow on remarriage is only confined to the category of cases detailed in S. 2. Under S. 2 she forfeits her rights only in her husband's property which she is entitled to by way maintenance, or by inheritance or by virtue of any will. In the case of a will she does not forfeit if under the will she is authorised to remarry or an absolute interest is conferred on her. The interest contemplated by the section is confined or limited to her lifetime. The section will not apply to an absolute interest legally acquired by the widow. AIR 1947 Mad 163, Ref. (Para 3)

Anno: H. W. R. Act, S. 2 N. 3; S. 5 N. 1.

(b) Hindu Widows Remarriage Act (1856), S. 5 — Compromise decree settling claims of widow and husband's heir — Effect of remarriage — Rules of construing compromise decree — (Deeds — Construction — Compromise decree).

The well settled rules of construction will apply to a compromise decree just like to any other document. If the terms of the compromise decree are clear and unambiguous it is not open to Courts to read into them words which are not there. The entire document must be read together and the

expressed intention of the parties is the guiding factor.

A compromise decree in resolving the conflicting claims may itself be a foundation of a new root of title. It may allot properties to the parties in affirmation of their respective claims. It may create an absolute interest or only a life estate.

Where the document is ambiguous it is open to a Court to construe the document having regard to the surrounding circumstances to ascertain the intention of the parties. A Court, therefore, to clear an ambiguity, may consider the claims of the parties, the quantum of interest they would derive on the basis of those claims and similar other circumstances. In construing the document the binding nature of the document or the validity of the clauses contained therein are not relevant. Case law discussed. (Para 7)

Held on construction of the compromise decree which settled the claims between a Hindu widow and her husband's brother, that the decree did not confirm the claims set up by the parties, but created a new title, that the widow got an absolute estate in the property allotted to her and that it was not liable to be forfeited by her remarriage.

Further, that the brother being a party to the compromise decree and having taken a benefit thereunder was estopped from questioning the binding nature of the decree. (Para 2)

Anno: H. W. R. Act, S. 5 N. 1.

K. S. Sankara Iyer and V. Sundaresan, for Appellants; R. Ramamurthy Iyer, for Respondent.

CASES CITED:

(A) ('47) AIR 1947 Mad 163: 1947-2 Mad LJ 377
(B) ('73-74) 1 Ind App 157 (PC)
(C) ('14) AIR 1914 PC 44: 27 Mad LJ 149 (PC)
(D) ('36) AIR 1936 PC 103: 63 Ind App 155 (PC)
(E) ('39) AIR 1939 Mad 179: 1939-1 Mad LJ 170
(F) ('11) 38 Ind App 87: 33 All 356 (PC)
(G) ('45) AIR 1945 Mad 527: 1945-2 Mad L J 266

JUDGMENT: The second appeal raises a question of the interpretation of S. 2, Hindu Widows Remarriage Act (15 of 1856), hereafter called the Act, and its application to the facts of the case. The facts are simple & are not in dispute. They may be briefly stated. One Mookan Asari, the elder brother of the plaintiff and the first husband of the defendant died. After his death, the plaintiff instituted O. S. No. 239 of 1944 on the file of the Court of the District Munsif of Ambasamudram claiming that the properties were joint family properties and that he was entitled to the same by survivorship. The defendant contended that the properties were the separate properties of Mookan Assari and that she succeeded to the same as his widow. The suit was ultimately compromised and Ex. A. 6 dated 11-6-1945 was the compromise decree made therein. Under the compromise decree, the properties described in Sch. 1 annexed to that decree were given absolutely to the plaintiff and the properties particularised in Sch. 2 annexed thereto were given absolutely to the defendant. The plaintiff and the defendant were put in possession of the properties allotted to their shares. After Mookan Asari's death on 28-10-1943, the defendant married one Somasundaram Asari on 24-9-1946. The plaintiff filed O. S. No. 323 of 1946 on the file of the District Munsif, Ambasamudram, for recovery of possession of the items of property given to the defendant under the compromise decree on the ground that she forfeited all her rights in the said properties under the Act by reason of her second marriage. The learned District Munsif held that the defendant did not forfeit her rights to the properties given to her under the compromise decree by reason of her second marriage, whereas on appeal the District Judge held contra. The result was that the suit was decreed with costs throughout. The defendant preferred the above appeal.

(2) At the outset it may be convenient to consider what would have been the legal position apart from the Act if the widow had died and the succession opened. The plaintiff having been a party to the compromise decree and taken a benefit thereunder would have been estopped from questioning the binding nature of the decree. As the terms of the decree were clear and unambiguous and the parties thereto got absolute interest in the properties allotted to their respective shares, the plaintiff could not have questioned the defendant's absolute interest in the plaint schedule properties. The plaintiff and defendant would have been bound by the terms of the decree. It is not necessary to speculate what would have been the position if a person other than the plaintiff was the next reversioner.

(3) Would the provisions of the Act make any difference? The governing provisions are Ss. 2 and 5 which read:

> S. 2: All rights and interests which any widow may have in her deceased husband's property by way of maintenance, or by inheritance to her husband or to his lineal successors, or by virtue of any Will or testamentary disposition conferring upon her, without express permission to remarry, only a limited interest in such property, with no power of alienating the same, shall upon her re-marriage cease and determine as if she had then died; and the next heirs of her deceased husband, or other persons entitled to the property on her death, shall thereupon succeed to the same.
>
> S. 5: Except as in the three preceding sections is provided, a widow shall not, by reason of her re-marriage forfeit any property or any right to which she would otherwise be entitled; and every widow who has remarried shall have the same rights of inheritance as she would have had, had such marriage been her first marriage.

Learned counsel for the respondent relying upon the provisions of the aforesaid sections contended that the defendant forfeited her rights in the properties given to her by reason of her re-marriage. His argument involved four steps:

1. Under the compromise decree the properties allotted to the defendant were in virtue of her pre-existing title;
2. She therefore came into possession of her husband's property by inheritance.
3. If she secured the properties by inheritance from her husband, the quantum of interest she possessed therein is immaterial for the application of the provisions of S. 2 of the Act.
4. Even if she had got an absolute interest under the compromise decree, the compromise in so far as it gave her an interest beyond her lifetime would not bind the plaintiff and the

property as there could not be an estoppel against the statute.

It may be useful at this stage to construe the relevant provisions of the Act unhampered by the facts of the case. A combined reading of Ss. 2 and 5 indicates that the forfeiture of the property by a widow on re-marriage is only confined to the category of cases detailed in S. 2. Under S. 2 she forfeits her rights only in her husband's property which she is entitled to by way of maintenance, or by inheritance or by virtue of any will. In the case of a will she does not forfeit if under the will she is authorised to remarry or an absolute interest is conferred on her. The words "shall upon her remarriage cease and determine as if she had then died; and the next heirs of her deceased husband or other persons entitled to the property on her death, shall thereupon succeed to the same", afford the clue to the scope of the section. They indicate that the interest contemplated by the section is confined or limited to her lifetime. The section will not apply to an absolute interest legally acquired by the widow. This interpretation was accepted by Rajamannar J. as he then was in — 'Bangaru Reddi v. Mangammal', AIR 1947 Mad 163 (A). After reading the provisions of S. 2 of the Act, the learned Judge said as follows:

"It is clear that this section has no effect on property belonging to the widow absolutely on the date of the remarriage. The rights and interests which she may have in her deceased husband's property by way of maintenance obviously refer to recurring rights as for example to payment of maintenance by the enforcement of a charge on her deceased husband's property. In the case of wills and other testamentary dispositions it is only the limited interest that ceases and determines. The words 'as if she had then died' supply the criterion for adjudicating on the rights and disabilities of the widow on remarriage. All the results which would follow the remarriage are results which would ensue if she had died on the date of the remarriage. In other words, if she had only a limited and life interest then that would cease; but if she had an absolute estate that would not cease."

I respectfully agree with the aforesaid observations.

(4) But this would not conclude the point against the respondent for his contentions, as stated above, namely, that under the compromise decree the defendant secured her rights which she acquired by inheritance to her husband and that the decree in so far it gave her absolute interest would not bind him, require to be countered. In support of his contention that a title conferred under a compromise decree is only an affirmation of a pre-existing title, the learned counsel appearing for the respondent cited before me a long catena of cases. I shall briefly deal with some of them. The leading case on the point is —' Rani Mewa Kuwar v. Rani Hulas Kuwar', 1 Ind. App. 157 (PC) (B). The facts there were: Immoveable property partly situated in Rohilcund and partly in Oudh belonged to the common ancestor of the appellant and the respondent. By a deed of compromise they agreed to divide it in certain proportions, and the agreement was carried out in Rohilcund but not in Oudh, where the respondent was, and continued in possession. At the end of nine years from the date of the deed of compromise, the appellant sued for possession of her share of the property in Oudh. The Judicial Committee held that the claim rested on a title to the land acknowledged and defined by the contract and therefore the suit for possession was within time. The passage relied upon is found on p. 166 of the report, and it reads:

"The compromise is based on the assumption that there was an antecedent title of some kind in the parties and the agreement acknowledges and defines what that title is."

I cannot understand the said statement as laying down a proposition of law that under all circumstances a title acknowledged under a compromise must necessarily refer to the title asserted. There may be cases where the conflict of claims may be resolved by a compromise creating a new root of title. Indeed the decision of the Judicial Committee in — 'Mt. Hiran Bibi v. Mt. Sohan Bibi', AIR 1914 PC 44 (C), is an illustration of the other class of cases. There, the widow of a Hindu, adopted a son but remained in possession of the property of her husband. The adopted son died before her. On the death of the widow, the widow of the adopted son succeeded to her, whereupon one of the daughters of the original owner brought a suit for her share, of the property belonging to her father, questioning the adoption. The suit was compromised. In a subsequent suit a daughter of the adopted son challenged the compromise decree on the ground that her mother had no power to come to a compromise as it amounted to an alienation. The Judicial Committee held that the compromise was in no sense of the word an alienation but a family settlement in which each party took a share of the family property by virtue of the independent title which was to that extent and by way of compromise admitted by the other parties and therefore binding on them.

(5) The same principle was applied by the Judicial Committee in — 'Nathulal v. Baburam', AIR 1936 PC 103 (D). In that case there was a dispute between a widow and her husband's alleged coparcener. The dispute was referred to arbitrators who gave an award. Under the award a share was given to the widow. Their Lordships held that though the properties were originally claimed by the widow through her husband and though the gift was in settlement of a dispute arising therefrom, she got an absolute estate under the award. This case was explained by Wadsworth J. in — 'Nagabhushanam v. Anandayya', AIR 1939 Mad 179 (E), on the ground that the compromise was based upon an admission made by the widow that her husband and brother-in-law were undivided. Even so, this affords another illustration of an independent title acquired by a widow under a compromise decree.

In — 'Khunnilal v. Gobind Krishna Narain', 33 All 356 (PC) (F), their Lordships of the Judicial Committee followed their observations in — '1 Ind. App. 157 (PC) (B)'. The facts in that case may be briefly noticed. A father and son constituted members of a joint Hindu family. The father was converted to Mahomedanism in 1945. The father survived the son. After the death of the father and the widows of the father and son, a compromise was effected between the two daughters of the son on the one side and the grandson of the father on the other, under which a $8\frac{1}{2}$ annas share was allotted to the daughters and a $7\frac{1}{2}$ annas share to the grandson. The daughters' share eventually devolved upon the respondents. In a suit by them for possession of the share allotted to the grandson of the father against the appellant who was his successor in title, the aforesaid compromise was relied upon to non-suit the plaintiffs. The plaintiffs contended that the said compromise was in effect and in substance an alienation, and therefore it was not binding on them. In overruling the said contention their Lordships made the following observations at p. 367:

"The true test to apply to a transaction which is challenged by the reversioners as an alienation not binding on them is, whether the alienee derives title from the holder of the limited interest or life tenant. In the present case Khairati Lal acquired no right from the daughters of Daulat, for 'the compromise' to use their Lordships language in — '1 Ind. App. 157 (PC) (B), is based on the assumption that there was an antecedent title of some kind in the parties, and the agreement acknowledges and defines what that title is."

These observations were made to counter the argument that the grandson of the father derived title under the widow of the son. A compromise of conflicting claims may be based upon a recognition of a pre-existing title; but the compromise in resolving the conflict may create a title in a party either more or less than the interest claimed. Wadsworth J. considered the aforesaid cases in 1939-1-M. L. J. 170 (E)'. The headnote gives a summary of the facts as follows:

"A (brother of B) claimed properties which were alleged to belong to the joint family, by survivorship and C and D claimed those properties as daughters of B who was alleged to have died as divided member. As a result of a compromise between them, the claims of C and D were in part recognised and they were given some properties to be enjoyed by them as of right (the terms used being kakku and Bhuktham)."

The learned Judge on a construction of the document and having regard to the observations of the Judicial Committee in some of the aforesaid decisions, held that the daughters got an estate similar to the one which they claimed, that is, the limited estate of a female. I do not think the learned Judge meant to lay down that even in a case where under the terms of a compromise decree an absolute interest is clearly created, a Court should hold that the daughter got only an estate similar to the one she claimed. That was made clear by the learned Judge in explaining the decision of the Privy Council in — 'AIR 1936 PC 103 (D)'. The learned Judge observed:

"I do not think that this case is authority for holding that when a female puts forward a claim consistent only with the claim to a limited estate and that claim is in part recognised by a compromise, the estate which would be conveyed by the compromise would in the absence of anything to the contrary be presumed to be anything else than an estate similar to that which was claimed."

After noticing the cases cited by the learned counsel the learned Judge summarised the law on the subject as follows:

"The general result of decisions such as these is, that when a person puts forward a claim based on a pre-existing estate and that claim is to some extent recognised by a compromise that compromise will be interpreted in the light of the claim which was put forward and the estate which will pass will be an estate similar to that which was claimed."

I understand these observations to mean that where the terms of a compromise or compromise decree are ambiguous it is open for a Court to interpret the terms of the said document, having regard to the circumstances such as the claim put forward and the nature of the estate that would pass on the basis of that claim.

(6) The same learned Judge reiterated his view in — 'Akkamma v. Pichamma', AIR 1945 Mad 527 (G). There the last maleholder, Venkayya, died leaving a widow and two daughters. The widow made two gift deeds, comprising the whole of the properties which she had got from her husband, in favour of her two daughters, defendant 1 and the plaintiff. Thereafter, Venkamma filed a suit against the nephews of Pichamma, the deceased widow of her brother-in-law, claiming possession of 3.80 acres alleged to have been given by the late Venkayya to Pichamma with a stipulation that she should enjoy the land during her lifetime and that thereafter it should pass to the plaintiff's family. The nephews of Pichamma contended that Pichamma was absolutely entitled to the land and had conveyed it to one of them by a deed of gift. The suit was compromised. Under the compromise the nephews of Pichamma were directed to deliver to Venkamma 1.56 acres out of the land in dispute and that they (the nephews) should be absolute owners of the remaining land. After the death of Venkamma, the appellant filed the suit for recovery of possession of the land got under the compromise decree. The learned Judge having regard to the aforesaid circumstances held that Venkamma got only a widow's estate. The learned Judge observed at page 528:

"There is no such indication in the compromise with which we are now concerned. There was apparently no finding that Venkamma's case was a bad one, nor was there any admission by her from which it could be inferred that she took what she got as a gift from persons who were absolutely entitled. The very fact that under the compromise she is merely given possession of 1.56 acres, while the defendants are to be absolute owners of the balance, seems a positive indication that the compromise merely acknowledged the title which she claimed to the extent of 1.56 acres. It purports to confer no new title upon her."

The observations make it clear that the learned Judge came to the conclusion on a construction of the compromise decree having regard to the surrounding circumstances.

(7) From the aforesaid discussion of the cases the law on the subject may be stated thus: The well-settled rules of construction will apply to a compromise decree just like to any other document. If the terms of the compromise decree are clear and unambiguous it is not open to Courts to read into them words which are not there. The entire document must be read together and the expressed intention of the parties is the guiding factor. A compromise decree in resolving the conflicting claims may itself be a foundation of a new root of title. It may allot properties to the parties in affirmation of their respective claims. It may create an absolute interest or only a life estate. Where the document is ambiguous it is open to a Court to construe the document having regard to the surrounding circumstances to ascertain the intention of the parties. A Court, therefore, to clear an ambiguity, may consider the claims of the parties, the quantum of interest they would derive on the basis of those claims and similar other circumstances. In construing the document the binding nature of the document or the validity of the clauses contained therein are not relevant.

(8) Bearing the aforesaid principles in view, if the terms of the document are looked into, there is no scope for any argument. Under the compromise decree Ex. A. 6, the conflicting claims of the plaintiff and the defendant were resolved. Each of them was given the properties particularised in the schedules annexed to the decree absolutely. The quantum of interest was defined by the same terms in the case of the plaintiff & the deft. It is not suggested that

the plaintiff did not get an absolute interest in the property allotted to him. I would, therefore, hold that under Ex. A. 6 the first defendant got an absolute interest in the plaint schedule properties..

(9) Under Ex. A. 6 the claims set up were not confirmed but a new title was created in deciding the conflicting claims. It is not possible to predicate that the compromise was based upon the assumption that the properties were the self acquired properties of the defendant's husband.

(10) There is no scope in this case for the application of the doctrine that there could not be an estoppel against the statute. The plaintiff, being the next heir of Mookan Asari, it was contended that under S. 2 of the Act he would be entitled to the property on the remarriage of the defendant and therefore, the compromise decree would not preclude him from asserting his right to the same. But the plaintiff has not established that the properties were the self acquisitions of Mookan Asari.

(11) In the result the decree of the lower Court is set aside and that of the District Munsif is restored with costs throughout. Leave granted.

B/D.R.R. Appeal allowed.

A. I. R. 1953 MADRAS 981 (Vol. 40, C. N. 388)

RAJAMANNAR C. J. AND
VENKATARAMA AYYAR J.

Gobald Motor Service Ltd., a company registered under the Indian Companies Act, by its Managing Directors N. Veeraswami Chettiar and another, Appellants v. R. M. K. Velusami and others, Respondents.

Appeal No. 164 of 1949, D/- 16-1-1953.

(a) Tort — Negligence — Accident — Driving at high speed.

Whether in a particular instance the speed was excessive or not must depend on a number of circumstances such as the condition of the road, the nature of the locality, the time and so forth. Whether in a given case the speed was excessive or not must be determined on a consideration of all the circumstances. Where the road passed over a culvert, taking a sharp bend with a downward gradient, and adjoining it was a ditch, the speed at 20 miles per hour was held to be excessive.

(Paras 3 and 4)

(b) Evidence Act (1872), S. 114 — Non-examination of witness.

Suit for damages resulting from rash and negligent driving — Driver absconding — No inference can be raised from his non-examination. (Para 6)

Anno: Evidence Act, S. 114 N. 11.

(c) Tort — Negligence — Motor accident.

In allowing a person who had a driving license to drive a bus, on a route which was new to him, assisted by the old driver who was acquainted with the route, the owner of the bus held did not act negligently. (Para 6)

(d) Tort — Negligence — Master and Servant.

Negligence of servant during course of employment — Employer is liable even though he himself is not negligent. (Para 6)

(e) Tort — Negligence — Motor accident — Accident taking place on off side of road — There is prima facie presumption of negligence — (Presumption held not rebutted). (1948) 2 All ER 460, Applied; English case law Ref. (Paras 10, 11)

(f) Fatal Accidents Act (1855), Ss. 1 and 2 Proviso 2 — Scope.

The two heads of claim under S. 1 and S. 2 are different in their legal character and incidents, though they arise out of the same facts. Thus, while damages under S. 1 are recoverable for the benefit of the persons named therein, compensation under S. 2 goes to the benefit of the estate. While the claim under S. 1 is limited to the loss sustained by the dependents mentioned therein, that under S. 2 will include damages claimable by the deceased such as damages for physical suffering and mental agony and for the loss of expectation of life. Thus, the person who will be entitled to damages under the two sections may be different and the principles on which damages will have to be awarded will also be different. While all the persons mentioned in S. 1 are entitled to relief under S. 1, it is only those in whom the estate has vested who are eligible for relief under S. 2. 1942 AC 601; AIR 1925 Lah 636, Ref. (Paras 14, 14a)

Anno: Fatal Accidents Act, S. 1 N. 2.

(g) Fatal Accidents Act (1855), S. 1 — Damages, calculation of.

Damages can be awarded under the Act only to the extent that the plaintiff suffers pecuniary loss. To ascertain that loss, regard must be had not merely to the conditions existing on the date of the accident, but to all reasonable expectation of pecuniary benefit in the future. The Court should not award sympathetic damages or damages by way of consolation. The burden is on the plaintiffs to establish the extent of their loss. AIR 1947 Cal 195 and English cases Ref. (Para 15)

Considering that the deceased was a man of the age of 34 carrying on business as a doctor, with reasonable prospects of improving in his business, was living in comfort and by his early death plaintiffs 2 to 7 had lost their prospects of education, position in society and even possible provision in their favour, the award of Rs. 25,200 as damages was held quite reasonable. Case law Ref. (Para 16)

Anno: Fatal Accidents Act, S. 1 N. 5.

(h) Fatal Accidents Act (1855), S. 1 — Damages.

The claim of each of the persons mentioned in S. 1 should be separately assessed because the relief to them is in respect of loss severally sustained by them. (Para 17)

Anno: Fatal Accidents Act, S. 1 N. 5, 5a.

(i) Fatal Accidents Act (1855), Ss. 1 and 2 — Damages under both sections — Overlapping.

The same claimant cannot recover twice over for the same wrong under S. 1 and again under S. 2. In computing the damages what is awarded under one head should be taken into account in the other; and it is not a mere rule of arithmetic compelling the deduction of the one from the other, but awarding damages under both heads

without duplication of the same claim. English Case law Ref. (Para 21)

Anno: Fatal Accidents Act, S. 1 N. 2, 5.

T. V. Muthukrishna Ayyar and K. Parasurama Ayyar, for Appellants; K. Rajah Ayyar and G. R. Jagadisan, for Respondents.

CASES CITED:

(A) (1942) 111 LJKB 292: 1942-1 KB 152
(B) (1825) 4 LJCP 75: 3 Bing 319
(C) (1865) 34 LJ Ex 220: 3 H & C 596
(D) (1949) 1949-1 KB 54: 1948-2 All ER 460
(E) (1950) 1950AC 185: (1950) 1 All ER 392
(F) (1909) 25 TLR 13
(G) (1909) 100 LT 115
(H) (1929) 74 SJ 140: 46 TLR 236
(I) (1942) 111 LJKB 418: 1942 AC 601
(J) ('25) AIR 1925 Lah 636: 6 Lah 451
(K) (1859) 157 ER 997: 4 H & N 653: 118 RR 667
(L) (1921) 90 LJKB 1307: 1921-2 KB 461
(M) ('36) AIR 1936 Mad 247: 59 Mad 402
(N) (1913) 82 LJKB 49: 1913 AC 1
(O) ('47) AIR 1947 Cal 195: ILR (1946) 2 Cal 433
(P) (1937) 81 SJ 80: 1937-1 All ER 108
(Q) ('25) AIR 1925 Cal 893: 52 Cal 602
(R) (1888) 58 LJPC 1: 13 AC 800
(S) (1915) 84 LJKB 918: (1915) 1 KB 627
(T) (1937) 106 LJKB 576: 1937 AC 826
(U) (1938) 1938-1 All ER 31
(V) (1939) 108 LJKB 292: 1939-2 KB 180
(W) (1941) 64 LT 401: 1941-1 KB 519
(X) (1941) 1941 AC 157

VENKATARAMA AYYAR J.: This appeal arises out of an action instituted by the respondents for compensation under the provisions of the Fatal Accidents Act, 13 of 1855. The appellant is a company engaged in the business of transporting passengers by bus between Dharapuram and Palani, among other places. On 20-9-1947 one of their buses MDC. 2414, while running from Dharapuram to Palani with passengers, met with an accident at a place called Puliampatti about 3 miles from Palani, as a result of which some of the passengers sustained injuries and one of them Rajaratnam died on 23-9-1947. Plaintiff 1 is his father, plaintiff 2 is his widow and plaintiffs 3 to 7 are his sons. They alleged in the plaint that the driver who was in charge of the bus was incompetent and inexperienced; that he was guilty of rash and negligent conduct in the driving of the bus; and that the accident was the result of his incompetence and negligence. Compensation was claimed under S. 1 of the Act for the loss of pecuniary benefit sustained by the plaintiffs personally, and under S. 2 for the loss sustained by the estate, by reason of the death of Rajaratnam.

The defendants contested the claim. They denied the allegations that the driver was incompetent and inexperienced or that the driving was rash and negligent. They further pleaded that the accident was the result of the rear centre bolt suddenly giving way and that no negligence could be attributed to them. They also pleaded that the damages claimed were excessive. The Subordinate Judge of Dindigul held that there was no proof that the bus was driven at a reckless speed at the scene of accident, but that the fact of its occurring on the off-side of the road was itself evidence of negligence and that it had not been rebutted by the defendants. He also held that Joseph, the driver, was not proved to be competent. He, therefore, held that the defendants were liable for the negligence of their servant. On the question of damages, he awarded a sum of Rs. 3600 to plaintiff 1 and a sum of Rs. 25,200 to plaintiffs 2 to 7 under S. 1, Fatal Accidents Act and a sum of Rs. 6000 to plaintiffs 2 to 7 under S. 2 of the Act. Against this decree, the defendants preferred the present appeal. The points that arise for decision in this appeal are: (1) Was the accident due to the negligence of driver Joseph? (2) If so, to what damages the plaintiffs are entitled?

(2) The facts are as follows: On 20-9-1947 bus No. MDC 2414 started on its journey from Dharapuram to Palani and Ex. A-19 which is the copy of the entry in the Police Register shows that the bus left the police station at 3 p.m. with 16 passengers and with one Sherifuddin (D. W. 3) as its driver. The bus then came to the stand and picked up the other passengers and actually left Dharapuram at 3-5 p.m. with 26 passengers. Just when it was about to start the cashier of the company put one Joseph in the place of Sherifuddin for driving the bus and asked the latter to help him as he was new to the road. Then Joseph took up the driving with Sherifuddin seated by his side. At Thumbalapatti just about 16 miles from Dharapuram, Rajaratnam, his brother P. W. 6 and one Thirumalai Goundan got into the bus. Three miles further down towards Palani there is a place called Puliampatti and that is where the accident took place. There, the road passes over a culvert and then there is a sharp bend with a downward gradient. East of the road is a drain and that is marked off by 5 stones 2 feet high. The bus after crossing the culvert crashed against the 5th stone with so much force that the latter was uprooted and broken. It next attacked a tamarind tree which is stated to be at a distance of 20 or 25 feet from the stone and its bark was peeled off and it travelled some more distance before it finally came to rest. Some of the passengers were knocked and thrown within the bus itself and sustained injuries. Rajaratnam was thrown out of the bus into the ditch at a place 16½ feet south of the tamarind tree. Vide plan filed with the plaint. The bus is stated to have stopped 5 or 6 feet away from this place.

At this time a bus belonging to the appellants which was coming from Palani was stopped and Rajaratnam and the other injured passengers were placed therein and sent to the Palani hospital. M.D.C. 2414 was then driven by D. W. 3 to the Palani bus stand. Rajaratnam was admitted in the hospital at about 5 p.m. Ex. A-1 is the first certificate issued by the doctor; and therein he reserved his opinion about the case. By 5-45 p.m. he considered the case sufficiently serious and sent the memo Ex. A 2 to the Sub-Magistrate, Palani, for recording the dying declaration. Ex. A. 3 the dying declaration was recorded at about 7 p.m. Meantime, Sherifuddin, Joseph and the manager of the appellant company, (D. W. 4), who was then at Palani, all of them, went to the hospital and saw Rajaratnam. After they left the hospital, a statement was prepared by the Manager mentioning the circumstances under which the accident took place. That was presented to the Police at about 8-15 p.m. (Ex. B. 2). In that statement which was signed by D. W. 3 it is stated that Joseph who had accompanied them to the Hospital had in the meantime disappeared. The condition of Rajaratnam became serious. He was sent for treatment to Madurai Hospital on 22-9-1947 and there he expired in the early hours of the 23rd September.

(3) The first question for determination is whether the accident was due to any negligence on the part of the driver Joseph. The contention of the plaintiffs is firstly that the car was driven at a reckless speed, secondly that the driver was inexperienced and incompetent and thirdly that the

very fact of the accident occurring on the side of the road and the bus crashing against the stone and the tamarind tree is proof of negligence. On the question of speed, there is considerable body of oral evidence that the bus was being driven at high speed. P. W. 3 was a passenger in the bus and he also sustained some injuries for which he was treated. He stated that the bus was coming at a great speed and that that was so from the start. P. W. 4 was another passenger who deposes that the bus came at uniformly great speed, that it was about to collide with a cart at Dharapuram and that it was running at great speed when it dashed against the stone and the tree. P. W. 5 runs a tea and coffee stall at the place of the accident. He picked up Rajaratnam after the accident, made him sit and gave him water. He deposes that the bus came at great speed. He was also examined by the Police during the investigation. P. W. 6 is the brother of Rajaratnam who got into the bus along with him at Thumbalapatti and he deposed that the bus ran at an unusually great speed and that his brother cautioned the driver to drive slowly. P. W. 7 is the Sub-Inspector who held an enquiry after the accident and he states that the witnesses told him that the bus was driven at great speed. On the side of the defendants, there is D. W. 2 who claims to have travelled by this bus. The suggestion of the plaintiffs is that this is not true and that derives considerable support from the answers given by the witness in the course of cross-examination. He stated that the bus came at the "usual speed", D. W. 3 is Sherifuddin who was sitting by the side of Joseph during the time. He is an old employee of the appellants and he is even now in their service. He stated that the bus ran at a speed of 20 miles per hour and that at the place of accident the speed was 15 miles.

In weighing this evidence there are certain facts which have to be taken into account. The distance from Dharapuram to Palani is about 22 or 23 miles and the time fixed by the Transport authorities for covering this distance is 1½ hours (vide Ex. B 7). There are 4 stops in this route which, starting from Dharapuram, i.e., Dhasanaikenpatti, Velanpatti, Thoppanpatti and Thumbalapatti. The accident occurred at a place beyond Thumbalapatti, the last of the stopping places. D. W. 3 admitted in his examination in chief that the bus stopped at Thoppanpatti and at Thumbalanpatti, though in cross-examination he stated that he could not say whether that day the bus stopped at Dasanaickenpatti, Velanpatti and Thoppanpatti. P. W. 4 stated that the bus stopped at Velampatti and picked up passengers and that is corroborated by Ex. B. 4. Thus, there is clear proof that the bus stopped at least at 3 places between Dharapuram and the place of accident. Though there is some conflict of evidence as to the precise time at which the accident took place, the statement of D. W. 3 that it took place at 5 minutes to 4 might be taken as correct. The result then is that the bus which left Dharapuram at 3-5 p.m. came to the scene of occurrence at 3-55 p.m. Making the necessary allowance for the 3 stoppages, it may be taken that the running time between Dharapuram and the place of accident was about 42 minutes and the distance covered was 19 miles. The speed, therefore, works out at an average of about 25 miles per hour. The argument on behalf of the appellants is that a speed of 30 miles per hour is permitted under the licence and that, therefore, the speed of 25 miles at which the bus ran was not excessive. That, however, is not the correct approach. Whether in a particular instance the speed was excessive or not must depend on a number of circumstances such as the condition of the road, the nature of the locality, the time and so forth. A speed which would be reasonable on a fine concrete road would be excessive on a road which is full of ruts and in a state of repair. What might be regarded as a safe speed in an uninhabited area might become dangerous in a congested one. A speed which might be harmless during the restful hours of the night might be reckless during the business hours of the day. Whether in a given case the speed was excessive or not must be determined on a consideration of all the circumstances.

In — 'Laurie v. Raglan Building Co.', (1942) 1 KB 152 at pp. 154-155 (A), a lorry which was driven at a speed of 10 to 12 miles skidded and killed a person standing on the pavement. At that time the road was in a dangerous condition due to heavy snow fall. The question was whether the driver was negligent in driving the lorry at that speed which under normal conditions would have been quite reasonable. In holding that the speed was unreasonable under the circumstances, Lord Greene M. R. observed:

> "I am quite unable to accept the proposition that, when a road is in that condition, a lorry of this kind, loaded in the way in which it was loaded, is entitled to proceed at such a speed. If roads are in such a condition that a motor car cannot safely proceed at all, it is the duty of the driver of the motor car to stop. If the roads are in such a condition that it is not safe to go at more than a foot pace, his duty is to proceed at a foot's pace. The evidence here shows clearly that the road was in such a condition that a prudent driver, even if he did not find it necessary to stop, would have proceeded at a very much slower speed. I, therefore, think that, not only did the fact that part of the lorry swept across the pavement raise a 'prima facie' case to be answered, but also that the evidence was sufficient to call for an answer even if there had been no such 'prima facie' case of negligence."

(4) The question for determination, therefore, is whether the speed at which the bus ran at the place was reasonable having regard to the condition of the locality. The material facts to be noted are that the road passes over a culvert, that it takes a sharp bend with a downward gradient, that adjoining it is a ditch, that with a view to prevent vehicles from running into it 5 stones 2 feet high are planted and that the road proper has a space of lands on either side and at their extremity there are trees standing. At such a place prudence requires that a bus must be driven with great caution and with much less speed than on a straight road. Was that done? Mr. T. V. Muthukrishna Ayyar, the learned advocate for the appellants argued that it was and he referred to the statements made by P. W. 6 in the course of cross-examination. He deposed that Rajaratnam and himself boarded the bus at 3-30 p.m. at Thumbalapatti, that the bus stopped only for one minute and that the dashing of the bus against the tree was at 3-45 p.m. The distance between Thumbalapatti and the place of accident being 3 miles; it is argued that the bus ran at a speed of less than 15 miles an hour and that, therefore, the accident could not have resulted from the speed. That, however, is to assume that the time given by the witness is accurate. D. W. 3, on the other hand, deposed that Thumbalapatti was reached at 3-45 p.m. and the accident occurred 5 minutes to 4. Making allowance for the stoppage time at Thumbalapatti, this works out at 20 miles per hour and this speed must be considered excessive having regard to the nature of the ground.

(5) It was argued that if the bus ran at an uncontrollable speed, it would have toppled over into the channel and the fact that it was steered athwart the road shows that the speed was not excessive. But it is one thing to say that the speed was not uncontrollable and quite a different thing to say that it was not reckless or excessive. In this connection, the following facts should be remembered. When the bus crashed against the stone the impact was so violent that the latter was uprooted and broken. Notwithstanding all the attempts in applying the brake, the bus travelled 25 feet to the tamarind tree and dashed against it. In view of the fact that the steering and brake were in good order, as appears from the certificate issued by P. W. 2 on 22-9-1947 it should have been possible to stop the bus even before it reached the tamarind tree if the speed had not been excessive. Then again after the dashing against the tamarind tree, the bus travelled a further distance of about 16½ feet and it was at this stage that Rajaratnam was thrown off. This again could not have happened if the bus was driven at reasonable speed, especially as the two impacts must have reduced its speed. In Ex. A- 3, the dying declaration by Rajaratnam, he stated "the bus came at a very high speed. The driver turned the bus at a certain place. I was telling him to drive the bus slowly. I do not remember in which place the bus was turned. I did not know as to what happened thereafter." Rajaratnam himself owned a car and knew driving and held the licenses therefor (vide Exs. A-7 and A-8). The statement given by him in Ex. A-3 is, therefore, entitled to great weight, especially as it is part of a dying declaration. The statement therein that he warned the driver to proceed slowly is confirmed by the evidence of P. W. 6. On the broad probabilities, we hold that the speed at which the bus was driven was excessive, having regard to the nature of the ground on which the accident happened and that, therefore, there was negligence on the part of the driver and the appellants are liable therefor.

(6) It was also argued for the plaintiffs that Joseph was not a competent driver and that the appellants acted negligently in having engaged him to drive the bus. Exs. B- 19 and B-20 are driving licences issued to Joseph and they show that he served in the Military as a car driver from 1942. D. W. 1 is a respectable witness on whose recommendation D. W. 4 made the appointment. It was argued that Exs. B- 19 and B- 20 are not sufficient in themselves to prove that the driver had the requisite skill, that Joseph himself had not been examined and that the evidence of D. Ws. 1 and 4 did not establish that he had sufficient competence. Stress is also laid on the fact that originally the bus was intended to have been driven by D. W. 3 as seen in Ex. A- 19, that Joseph was put in later on at the instance of the cashier, that that was the first trip undertaken by him and that as it was known that he was new to the road, it was negligence on the part of the appellants to have entrusted the running of the bus to him.

But as Exs. B- 19 and B- 20 are licences issued by the authorities whose duty it was to satisfy themselves about the competence of the driver, it cannot be held that the appellants acted with negligence in acting upon them. Joseph had absconded and no inference can be drawn against the appellants by reason of his non-examination. No doubt, Joseph was new to the route. But the appellants had taken the precaution of putting D. W. 3 by his side for the purpose of guiding him. It is, therefore, impossible to find any negligence on the part of the appellants either in employing Joseph or in allowing him to drive with the assistance of D. W. 3. That the driver acted negligently, we have no doubt. As observed by Best C. J. "The coachman must have competent skill, and must use that skill with diligence; he must be well acquainted with the road he undertakes to drive." Vide 'Crofts v. Waterhouse', (1825) 3 Bing. 319 (B). It was by reason of his unfamiliarity with the road that Joseph drove at a speed which was excessive and rash for the place of occurrence. But, the liability of the appellants arises by reason of negligence of their servant and not of their own.

(7) It was argued for the respondents that even apart from the positive evidence of negligence adduced both in the matter of the speed at which the bus was driven and the incompetence of the driver, there was the further fact that the accident occurred not on the road proper, but on the off-side and that it was itself sufficient to establish negligence. The reason for this rule which is well established, was thus stated by Earle C. J. in Scoot v. London Dock Co; (1865) 3 H and C. 596, at P. 601 (C):

> "Where the thing is shown to be under the management of the defendant or his servants, and the accident is such as in the ordinary course of things does not happen if those who have the management use proper care, it affords a reasonable evidence, in the absence of explanation by the defendants, that the accident arose from want of care."

(8) In — 'Barkway v. South Wales Transport Co.', (1943) 2-All ER 460 (D), the facts were that there was tyre burst

> "and the omnibus then went over to the off-side of the road, mounted the pavement, crashed into some railings and fell on its side down an embankment on to some railway trucks, killing four of the passengers and injuring others."

It was held that

> "the fact that the omnibus left the road and fell down the embankment raised a presumption of negligence against the defendants, requiring them to prove affirmatively that they had exercised all reasonable care."

(9) The principles applicable were thus summed up by Asquith L. J.:

> "The position as to onus of proof in this case seems to me to be fairly summarised in the following short propositions: (i) If the defendants' ombinus leaves the road and falls down an embankment, and this without more is proved, then 'res ipsa loquitur', there is a presumption that the event is caused by negligence on the part of the defendants, and the plaintiff succeeds unless the defendants can rebut this presumption. (ii) It is no rebuttal for the defendants to show, again without more, that the immediate cause of the omnibus leaving the road is a tyre burst, since a tyre burst 'per se' is a neutral event consistent, and equally consistent, with negligence or due diligence on the part of the defendants. When a balance has been tilted one way, you cannot redress it by adding an equal weight to each scale. The depressed scale will remain down. There is the effect of the decision in — '(1942) 1 KB 152 (A)', where not a tyre burst but a skid was involved. (iii) To displace the presumption, the defendants must go further and prove (or it must emerge from the evidence as a whole) either (a) that the burst itself was due to a specific cause which does not connote negligence on their part but points to its absence as more probable, or (b) If they

can point to no such specific cause, that they used all reasonable care in and about the management of their tyres."

It may be mentioned that in the actual application of the above principles there was a difference of opinion among the Judges, the majority holding that the inference of negligence had been displaced on the facts, while Bucknill L. J. held otherwise. The case was taken on appeal to the House of Lords who differed on the facts from the decision of the majority. On the principles applicable, however, there was no disagreement (vide — 'Barkway v. South Wales Transport Co.', (1950) 1 All E R 392 (E)).

In Halsbury's Laws of England, Vol. 23 at page 671, paragraph 956, the law is thus stated:

"An exception to the general rule that the burden of proof of the alleged negligence is in the first instance on the plaintiff occurs wherever the facts already established are such that the proper and natural inference immediately arising from them is that the injury complained of was caused by the defendant's negligence, or where the event charged as negligence 'tells its own story' of negligence on the part of the defendant, the story so told being clear and unambiguous. To these cases the maxim 'res ipsa loquitur' applies. Where the doctrine applies, a presumption of fault is raised against the defendant, which, if he is to succeed in his defence, must be overcome by contrary evidence, the burden on the defendant being to show how the act complained of could reasonably happen without negligence on his part. Where, therefore, there is a duty on the defendant to exercise care, and the circumstances in which the injury complained of happened are such that with the exercise of the requisite care no risk would in the ordinary course of events ensue, the burden is in the first instance on the defendant to disprove his liability. In such a case, if the injurious agency itself & the surrounding circumstances are all entirely within the defendant's control, the inference is that the defendant is liable, and this inference is strengthened if the injurious agency is inanimate."

(10) On the same principle it has been held that if a bus knocks against a stationary object on the road, that would itself be evidence of negligence. Thus, in — 'Isaack Walton & Co. v. Vangaurd Motor Bus Co.', (1909) 25 T L R 13 (F), the omnibus had skidded and dashed against a lamp post on the pavement. That was itself held to be 'prima facie' evidence of negligence. Vide also — 'Barnes U. D. C. v. London General Omnibus Co.', (1909) 100 L T 115 (G) and — 'Ellor v. Selfridge & Co. Ltd.', (1929) 46 TLR 236 (H). It is argued for the respondents that on these principles the fact of the accident occurring on the off-side of the road and of the bus crashing against the stone and the tamarind tree are themselves without more sufficient to establish negligence on the part of the servants of the appellants. Mr. T. V. Muthukrishna Aiyar, while not disputing the principles laid down in these cases, argues that the 'prima facie' inference of negligence has in fact been rebutted by proof that the accident was due to the rear central bolt of the bus suddenly giving way and that the presumption of negligence had been negatived. The point for consideration is whether the accident was caused by the centre bolt suddendly giving way. (After considering the evidence, the judgment proceeded:) The accident must, therefore, be held to be due not to the break of the bolt, but to the reckless speed at which the bus was driven.

(11) On behalf of the plaintiff, it was argued that even if the possibility of the defendants themselves having broken the bolt after the bus reached Palani is ruled out, there are still two hypotheses possible with reference to the break of the bolt. One is that it might have occurred even before the journey commenced at Dharapuram in which case it would undoubtedly have been negligence on the part of the defendants to have put such a vehicle on the road; and the other is that the breaking of the bolt might have resulted from the impact of the bus with the stone and the tamarind tree, in which case that would be the result and not the cause of the accident. (Evidence referred:) Thus, the evidence is inconclusive and it is impossible to say therefrom how and when the breaking of the bolt occurred. Even on that footing, the defendants on whom lies the burden of rebutting the inference of negligence arising by reason of the accident taking place on the off-side of the road and the bus crashing against the stone and the tamarind tree, have failed to discharge the same. To sum up, the evidence establishes that the driver was unfamiliar with the route and drove the bus at a speed greatly in excess of what would be reasonable having regard to the conditions of the road and that the accident was the result of such rash and negligent driving. The presumption of negligence arising from the accident happening on the off-side of the road has not been rebutted by any satisfactory explanation on the part of the appellants. The finding of the Subordinate Judge that there was negligence on the part of the appellants' servants must, therefore, be affirmed.

(12) The next question for determination is, to what damages the plaintiffs are entitled? The claim was made both under Ss. 1 and 2, Fatal Accidents Act, 13 of 1855.

(13) Section 1 is as follows:

"Whenever the death of a person shall be caused by wrongful act, neglect or default, and the act, neglect or default is such as would (if death had not ensued) have entitled the party injured to maintain an action and recover damages in respect thereof, the party who would have been liable if death had not ensued shall be liable to an action or suit for damages, notwithstanding the death of the person injured, and although the death shall have been caused under such circumstances as amount in law in felony or other crime.

Every such action or suit shall be for the benefit of the wife, husband, parent and child, if any of the person whose death shall have been so caused, and shall be brought by and in the name of the executor, administrator or representative of the person deceased; and in every such action the Court may give such damages as it may think proportionate to the loss resulting from such death to the parties respectively, for whom and for whose benefit such action shall be brought; and the amount so recovered, after deducting all costs and expenses, including the costs not recovered from the defendant, shall be divided amongst the beforementioned parties, or any of them, in such shares as the Court by its judgment or decree shall direct."

This is in substance a reproduction of Ss. 1 and 2, English Fatal Accidents Act 9 and 10 Vict. Ch. 93, known as the Lord Campell's Act and it confers on the persons named therein right to claim damages and the extent of that relief is the pecuniary loss which those persons suffer by reason of the death. Section 2 of the Act is as follows:

"Provided always that not more than one action

or suit shall be brought for, and in respect of the same subject-matter of complaint.

Provided that, in any such action or suit, the executor, administrator or representative of the deceased may insert a claim for and recover any pecuniary loss to the estate of the deceased occasioned by such wrongful act, neglect or default, which sum, when recovered, shall be deemed part of the assets of the estate of the deceased."

It is the second proviso that is material for the present purpose. It enacts that any pecuniary loss sustained by the estate by reason of the death might be recovered as part of the estate. This is a claim distinct from and independent of what is provided in S. 1.

(14) A similar provision was enacted in England by the Law Reforms. (Miscellaneous Provisions) Act, 1934. It is important to note that the two heads of claim are different in their legal character and incidents, though they arise out of the same facts. Thus, while damages under S. 1 are recoverable for the benefit of the persons named therein, compensation under S. 2 goes to the benefit of the estate. While the claim under S. 1 is limited to the loss sustained by the dependents mentioned therein, that under S. 2 will include damages claimable by the deceased such as damages for physical suffering and mental agony and for the loss of expectation of life. Thus, the persons who will be entitled to damages under the two sections may be different and the principles on which damages will have to be awarded will also be different.

"The rights of action in the two cases are quite distinct and independent. Under the Law Reforms Act the right of action is for the benefit of the deceased's estate; under the Fatal Accidents Act the right of action is for the benefit of the deceased's dependents."

Per Lord Macmillan in — 'Davies v. Powell Duffryn Associated Collieries Ltd.', 1942 AC 601 at p. 610 (I):

"The law contemplates two sorts of damages: the one is the pecuniary loss to the estate of the deceased resulting from the accident; the other is the pecuniary loss sustained by the members of his family through his death. The action for the latter is brought by the legal representatives, not for the estate, but as trustees for the relatives beneficially entitled; while the damages for the loss caused to the estate are claimed on behalf of the estate and when recovered form part of the assets of the estate."

Per Sir Shadi Lal C. J. in — 'Secretary of State v. Gokul Chand', AIR 1925 Lah 636 at pp. 636-637 (J).

(14a) In the present case, while all the plaintiffs are entitled to relief under S. 1, it is only plaintiffs 2 to 7 who are eligible for relief under S. 2 as the estate of the deceased Rajaratnam has vested in them as his heirs.

(14b) The Subordinate Judge has granted a decree under S. 1 for Rs. 3,600 to plaintiff 1 and for Rs. 25,200/- to plaintiffs 2 to 7 and under S. 2 for Rs. 6000 to plaintiffs 2 to 7. The appellants press three contentions on the question of damages: it was contended (1) that Rs. 25,200 awarded to plaintiffs 2 to 7 was excessive; (2) that the award of Rs. 3600 to plaintiff 1 over and above Rs. 25,200 decreed to plaintiffs 2 to 7 was illegal and (3) that a sum of Rs. 5000 being the damages awarded under S. 2 for loss of expectation of life should go in reduction of the sum of Rs. 25,200 awarded under S. 1 to plaintiffs 2 to 7.

(15) The first point for decision is whether the award of Rs. 25,200 to plaintiffs 2 to 7 under S. 1 of the Act was excessive. Mr. T. V. Muthukrishna Ayyar contended that the basis for awarding damages under that section was the loss of pecuniary benefit sustained by the defendants and that it was incumbent on the plaintiffs to furnish by clear evidence the necessary data for determining that loss. He quoted — 'Duckworth v. Johnson', (1859) 4 H and N 653 (K); — 'Barnett v. Cohen', (1921) 2 K B 461 (L) and — 'Stanes Motors Ltd. v. Vincent Peter', AIR 1936 Mad 247 (M) in support of this position.

In — '(1859) 4 H and N 653 (K)', a boy of 14 was killed by the fall of a certain wall. At the time of his death he was without employment. But there was evidence that he had been earning for about a year or two. On that, the jury awarded damages of £20/-. The defendant having applied to set aside the decree on the ground that there was no evidence of any pecuniary loss, Pollock C. B. observed:

"My opinion is that, looking at the Act of Parliament, if there was no damage the action is not maintainable. It appears to me that it was intended by the Act to give compensation for damage sustained and not to enable persons to sue in respect of some imaginary damage."

But the decree was confirmed on the ground that there was evidence of pecuniary loss. In — '(1921) 2 K B 461 (L)', McCardie J. made a distinction between cases where there is a mere speculative possibility of benefit and cases where there is a reasonable probability of pecuniary advantage and held that the plaintiff had not established any pecuniary loss by reason of the death of a four year old boy. This decision was followed in — 'AIR 1936 Mad 247 (M)', wherein Cornish J. observed:

"The rule is that the damages must be fixed solely with reference to the pecuniary loss sustained by the relatives of the deceased in respect of past contributions or in respect of reasonable expectation of future pecuniary benefit from the deceased. The plaintiff must adduce evidence affording a reasonable basis for the ascertainment of the pecuniary loss so inflicted."

In — 'Taff Vale Railway v. Jenkins', 1913 AC 1 (N), the question came up for consideration before the House of Lords whether damages could be awarded under the Act when the deceased was not in employment at the time of the accident. It was held that the plaintiff would be entitled to damages, provided there was a reasonable expectation of pecuniary benefit from the continuance of the life. Vide also — 'Jeet Kumari v. Chittagong E. and E. Supply Co.', AIR 1947 Cal 195 (O). The law, therefore, may be taken to be well settled (1) that damages could be awarded under the Act only to the extent that the plaintiff suffers pecuniary loss; (2) that to ascertain that loss, regard must be had not merely to the conditions existing on the date of the accident, but to all reasonable expectation of pecuniary benefit in the future and (3) that the court should not award sympathetic damages or damages by way of consolation.

In the light of these principles, we may examine the evidence, the burden being on the plaintiffs to establish the extent of their loss. (His Lordship considered the evidence and proceeded:) The following passage in Mayne on Damages, 11th Edition at page 565 aptly applies to the facts of this case:

"Children may recover for the loss of the education, comforts, and position in society, which they would have enjoyed if their father had lived and retained the income which died with him, and they had continued to reside with him; and even the probability that the deceased

if he had lived would have made provision for his children may be considered."

In — 'Fosbroke Hobbes v. Airwork Ltd.', (1937) 1 All E R 108 at p. 114 (P), one Mr. Hobbes was killed in an air crash due to the negligence of the defendants' servants. The widow and three daughters of Hobbes preferred a claim under the Fatal Accidents Act. In decreeing the claim Goddard J. observed:

"The damages necessarily must be heavy, and it has caused me a good deal of anxiety to come to a conclusion as to the proper amount to award. In losing a husband and a father in the early prime of life, with the further expectation of life of some 30 years, in a good position which had excellent prospects of improvement, the plaintiff and her daughters have suffered a grievous injury. On full consideration, I have come to the conclusion that a fair sum to award is £10,000."

In — Nani Bala Sen v. Auckland Jute Co. Ltd.', AIR 1925 Cal 893 (Q), Sashi, a graduate employed on a salary of Rs. 50 per month and of the age of 26 years died in a motor accident leaving behind a widow and 4 children. On a question as to the damages to which the plaintiffs would be entitled, Page J. observed:

"Such an investigation must always be more or less guess work, for it is impossible accurately to estimate the loss which has been sustained by the death of a husband or a father.....In my opinion, in estimating the amount of the decree to be passed in a case of this nature the Court must take into account all the circumstances which are material for considering the pecuniary loss which has been sustained. The Court must view the matter broadly. No doubt, it must take into account the chance of life, the chances of any improved condition in which the family of the deceased might have passed their days; it must take into account the standard of living of the family which was dependent upon the deceased, and having regard to all the material circumstances, it must do the best it can to estimate what is a fair and reasonable sum to be awarded."

In — 'Grand Trunk Railway Co. of Canada v. Jennings', (1888) 13 AC 800 at pp. 803-804 (R) which was a decision on the Fatal Accidents Act, Lord Watson observed:

"The Courts below have justly held that the right conferred by statute to recover damages in respect of death occasioned by wrongful act, neglect or default, is restricted to the actual pecuniary loss sustained by each individual entitled to sue. In some circumstances, that principle admits of easy application, but in others, the extent of loss depends upon data which cannot be ascertained with certainty, and must necessarily be matter of estimate, and, it may be, partly of conjecture."

(16) Such being the principles, the position is that there is here a man of the age of 34 carrying on business as a doctor, with reasonable prospects of improving in his business. He was living in comfort and by his early death plaintiffs 2 to 7 have lost their prospects of education, position in society and even possible provision in their favour. Under the circumstances the award of Rs. 25200 as damages must be accepted as quite reasonable.

(17) The next contention relates to the award of Rs. 3600 to plaintiff 1 under S. 1 of the Act. It is argued for the appellants that Rs. 25,200 must be taken to represent the total damages payable under that section and that the only right of plaintiff 1 was to recoupe his loss from out of that amount. It is undoubted law that the claim of each of the persons mentioned in S. 1 should be separately assessed because the relief to them is in respect of loss severally sustained by them. It has, therefore, to be examined whether the award of Rs. 25,200 represents damages sustained by plaintiffs 2 to 7 only or whether it also includes the loss sustained by plaintiff 1. A reading of the judgment under appeal clearly shows that the two claims were considered separately and on their own merits. In paras. 23 to 25 the claim of the plaintiffs 2 to 7 is considered. After discussion of the evidence relating to the earnings of Rajaratnam and taking into account the age at which he lost his life, the Subordinate Judge awarded Rs. 25,200 as damages to plaintiffs 2 to 7. In para. 30 he considered the claims of plaintiff 1 separately and after referring to the loss of free services which Rajaratnam was rendering as Manager of the Vaidyasalai awarded Rs. 3600 as compensation for that loss. There is authority in — 'Berry v. Humm & Co. (1915) 1 KB 627 (S) that when the deceased was rendering gratuitous service to the plaintiff and that by reason of the death it would become necessary for the plaintiff to pay for similar service he would be entitled to recover damages under the Act. Rajaratnam was attending to the management of the Vaidysalai without remuneration and the award of Rs. 3600 is by way of compensation for the loss of this service. The validity of this claim as such is not disputed. But the argument of the appellants is that this has been taken into account in awarding Rs. 25,200 to plaintiffs 2 to 7. The basis for this contention is this: When discussing the earning capacity of Rajaratnam, the Subordinate Judge observed that the Vaidyasalai was till 1940 in charge of a manager who was paid Rs. 70 per mensem, that Rajaratnam was doing that service thereafter and that it might require Rs. 100 to engage a manager. But this was mentioned only for assessing how much Rajaratnam could have earned. The Subordinate Judge expressly adds "that gives an idea that that Rajaratnam was doing and can do work which has a pecuniary value". There is, therefore, no justification for the complaint that the award of damages to plaintiff 1 is a duplication of what has been included in the award to plaintiffs 2 to 7.

(18) But, it may be mentioned that the Vaidyasalai is stated to be a joint family concern in which case the loss of service would fall not merely on plaintiff 1 but on the other sons as well. They are, however, not entitled to any relief under S. 1. Plaintiff 1 can get only what is due for his share of the loss. We accordingly reduce the damages on this account to the round figure of Rs. 1000.

(19) The last contention relates to a sum of Rs. 5000 awarded to plaintiffs 2 to 7 under S. 2 of the Act by way of damages for loss of expectation of life. The contention of the appellants is that this amount should go in reduction of the sum of Rs. 25,200 awarded under S. 1, as otherwise it would be a duplication of damages in respect of the same wrong. It has been already stated that the nature of the cause of action under S. 1 is different from that under S. 2 and that the persons entitled to benefit under the one section may be different from those entitled under the other. In such cases there can be no overlapping of damages. But it might happen that the same person is entitled to benefit under both the sections. The question then arises whether he can claim damages twice over for the same wrong, once under S. 1 and again under S. 2.

The contention of Mr. T. V. Muthukrishna Aiyar is that what is awarded under one head

must be deducted in the other and applying that principle, the sum of Rs. 5,000 awarded under S. 2 for loss of expectation of life should be deducted out of Rs. 25,200 awarded under S. 1 of the Act. The decisions in — 'Rose v. Fort', 1937 AC 826 at p. 835 (T); — 'Feay v. Barnwell', (1938) 1 All E R 31 (U); — 'Ellis v. Raine', (1939) 2 KB 180 (V); — 'Yelland v. Powell Duffereign Associated Collieries Ltd.', (1941) 1 KB 519 (W) and — '1942 AC 601 (I)', were quoted in support of this position. In — '1937 AC 826 (T)', a young woman called Rose was killed in an accident. Her father sued for damages both under Lord Campbell's Act and under 1934 Act. There was no dispute about the claim made under Lord Campbell's Act. The point in controversy was whether damages could be awarded for the loss of expectation of life. It was held that they could be. Incidentally the question was raised whether there would not be overlapping of damages under the two heads. As to this, Lord Atkins observed:

"I should add that I see no difficulty as to the alleged duplication of damages under the Act of 1934 and the Fatal Accidents Acts. If those who benefit under the last mentioned Acts also benefit under the Will or intestacy of the deceased personally, their damages under those Acts will be affected. If they do not, there seems no reason why an increase in the deceased's estate in which they take no share should affect the measure of damages to which they are entitled under the Act."

In — '(1938) 1 All ER 31 (U)', Mrs. Feay was killed in an accident and her husband sued for damages both under the Fatal Accidents Act and the Law Reforms Act of 1934. Lingleton J. fixed £600, as damages under the 1934 Act and £625 as damages under the Fatal Accidents Act. As the claimant under both the Acts was the same person, the learned Judge following the observations in — '1937 AC 826 (T)', held that the award under the 1934 Act should be taken into account in fixing the amount of damages under the Fatal Accidents Act; that out of £600 awarded under the 1934 Act a sum of £25 would have to go for duty and administration expenses, that what would reach the plaintiff net would be £575 and deducting that amount, a decree for £50 should be awarded under the Fatal Accidents Act. Thus, the question is not one of mere arithmetical deduction but of avoiding duplication of damages. In — '(1939) 2 KB 180 (V)', the parents of an infant who had been negligently killed in an accident claimed damages under both the Acts. The Court of Appeal sent the case down for a fresh hearing on the ground that the jury had not understood the nature of the two claims put forward. The following observations of Goddard L. J. at page 185 bring out the principles applicable:

"If the parties who will benefit from the damages awarded under the Fatal Accidents Act are the same as those who will benefit from the damages awarded under the Law Reforms Act, the damages under the Fatal Accidents Act must be reduced by the amount which is given as loss under the Law Reforms Act. If the amount given under the Law Reforms Act is equal to or exceeds what the jury may give under the Fatal Accidents Act, they give nothing under the Fatal Accidents Act at all. If on the other hand, in any particular case a jury (as well may happen) should consider that the damages under the Fatal Accidents Act exceed the damages given under the Law Reforms Act, then it may be necessary to assess both."

(20) '(1941) 1 KB 519 (W)' was again a case in which the plaintiffs claimed damages both under the Fatal Accidents Act of 1846 and the Law Reforms Act 1934. Damages were awarded under both the Acts. But as one of the plaintiffs was a person who derived benefit under the 1934 Act the damages under the 1846 Act were reduced by the amount by which she would be benefited by award under the 1934 Act. The question was whether such a deduction could be legally made. It was held by the Court of Appeal that it could be. This decision was taken on appeal to the House of Lords and confirmed, the Noble Lords observing that the award under one head should be "taken into account" in assessing damages under the other. Vide '1942 AC 601 (I)'.

(21) The result of these authorities is that the same claimant cannot recover twice over for the same wrong; that in computing the damages what is awarded under one head should be taken into account in the other; and that it is not a mere rule of arithmetic compelling the deduction of the one from the other, but awarding damages under both heads without duplication of the same claim.

(22) Applying these principles, what is that has been awarded to plaintiffs 2 to 7? Rs. 25,200 for the pecuniary loss sustained by them by reason of the death of Rajaratnam under S. 1 and Rs. 1,000 for agony and suffering and Rs. 5,000 for loss of expectation of life under S. 2 of the Act. All these are items of damages which are distinct and separate from each other. In — 'Banhan v. Gambling', 1941 AC 157 (X), it was held that in a claim under the 1934 Act it would not be proper to make a claim for pecuniary loss to the estate. Viscount Simon L. C. observed:

"Of course, no regard must be had to the financial losses or gains during the period of which the victim has been deprived. The damages are in respect of loss of life, not for loss of future pecuniary prospects."

(23) It was evidently in view of these observations that (claim for) damages on the basis of loss of pecuniary benefit was made only under S. 1, while the claim under S. 2 was limited to damages for mental agony and suffering and loss of expectation of life. There is no duplication of damages and no scope for the application of the decision in — '1942 AC 601 (I)'.

(24) In the result, we modify the decree of the lower Court by reducing the damages payable to plaintiff 1 to Rs. 1,000 and confirm the decree in other respects. Subject to this modification, the appeal is dismissed with costs.

B/R.G.D. Order accordingly.

A. I. R. 1953 MADRAS 988 (Vol. 40, C. N. 389)

GOVINDA MENON AND BASHEER AHMED SAYEED JJ.

Puttayya and another, Appellants v. Varanashi Subraya Hebbar and others, Respondents.

Second Appeal No. 480 of 1949, D/- 29-1-1953.

(a) Civil P. C. (1908), O. 21, Rr. 90, 92 and O. 22, R. 2 — Omission to implead legal representative of deceased judgment-debtor and non-representation of minor.

In execution of a mortgage decree for sale against the members of a joint Hindu family consisting of father and his two minor sons, the hypotheca was sold but before the confirmation of sale the father died and the sale was confirmed without any entry being made under O. 22, R. 2

that the minor sons were the legal representatives of the deceased judgment-debtor and without any fresh appointment of guardian of the two minor sons.

Held that the mere failure to make an entry that the minor judgment-debtors, who were already on record, were the legal representatives of the deceased judgment-debtor was at most an irregularity and would not invalidate the sale. AIR 1952 Mad 871 and AIR 1929 Oudh 235, Distinguished. (Para 4)

Held also that the absence of guardian-ad-litem for the minor judgment-debtors at the time of confirmation of sale would not make the sale invalid. AIR 1927 Nag 198, Rel. on. (Para 7)

Anno: C. P. C., O. 21, R. 90 N. 34, 35.

(b) Civil P. C. (1908), O. 21, R. 92 — Necessary parties and notice to them.

There is no provision in the Code of Civil Procedure for a purchaser to apply for bringing on record the legal representative of the deceased judgment-debtor after the sale takes place but before confirmation. There is also no period of limitation prescribed for such bringing on record. The period of ninety days for bringing on record a legal representative in a suit cannot apply to a case where the judgment-debtor dies after sale but before confirmation. The confirmation might be at any time and need not necessarily be within thirty days of the sale. Under O. 21, R. 92(1) there is no obligatory duty of issuing any notice of confirmation to the judgment-debtor. (Para 4)

Anno: C. P. C., O. 21, R. 92 N. 4.

T. Krishna Rao, for Appellants; S. Ramayya Nayak, for Respondents.

CASES CITED:

(A) ('29) AIR 1929 Mad 152: 51 Mad 347
(B) ('30) AIR 1930 Mad 69: 57 Mad LJ 712
(C) ('29) AIR 1929 Oudh 235: 4 Luck 635
(D) ('52) AIR 1952 Mad 871: 1952-1 Mad LJ 400
(E) ('05) 32 Ind App 23: 32 Cal 296 (PC)
(F) ('09) 36 Ind App 168: 31 All 572 (PC)
(G) ('33) AIR 1933 Cal 627: 60 Cal 753
(H) ('36) AIR 1936 Mad 205: 59 Mad 461 (FB)
(I) ('96) 19 Mad 219
(J) ('96) 23 Cal 686
(K) ('27) AIR 1927 Nag 198: 101 Ind Cas 288
(L) ('24) AIR 1924 Mad 130: 47 Mad 63

GOVINDA MENON J.: In O. S. No. 431 of 1935 on the file of the Court of the District Munsif of Kundapur, a mortgage decree was passed by which the defendants therein were to pay a sum of money to the plaintiffs within a stipulated period in default of which a final decree had to be passed for sale of the mortgaged property. The defendants were members of a joint Hindu family of which defendant 1 was the father and manager and defendants 2 and 3 were his two minor sons. The preliminary decree was passed on 30-11-1935 and since no payment was made, a final decree Ex. B-2 was passed on 10-7-1936. In pursuance of that final decree, the hypotheca was sold by public auction on 16-1-1937 and the mortgagee decree-holder himself became the purchaser. Before the sale was confirmed, defendant 1 Manjunatha Hebbar died on 23-1-1937. No steps were taken to declare that defendants 2 and 3 were the legal representatives of defendant 1 and no attempt was made to appoint anybody as guardian-ad-litem of the minor defendants 2 and 3. But the sale was confirmed on 24-2-1937 and the sale certificate, Ex. P-3 dated 15-3-1937 was issued to the auction purchaser who obtained delivery by R. E. A. No. 156 of 1937 on 17-4-1937, Ex. P-4. Thereafter, the decree-holder purchaser leased the property to defendants 1 and 2 in the suit and the last of these leases Ex. P-5 is dated 11-10-1944. Later on, there was a notice of ejectment issued to defendants 1 and 2, see Ex. P-6 dated 7-1-1946. To that, the present defendants 1 and 2 replied that by the auction purchase the decree-holder purchaser had not obtained any title but that the title in the property was vested in the present defendant 3 who had purchased the property under Ex. D-3 dated 1-9-1943 from the two minor defendants in O. S. No. 431 of 1935 who had become majors and that they had executed 'chalgeni' lease deeds to defendant 3. In a family partition between the decree-holder and his brother, the property has been allotted to plaintiff 1 in the present suit. Therefore the present suit was laid by plaintiffs 1 and 2 against the three defendants for recovery of possession with mesne profits.

(2) Defendants 1 and 2 in the suit were the lessees and defendant 3 is the purchaser of the rights in the property from the guardian for minor defendants, who claim title adverse to the plaintiffs. The trial court found that the auction sale vested title in the purchaser and therefore defendants 2 and 3 in O. S. No. 431 of 1935 had nothing left in them which could be conveyed to the present defendant 3 and therefore decreed the suit. On appeal, the learned Subordinate Judge found that since at the time the sale took place on 16-1-1937 the minor defendants were not represented by any guardian-ad-litem, the sale was void and as such the decree-holder purchaser did not obtain any title to the property. Disagreeing with the trial Court which held that the non-appointment of a guardian-ad-litem for the minors before the sale was confirmed was only an irregularity which would not make the sale invalid, the learned Subordinate Judge held that since there was no legal representative for defendant 1 Manjunatha Hebbar and since there was no guardian for the two minor defendants, the confirmation did not take any effect and therefore the purchaser had not obtained any title. Hence the second appeal.

(3) Satyanarayana Rao J. before whom this second appeal came on for hearing in the first instance has directed this case to be posted before a Bench as the question raised in this case relating to execution proceedings is practically bare of authority and it would be better if there was a decision of a Bench on the point and that is how this second appeal has come to be posted before us.

(4) The first question that arises for consideration is whether the fact that Manjunatha Hebbar's legal representatives, who were already on record, were not declared by Court to be the legal representatives before the sale was confirmed would make the sale invalid. It has to be remembered that the decree was against the joint family as such in which all the members were made parties. Such being the case the death of the managing member would not bring about an abatement of the suit. We are, in this case, governed by O. 22,

R. 2, Civil P. C. which lays down that where there are more defendants than one and only one of them dies and where the right to sue survives against the surviving defendants the Court shall cause an entry to that effect to be made on record and the suit shall proceed against the surviving defendants. What has happened in this case is that no entry has been made that defendants 2 and 3 in O. S. No. 431 of 1935 are the legal representatives of defendant 1. Does it invalidate the confirmation of sale is the question.

The decision in — 'Achutan Nair v. Manavikraman', AIR 1929 Mad 152 (A) definitely lays down that where the legal representatives of a deceased defendant or respondent are already on record, it is not necessary that an application should be made to bring the legal representatives on record within three months. All that is necessary is that at some time or other, before the hearing of the suit or appeal, the plaintiff should bring to the notice of the Court the fact of the death of the defendant, and if the Court, as a result of it, gets it noted on the record, then that would satisfy the obligation under the law. Where a preliminary decree on a mortgage was passed against more than one judgment-debtor and one of them dies before the final decree was passed and the other judgment-debtors happened to be some of his legal representatives, then the omission to bring on record all the legal representatives to represent the estate of the deceased judgment-debtor would not make the final decree a nullity. Vide — 'Kunhi Kalanda Beari v. Kunhipakki', AIR 1930 Mad 69 (B). In that case, before the decree was passed one of the defendants died and some of his legal representatives were already on record in another capacity but not all. A decree was passed by the Court without any application being made to bring on record the legal representatives of the deceased defendant of whom two were already on record. The final decree was passed without all the legal representatives being before the Court. The Court did not even make a declaration that the existing legal representatives sufficiently represented the estate of the deceased defendant. Even in such a case the learned Judges held that the failure to bring on record all the legal representatives of the deceased defendant would not invalidate the decree. It was further held that even if the Court did not make an entry to the effect that the other defendants were the legal representatives of the deceased defendant, still it cannot be said that the decree passed therein was nullity. It seems to us that there is some resemblance between the facts of that case and what we have to consider here.

Manjunatha Hebbar's legal representatives were defendants 2 and 3 in O. S. No. 431 of 1935 and simply because the Court did not make an entry after the sale took place that the minor defendants 2 and 3 are the legal representatives of Manjunatha Hebbar, no argument can be accepted that the confirmation of the sale, without the other judgment-debtors being declared as the legal representatives of the deceased Manjunatha Hebbar, is void. Even in cases where no legal representative of a deceased judgment-debtor was brought on record after sale but before confirmation, it has been held that the confirmation without a legal representative is only an irregularity which would not invalidate the sale as void. The provisions of Cls. (2) and (3) of O. 21, R. 92, C. P. C. are the governing factors in matters of this kind. Under Cl. (1) of the rule where after a sale takes place no application is made under R. 89 or R. 90 or R. 92 to set aside the sale, or where such application is made and disallowed the Court shall make an order confirming the sale and thereupon the sale shall become absolute. The period of limitation for making applications under Rr. 89, 90, and 91 of O. 21, C. P. C. is thirty days as prescribed under Art. 165 of the First Schedule of the Limitation Act. Therefore after the lapse of thirty days, if no application is made to set aside the sale or if during that period, an application is made and subsequently that application is disallowed, then it is the bounden duty of the Court to confirm the sale without any fresh application or a request from the decree-holder or the purchaser in court auction. When once a sale takes place and the decree-holder is not the purchaser, he ceases to have any interest in the property and all the burden which the decree-holder till then had is shifted on the shoulders of the purchaser. There is no provision in the Code of Civil Procedure for a purchaser to apply for bringing on record the legal representative of the deceased judgment-debtor after the sale takes place but before confirmation. There is also no period of limitation prescribed for such bringing on record. The period of ninety days for bringing on record a legal representative in a suit cannot apply to a case where the judgment-debtor dies after sale but before confirmation. The confirmation might be at any time and need not necessarily be within thirty days of the sale. We have also to remember that under Cl. (1) of R. 92 of O. 21 there is no obligatory duty of issuing any notice of the confirmation to the judgment-debtor unlike what we find in Cl. (2) of that rule. Though the confirmation of sale is a judicial matter and not an administrative act, the Code does not provide for the issuing of any notice to the judgment-debtor whose property has been sold in auction.

Our attention was invited to a decision in — 'Kamakhya Dutt Ram v. Lala Shyam Lal', AIR 1929 Oudh 235 (C). What happened there was that after a sale took place but before the sale was confirmed, the judgment-debtor died and subsequently without the legal representatives of the judgment-debtor being brought on record, a confirmation took place. When the validity of the sale was later on questioned by the legal representatives of the deceased judgment-debtor, the learned Judges, Hasan A. C. J. and Misra J. held that as the sale had taken place during the lifetime of the judgment-debtor and there are no provisions in the Code of Civil Procedure which required the legal representative of the judgment-debtor who died after the sale to be brought on record for the purpose of confirmation, the sale was not void. But the learned Judges also differentiated the case where the judgment-debtor dies before the sale takes place and the sale takes place behind the back of his representatives. In such a case they did not express any opinion. A different view was taken by Satyanarayana Rao J. in a recent decision decided after the case was referred to a Bench in — 'Arunachala Chettiar v. Vadla Koundan', AIR 1952 Mad 871 (D). There, the learned Judge, after referring — 'AIR 1929 Oudh 235' (C), held on similar facts that where in execution of a decree, property belonging to the judgment-debtor was brought to sale and the sale confirmed, but

before confirmation the judgment-debtor died, and confirmation takes place in the absence of the legal representative of the judgment-debtor, that the order of confirmation was a nullity because it cannot be made without the presence of parties who are sought to be affected. The reasoning of the learned Judge was that even after a sale takes place the judgment-debtor's interest in the property has not been sufficiently extinguished because according to the decisions it is possible that a judgment-debtor's interest in the property can be attached and sold by other creditors as his interest has not ceased to exist. Such being the case, since the judgment-debtor has still an interest in the property despite the fact that the sale has taken place, the confirmation of the sale without the persons really affected, viz., the judgment-debtor's legal representatives being brought on record, would not pass title to the purchaser in order that the sale shall become absolute. The learned Judge also referred to Cl. (3) of O. 21, R. 92, C. P. C. which says that no suit to set aside an order of confirmation of sale shall be brought by any person against whom such order is made. Since according to this clause, a person against whom an order of confirmation is made is precluded from bringing a suit to set aside the sale, it must be held according to the learned Judge, that the confirmation of sale is an order passed against a person; and if there is no legal representative on record, no order can be passed against him. On account of the existence of O. 21, R. 92, cl. (3), C. P. C. the learned Judge was of opinion that though the sale was valid, the confirmation was a nullity. The decision in — 'AIR 1952 Mad 871' (D) is therefore directly against the view expressed by the Lucknow decision; but so far as the present case is concerned it is unnecessary for us to resolve the conflict between these two decisions for in the case before us, the legal representatives of the deceased Manjunatha Hebbar were already on record and therefore the decision in — 'AIR 1952 Mad 871' (D) is not applicable in 'pari materia' to the facts of the present case. Had it been a case where Manjunatha Hebbar was the sole judgment-debtor, and after the sale took place he died and no legal representative was brought on record then the present case would have resembled — 'AIR 1952 Mad 871' (D) as well as — 'AIR 1929 Oudh 235' (C). But here we have a different situation, viz., the legal representatives being already on record but without a guardian. Defendants 2 and 3 in O. S. No. 431 of 1935 were as much judgment-debtors as Manjunatha Hebbar because in fact the suit was against the joint family of which Manjunatha Hebbar and his two sons were the sole members. It is not contended that the sale which took place on 16-1-1937 is in any manner invalid and therefore when once we hold that the sale is valid, any subsequent irregularity, such as the non-recording of the remaining judgment-debtors as the legal representatives of one of the judgment-debtors who died, would not invalidate the sale as it is not necessary that any notice about the confirmation of sale should be sent to anybody for the purpose of confirmation.

(5) The next question is whether the fact that no guardian was appointed for the minor defendants would make the sale null and void. On behalf of the respondents Mr. Nambiar contends that the purchaser plaintiff 2 was aware of Manjunatha Hebbar's death and he did not take any steps to appoint a guardian for the minors. That would show the absence of bona fides on the part of the decree-holder purchaser for, if he had taken steps and got a guardian appointed, then such a guardian would have taken steps to file an application either under R. 89 or R. 90 of O. 21, Civil P. C. to set aside the sale. Therefore it is contended that the negligence or fraud of the decree-holder cannot entitle him to gain an advantage by preventing the filing of an application to set aside the sale.

Learned counsel also relies upon the observations of the Privy Council in — 'Khiarajmal v. Daim', 32 Cal 296 (PC) (E) at pages 309, 310, 311 and 312 as well as in — 'Mt. Rashid Unnissa v. Muhammad Ismail Khan', 31 All 572 (PC) at pages 581 and 582 (F). Both these well known cases related to instances of non-representation. In both of them, at the time decrees were passed, either the minors were not represented by a guardian or they were represented by persons who, under the law, could not have functioned as guardians. Neither of these cases is authority for the proposition that where there has been a valid sale but before its confirmation one of the judgment-debtors who happened to be a guardian of the other judgment-debtor died then the fact that no fresh guardian was appointed would invalidate the sale. We have carefully considered the various passages in the two Privy Council judgments cited before us and do not find anything that could help the respondents in this argument. If, as has been held in those cases, before the decree was passed, the minor was not represented by a guardian, then the decree is void so far as such minor is concerned. We may also say that if in execution of a valid decree, a minor is not represented before the sale takes place, such a sale also may not be binding on the minor. But these decisions do not help us to resolve the present problem, viz., proper representation at the time of sale but insufficient representation at the time of confirmation.

The two other cases which the learned counsel invited our attention to, viz., — 'Midnapore Zamindari Co. Ltd. v. Abdul Zalil', AIR 1933 Cal 627 (G) and — 'Kanchamalai Pathar v. Shahaji Rajasahib', AIR 1936 Mad 205 (FB) (H) also do not touch the present controversy. In the earlier case, after referring to — '32 Cal. 296' (E) the learned Judges held that a Court has no jurisdiction to sell the property of persons who were not parties to the proceedings or properly represented on the record. As against such persons the decrees and sale purporting to be made would be nullity and might be disregarded without any proceedings to set them aside. Here also the decree was obtained in a suit in which the minor was not represented and a sale of his property in execution of such a decree was held void.

The other case is the well known Full Bench case where it has been held that if after the settlement of a sale proclamation but before the sale was held the judgment-debtor dies, and no legal representative was brought on record before the sale took place, such a sale was void and not merely voidable. None of these cases really decide the present question. But facts and circumstances somewhat akin to what have arisen now were considered in — 'Narayana Kothan v. Kalianasundaram Pillai', 19 Mad 219 (I). There the learned Judges had to consider a case where there was valid decree

against a particular person but prior to an execution sale taking place in pursuance to that decree, the judgment-debtor had been declared insane and no attempt was made to have a guardian appointed for him before the sale took place. Actually when the sale took place the judgment-debtor was insane. The question that rose was whether a sale held when there was no guardian to represent the insane judgment-debtor was void or not. Both the learned Judges held that the question about the void or voidable nature of the sale cannot be taken in execution and one of the learned Judges, Subramania Aiyar J. also held that the sale was only irregular and not void. At page 226 of the report, Subramania Aiyar J. observes as follows:

"Though S. 463, C. P. C. is not expressly made applicable to execution proceedings yet, I think the procedure laid down therein ought in reason to be followed in case like the present also, as otherwise serious harm might be done to judgment-debtors under such disability, whose helpless condition entitled them to peculiar protection at the hands of the Court directing the sale of their properties in execution. I am of opinion, therefore, that defendant 1 was bound to see that plaintiff 1 was duly represented in the sale proceedings. And as he omitted to do so the sale must be held to have taken place without due observance of the requirements of law on the point. Is such a sale void or is it only liable to be set aside at the instance of the party affected? We have not been referred to any direct authority on this point. In England it is quite settled that a contract by a person of unsound mind is not void, but only voidable..... when such is the case in respect of transactions into which private parties enter directly with insane persons, it is difficult to see how a different rule is to be laid down with reference to public sales held under the authority of a Court of justice, it being of the greatest importance as Sir Edward Sugden observes in the case already referred to that such sales should not be lightly set aside. Against this view it may perhaps be urged that the Indian law as to contracts by persons of unsound mind is different from the English law and that such contracts according to the proper construction of S. 12, Indian Contract Act are void and not merely voidable. It is not, however, necessary in this case to express any opinion on this point, for assuming for argument's sake that this construction of the section is correct, the ground on which it rests viz., incompetency to enter into a contract, is quite inapplicable to proceedings in execution where property of judgment-debtors, whether competent to contract or not, is equally liable to be seized and sold. And considering that in such proceedings Courts could and would hold the scales evenly between judgment creditors and purchasers on the one hand and judgment-debtors on the other, the proper course is not to treat sales like the present as entirely null, but to hold that they are liable to be set aside for good cause shown."

An earlier decision of the Calcutta High Court follows the same line of reasoning. See — 'Netlall Sahoo v. Kareem Bux', 23 Cal 686 (J). There also among several judgment-debtors there were three judgment-debtors of whom one was a minor and the other was wrongly described as a minor. The adult judgment-debtor was the guardian of the two others. After a mortgage decree was made absolute, proceedings were taken in execution and during the pendency of such execution proceedings, but before sale, the adult judgment-debtor died and although some of the other judgment-debtors were the legal representatives of that judgment-debtor, no one was brought on record as the legal representative and no one was appointed as the guardian-ad-litem for the minor and the alleged minor. The sale took place without the minors being properly represented. Under such circumstances it was held that the omission to bring the legal representatives of the deceased judgment-debtor did not vitiate the sale and that neither the absence of a guardian-ad-litem for the minor nor the description of the other person as a minor affected the validity of the sale. At page 689 the learned Judges observe as follows:

"The absence of a guardian-ad-litem for Jaidia stands upon the same footing. The order for sale having been made when she was properly represented, it was binding upon her, and if there had been any wish to satisfy the decree on her behalf, she could have applied to do so through a next friend, as in the fact she has preferred the present appeal. Nor are we prepared to say that the description of Kareem Buksha as a minor in any way affects the validity of the proceedings. This description may indeed be treated as surplusage....."

(6) A sale held in execution of a decree after the death of the guardian-ad-litem of a minor judgment-debtor without appointing a fresh guardian is not a nullity. See — 'Baldeo Prasad v. Kusam Singh', AIR 1927 Nag 198 (K) which followed — '23 Cal 686' (J) as well as a decision in — 'Dorasami v. Chidambaram Pillai', AIR 1924 Mad 130 (L), which was subsequently overruled by the Full Bench in — 'AIR 1936 Mad 205 (FB) (H)'.

(7) A review of the decisions which we have just noticed above shows that even in cases where at the time of sale a minor was not properly represented by a guardian but when execution was ordered there was proper and sufficient representation of the minor, then such a sale could at the worst be held only an irregular sale and not a void one. All the more so should we hold that a sale validly held cannot be declared invalid by the mere fact that at the time of confirmation the judgment-debtor's minor sons were not represented by guardian. The question which arises in this case is really bereft of direct authority. But the principles deducible from analogous cases is that it is impossible to hold that the confirmation is invalid. It seems to us therefore that the absence of a guardian-ad-litem for the minor judgment-debtors at the time of the confirmation of sale would not make the sale invalid. The second appeal is therefore allowed, the decree of the Subordinate Judge is set aside and that of the District Munsif restored. The appellants are entitled to their costs in this and the lower appellate Court.

B/K.S.B. Appeal allowed.

A. I. R. 1953 MADRAS 993 (Vol. 40, C. N. 390)

BASHEER AHMED SAYEED J.

K. V. Chandramouleswaran, Petitioner v. G. Krishnaswami Naidu and others, Respondents.

Civil Revn. Petn. No. 473 of 1950, D/- 26-7-1951, to revise order of Dist. Court, Coimbatore, in C. M. A. No. 32 of 1949.

(a) Provincial Insolvency Act (1920), S. 16 — A applying for adjudication of B as insolvent — B depositing in Court amount claimed by A as due to him — Application dismissed — As per agreement between A and B, amount deposited kept earmarked to meet debt of A, if any — Money to be paid to A on his establishing his claim in suit and obtaining decree — Dismissal of application held was not due to any want of due diligence on A's part but was on merits. AIR 1946 Bom 20, Ref. to. **(Para 4)**

Anno: Pro. Ins. Act, S. 16 N. 1.

(b) Provincial Insolvency Act (1920), S. 19 (2) — Application for adjudicating debtor as insolvent — Court calling upon petitioning creditor to deposit charges and ordering notice to debtor — Publication of notification in Gazette also ordered — Notification appearing in Gazette — Debtor served — On date fixed for hearing Court giving time to creditors to appear and be heard — Requirements of S. 19 (2) held were complied with. AIR 1915 Mad 589, AIR 1917 Mad 203 and AIR 1950 Mad 386, Disting. **(Para 5)**

Anno: Pro. Ins. Act, S. 19 N. 1.

(c) Provincial Insolvency Act (1920), Ss. 16 and 19 — Application for adjudicating debtor as insolvent — Application dismissed on basis of compromise — Proper procedure is to restore application under inherent power on petition of another creditor — (Civil P. C. (1908), S. 151).

Held that the proper thing for the court would have been to withhold the payment of the amount for a period in order to allow other creditors to come up and then adjudge their rights against the debtor. Such a procedure would alone have satisfied the principle or the policy and scheme underlying the Provincial Insolvency Act that the petitioning creditor acts not merely for himself but also on behalf of other creditors when once he files a petition to adjudicate debtors as insolvents. (Para 6)

Anno: Provincial Insolvency Act, S. 16 N. 1; S. 19 N. 1; Civil P. C., S. 151 N. 8.

R. Ramasubba Iyer, for Petitioner; P. R. Vasudeva Iyer, for Respondents.

CASES REFERRED TO:

(A) ('33) AIR 1933 Rang 251: 11 Rang 407
(B) ('46) AIR 1946 Bom 20: ILR (1945) Bom 734
(C) ('15) AIR 1915 Mad 589: 1 Mad LW 1012
(D) ('17) AIR 1917 Mad 203: 34 Ind Cas 696
(E) ('50) AIR 1950 Mad 386: 1950-1 Mad LJ 113

ORDER : This revision petition is against the order of the learned District Judge of Coimbatore confirming the order of the learned Subordinate Judge of the same place dismissing a petition under S. 16, Provincial Insolvency Act, and Ss. 151 and 152, Civil P. C.

(2) One Krishnaswami Naidu filed a petition against the two respondents, namely, second and third respondents in this petition, for adjudicating them insolvents in I. P. No. 24 of 1946 on the file of the Sub Court, Coimbatore. The respondents who were sought to be adjudged insolvents pleaded that no amount was due to the first respondent, the petitioning creditor. The third respondent in particular pleaded that he was not unable to pay his debts and actually deposited in court on 22-2-1947 a sum of Rs. 1680, being the entire amount claimed by the first respondent-petitioning creditor, as due to him. The third respondent also challenged the first respondent to establish his claim by way of suit and draw the amount if he obtained a decree in respect of his claim. On such deposit of the sum of Rs. 1680 the learned Subordinate Judge who heard the application dismissed the said petition of the first respondent by an order dated the 24th February 1947.

The learned Subordinate Judge in his order held that as a result of the deposit it followed that the respondents were in a position to pay their debts and that it was not necessary therefore to go into the question whether there was really any debt due to the petitioner in the said petition. He opined that in the circumstances there was no longer any necessity, nor sufficient grounds to adjudicate the respondents as insolvents. He further ordered that as per the agreement entered into between the respondents and the petitioning creditor, the amount deposited in court could be kept earmarked to meet the debt of the petitioning creditor if any, and if the petitioning creditor could establish his claim in a suit and obtain a decree he can draw the money from court.

In the opinion of the court, the agreement entered into between the petitioning creditor and respondents 2 and 3 was a right one and it accordingly directed the money deposited to be kept earmarked for the claim of the petitioner as and when he obtained a decree against respondents 2 and 3. It also gave time for the filing of the suit by the petitioning creditor and directed that in default of a suit being filed within the time stipulated the 2nd respondent (3rd respondent in C. R. P. No. 473 of 1950) could draw out the amount deposited in court by him. In the event of the petitioning creditor getting a decree, the amount in court deposit will be paid off in satisfaction of the decree, was the further direction made by the learned Subordinate Judge. On the strength of this order the learned Subordinate Judge thought that there was no more justification for proceeding with the application of the petitioning creditor and so dismissed the same.

Nearly five months after this dismissal order, the petitioner now before me filed a petition, I. A. No. 130 of 1947 in the said I. P. No. 24 of 1946 praying that the Sub Court should be pleased to reopen I. P. No. 24 of 1946 on its file and substitute and implead the petitioner as the 2nd petitioning creditor in the said insolvency petition and allow the petitioner to continue the application for the adjudication of the 2nd respondent before him as an insolvent. This petition was purported to be filed under S. 16 of the Provincial Insolvency Act and also under Ss. 151 and 152 C. P. C. The learned Subordinate Judge who heard this application, dismissed the application holding that a prayer of the kind contained in the application of the petitioner could be granted

only if the original petitioning creditor did not proceed with his application against respondents 2 and 3 with diligence.

According to him, S. 16 provided that where the petitioner does not proceed with due diligence with his petition, the court may substitute as petitioner any other creditor to whom the debtor may be indebted in the amount required by the Act in the case of a petitioning creditor. He said in so far as the dismissal of I. P. No. 24 of 1946 was not on the ground that the petitioning creditor had not proceeded with the petition with due diligence, S. 16, Provincial Insolvency Act, would not entitle the present petitioner to sustain the application for being brought on record in substitution of the original petitioning creditor. In dismissing the said application the learned Subordinate Judge also relied upon a ruling of a Division Bench of the Rangoon High Court in — 'Gye Maung v. A. K. P. Chettyar firm', AIR 1933 Rang 251 (A), in which the facts were identical with the facts of the present petition.

(3) Against this order of dismissal, the petitioner preferred an appeal before the District Judge of Coimbatore, questioning the validity of the order of the learned Subordinate Judge. But the learned District Judge who heard the appeal in C. M. A. No. 32 of 1949 agreed with the learned Subordinate Judge and dismissed the appeal holding that the petition of the petitioning creditor was dismissed not on default of the petitioning creditor or for lack of due diligence on his part but that the petition was dismissed on merits and that under S. 25(1), Provincial Insolvency Act, if the court was satisfied that the debtor was able to pay his debts, the court had no alternative but to dismiss the petition and inasmuch as the order dated 22-2-1947 passed by the learned Subordinate Judge was on that basis there was no alternative for the learned District Judge but to dismiss the said appeal.

(4) Against this order of dismissal, it is that the petitioner has now preferred this revision petition. In the course of his argument learned counsel, Mr. Ramasubha Aiyar appearing for the petitioner contended in the first place that S. 16 Provincial Insolvency Act, would apply to the facts of the case and though the petition was dismissed on the basis of a compromise entered into between the petitioning creditor and respondents 2 and 3, it should be held that the dismissal was due to want of due diligence in the prosecution of the petition and that therefore his client was entitled to be substituted under that section.

I must say I am unable to agree with this contention of the learned Counsel for the petitioner that S. 16 gives him any remedy. The facts as stated above are quite clear and it cannot be said that the dismissal of the petition on 24-2-1947 was due to any lack of due diligence on the part of the petitioning creditor in the prosecution of his petition. It must be held that the dismissal of the petition was on merits after an enquiry and on the court being satisfied under S. 25(1), Provincial Insolvency Act, that there was no ground for adjudicating the respondents insolvents. Learned counsel for petitioner relied upon — 'Keshav Appa v. Sitaram Hanumandas', AIR 1946 Bom 20 (B), in support of his contention that S. 16 Provincial Insolvency Act, gives him the right to come in as a substitute for the petitioning creditor. I do not think that that decision helps the learned counsel to any extent on that point.

(5) The next point that the learned counsel for the petitioner relied on was that his client, the petitioner, did not have notice as required under S. 19(2), Provincial Insolvency Act. Prima facie it looked as though there was some substance in this contention; but on a scrutiny of the records particularly the B diary, it was found that the learned counsel was not right in saying that the requirements of S. 19(2) were not satisfied. In fact after the petition was admitted and before the hearing date was fixed, which was in this case 24-1-1947, the court called upon the petitioning creditor to deposit charges and ordered notice to respondents and also for a notification to be published in the Fort St. George Gazette. This direction was in pursuance of R. 21 of the rules framed under the Provincial Insolvency Act.

The records would further show that this notification did appear in the gazette as prescribed by R. 21 of the said Provincial Insolvency Rules and that the respondents who were the debtors were also served. The records further show that on 24-1-1947, which was the date fixed by the court for this petition, the court also gave time till 1-2-1947 for creditors, if any, to appear and to be heard. The B Diary makes this clear. In such circumstances, I do not think it is open to the learned counsel for the petitioner to say that the requirements of S. 19(2) have not been complied with in this case. If the position were otherwise, certainly, the authorities quoted by him, namely, — 'Muthukaruppan Chettiar v. Muthuraman Chettiar', AIR 1915 Mad 589 (C) and — 'Nachiappa Chetti v. Thangavelu Chetti', AIR 1917 Mad 203 (D) and also the latest decision in — 'Krishnayya v. Rangarayakulu', AIR 1950 Mad 386 (E), would have been very helpful to him. But actually as set out above, the facts are otherwise. On both these points, therefore, there is no ground for the learned counsel for the petitioner to succeed in his contentions.

(6) But the learned counsel for the petitioner will not leave the matter at that. He would on the other hand urge that the dismissal of his petition filed not merely under S. 16, Provincial Insolvency Act, but also under S. 151, Civil P. C., ought not to have been dismissed by the learned Subordinate Judge for the reason that such dismissal entails gross failure of justice. It is well known that petitioning creditors, when they seek debtors to be adjudicated insolvents, do so not merely on behalf of themselves but also on behalf of a large body of other creditors, and when that is the position, if any one petitioning creditor is permitted to withdraw the petition and walk away with any deposit of money that might be made in court in order to satisfy that petitioning creditor or to purchase peace from him, certainly it will be to the prejudice of the other creditors who at the time may not be before the Court.

In this case, the learned counsel for the petitioner would further urge that not merely was there a compromise between the petition-

ing creditor and the debtors on the basis of which the petition was dismissed, but there was a further order of the learned Subordinate Judge that the sum of Rs. 1680 which was deposited in court should be paid over to the petitioning creditor in case he obtained a decree against one of the respondents. Such an order, learned counsel contends, would work out great hardship and prejudice to the rest of the creditors who would also be entitled to a dividend out of the deposit amount that was available from the debtors. Therefore, in such circumstances not merely was the order, without giving an opportunity to other creditors to appear on the scene but also making the deposit payable exclusively to one of the creditors when there was a specific allegation in the petition of the respondent before this court that the debtors had given notice to their creditors suspending payment of their debts, wholly unjust, but it was also against the interests of justice.

I should consider that there is considerable force in this contention of the learned counsel for the petitioner. It is the policy and scheme of the Provincial Insolvency Act that the filing of a petition by one of the creditors to adjudicate debtors for non-payment of their debts should enure to the benefit of the rest of the creditors who may or may not be before court at the time the petition was filed. Certainly under S. 19(1) there is provision for notice being given to the rest of the creditors by means of publication in the Fort St. George Gazette. But even granting that in pursuance of such notice some other creditors appear on the scene and are brought on record before the court which hears the petition for adjudicating the debtors, if the other creditors are actually not in court on the day on which a compromise between the petitioning creditor and the debtors is entered into, it may not be just nor proper that the other creditors should be deprived of their legitimate right to the benefit of the insolvency proceedings. Much worse would be the position if the creditors are yet to come on the scene.

As has been observed in — 'AIR 1946 Bom 20 (B)' even when a petition is dismissed for lack of due diligence on the part of the petitioning creditor, it will be just and proper that the court should wait for some reasonable time before a final order of dismissal for default is passed, with a view to enable the other creditors to get themselves substituted for the creditor who has failed to prosecute the petition with due diligence. If such be the policy underlying the Provincial Insolvency Act, it is all the more necessary and reasonable that when there is a compromise or settlement entered into between the petitioning creditor and the debtors as a result of which the petition is likely to be dismissed once for all, there should be an opportunity given to other creditors who would like to safeguard their interests from being jeopardised by the action of the sole petitioning creditor.

It may be certainly difficult under the rules as they stand at present for the court to give any specific notice to the other creditors when a compromise is sought to be entered into between the petitioning creditor and the debtors, but this difficulty can be obviated certainly by court notice being put on the notice board of the court that the petitioning creditor is seeking to settle the matter between himself and the debtors and that the other creditors who are interested and who are already on record or not may take necessary steps to safeguard their interests. Such a thing has not been done in the present case and what is worse, the learned Subordinate Judge has thought it fit to make an order that the sum of Rs. 1680 deposited by one of the respondents before me should be taken away by the petitioning creditor in whole.

Such an order is certainly manifestly unjust to the rest of the creditors, especially when it was brought to the notice of the court in the petition filed by the petitioning creditor that there were other creditors besides to whom payment had been suspended by the debtors. The proper thing for the court would have been to withhold the payment of the amount for a period in order to allow other creditors to come up and then adjudge their rights against the debtors. Such a procedure would alone have satisfied the principle or the policy and scheme underlying the Provincial Insolvency Act that the petitioning creditor acts not merely for himself but also on behalf of other creditors when once he files a petition to adjudicate debtors as insolvents.

(7) Further, I must observe that the courts below have not addressed themselves to the fact that the application filed by the petitioner before me for substitution and for restoration of the original petition I. P. No. 24 of 1946 was filed under S. 151 Civil P. C., which lays down that the courts have inherent power to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the court. This is a fit case where the ends of justice require that in the exercise of the powers vested in court under S. 151 of the Code, the original I. P. No. 24 of 1946 should be ordered to be restored to file in order that the claims of the other creditors against the respondents could be considered and disposed of. Even if Ss. 16 and 19 of the Provincial Insolvency Act would not be of any avail to the petitioner, still the courts below had ample power and jurisdiction to rectify situations such as this, where if such rectification does not take place, injustice will ensue.

In this view I think the courts below ought to have allowed the petition for restoration of I. P. No. 24 of 1946 on the file and also ordered substitution of the petitioner in place of the original petitioning creditor who went out of the scene. Otherwise, the position would be that, the debtors having already alienated all the properties, as represented by the original petitioning creditor in the said insolvency petition, there would be no further acts of insolvency which would enable any other creditor to proceed with any application for adjudication of the debtors within the period of time prescribed by the Act.

The result would be that the other creditors would be left without any remedy at all and one of the creditors would have already walked away with the entire sum that was available to all the creditors as such. This in my opinion could not be claimed to be the policy underlying the provisions of the Provincial Insolvency Act. Therefore in order to meet

the ends of justice, I consider that there should be an order directing the Subordinate Judge's court, Coimbatore to restore the petition I. P. No. 24 of 1946 to its file and proceed with the same, substituting the petitioner before me as the petitioning creditor and dispose of the same according to law. In view of the lack of diligence on the part of the petitioner before me, I do not think that he should be awarded any costs. The petition is therefore allowed without costs.

B/V.R.B. Petition allowed.

A.I.R. 1953 MADRAS 996 (Vol. 40, C. N. 391)

BASHEER AHMED SAYEED J.

President of F. 1250 Chowghat Firka P.C.C. Co-operative Society Ltd., A. C. Raman, Petitioner v. Muthavally Seydali's son Valiyakath Kaithakkal Kunhi Bara Haji, Respondent.

Civil Revn. Petn. No. 1290 of 1950, D/- 16-11-1951, to revise decree of Dist. Munsif, Chowghat in S. C. S. No. 56 of 1949.

(a) Transfer of Property Act (1882), S. 111 (h) — Lease terminated by notice — Landlord refusing to take possession — Lease does not continue. (Para 5)

Anno: T. P. Act, S. 111 N. 23.

(b) Transfer of Property Act (1882), S. 108 (m) — Defendant terminating tenancy and offering possession — Premises not in state of proper repairs — Offer by tenant refused — Section does not compel defendant to remain in possession — Landlord plaintiff can only sue for damages for neglect or default of tenant. (Para 5)

Anno: T. P. Act, S. 108 (m) N. 1.

(c) Transfer of Property Act (1882), Ss. 108 (m) and 111 (h) — Loss caused to landlord — Landlord cannot challenge notice or termination of agency but must sue for damages for wilful negligence of tenant. 22 Bom 348 and AIR 1937 Lah 121, Rel. on. (Para 5)

Anno: T. P. Act, S. 108 (m) N. 1, Pt. 14; S. 111 N. 23.

N. Sundara Aiyar and A. R. Srinivasan, for Petitioner; C. T. Verghese, for Respondent.

CASES REFERRED TO:

(A) (1869) 38 LJQB 73: (1869) 4 QB 170
(B) ('45) AIR 1945 PC 77: 72 Ind App 72 (PC)
(C) ('83) 12 Cal LR 343: 9 Cal 671
(D) ('98) 22 Bom 348
(E) ('37) AIR 1937 Lah 121: 173 Ind Cas 694

ORDER : This civil revision petition is against the decree and judgment of the learned District Munsif of Chowghat decreeing the suit brought by the plaintiff claiming a sum of Rs. 285 towards rent due in respect of a godown belonging to the plaintiff for the month of February 1949. The defendant is the petitioner. The plaintiff is the manager of a wakf and the suit property forms part of the family wakf created for the benefit of the descendants of the wakif and the ultimate benefit vests in poor orphans.

The property is a godown said to have been constructed for the purpose of storing foodgrains. It was taken up by the Government and in the first instance was allowed to be kept by one of the distributors. Subsequently, the defendant became the occupier of the premises at the stipulated rent of Rs. 285 per month. By Ex. B.2 dated 6-12-1948 the defendant-society gave notice to the plaintiff that since the godown was no longer required for the society's use, the plaintiff should take possession of the same on 15-12-1948. The defendant society also offered to give the key of the premises. This notice was promptly replied to by the plaintiff on 14-12-1948.

The plaintiff in that notice stated that the society was not entitled to surrender the building as it was put up for the purpose of storing foodgrains and on the understanding with the Government that it would be occupied as long as the distribution of grains continued in that Firka, that the notice issued by the society was neither legal nor proper, that on account of the carelessness of the society the building had been damaged and that consequently he was not bound to take possession and that for any loss caused to the plaintiff, the society would be held responsible.

On receipt of this notice, the defendant society sent another notice, Ex. B. 3, dated 27-12-1948, reiterating that the society was going to surrender the building by the end of 31-1-1949 after paying the rent till that date and that there will be no liability against them for any subsequent rent. The society also denied that any damage had been caused to the building on account of the society's carelessness. Ex. A.3 dated 28-1-1949 was then sent by the plaintiff to the defendant denying the allegations contained in Ex. B.3 and questioning the attitude of the society in offering to surrender the building without paying for the damages and characterising it as a wrongful attitude and questioning the legality of the notice on that ground and intimating the society that they would be held responsible for the subsequent rent also. Thereafter, the plaintiff filed the suit against the defendant for recovery of the rent for the month of February 1949.

(2) In the plaint the averment seems to be to the effect that in spite of the demands, the defendant society was wilfully not paying the arrears of rents and that since the society has damaged the property very much, the plaintiff was not bound to take possession, that the lease had consequently not been determined and so the plaintiff was entitled to claim rent, that even if the lease was determined, since the property had not been restored to its original condition, the plaintiff was entitled to damages for use and occupation.

(3) The defendant society raised various contentions; chief among them being that the lease was determined by sending a valid notice to the plaintiff, that along with it the rent for January 1949 had also been remitted and which the plaintiff had accepted, that the society had vacated the building from that date and it was therefore not liable for any subsequent rent or damages and that the other allegations in the plaint that the lease had not been determined were not true, that the defendant society had not committed any damages to the building and that the plaintiff was not entitled to any amount.

The learned District Munsif held in the course of his judgment that the notice the original of Ex. B.3 was a proper notice expressing the intention of the defendant to de-

termine the tenancy by the end of the midnight of January 1949. He further held that the validity of the notice was not questioned in the plaint. The only point on which the notice terminating the lease was questioned would appear to be that it was not a valid notice for the reason that it did not express the defendant's willingness to pay for the damages.

(4) Having held that the notice was a proper notice and by reason of the notice the lease determined, the learned District Munsif proceeded to consider the further question as to whether the building was damaged by the defendant and consequently the plaintiff was not bound to take possession and therefore the tenancy continued. On this question after a very elaborate discussion, the learned District Munsif came to the conclusion, on a consideration of the evidence on either side, that the building was really damaged when the defendant was in possession and that being so, he held that because the society was bound to repair the building and give it back in the condition in which it was taken up for occupation, the plaintiff was not bound to take possession till then, that the tenancy continued and that it had not been determined and therefore he decreed the suit. It is against this decree that the present civil revision petition has been preferred.

(5) I have been taken through the relevant portions of the judgment and even at the outset, I must state that while the claim of the plaintiff is extraordinary, the finding of the learned District Munsif is still more extraordinary. The plaintiff, it must be stated, has misconceived his remedy and by no stretch of imagination could it be said that the plaintiff, who has refused to take possession when possession was offered, could hold the defendant liable for any rents after the lease was terminated and after the plaintiff refused to take possession. The grounds alleged for refusing to take possession by the plaintiff were that the building was damaged and that until and unless the building is repaired, the plaintiff is not obliged or bound to take possession. Such a position seems to be wholly untenable.

When the lease has been terminated by a valid notice as provided for under S. 111, Transfer of Property Act and when possession has been offered and the plaintiff had refused to take possession, it cannot be held that the lease would still continue in favour of the plaintiff. No authority has been cited by the learned counsel for the respondent to substantiate this extraordinary position he has taken up. The authorities which have been cited by him seem to be completely without any bearing on the point at issue.

The first of them is — 'Henderson v. Squire', (1869) 4 QB 170 (A). That was a case where a tenant, under a parol agreement, without any stipulation that he should deliver up possession of the premises at the end of the term, was nevertheless bound at law to deliver up complete possession. The facts in that case appear to be that a tenant under such an oral agreement underlet a part of the premises & at the determination of both tenancies the under-tenant held over against the will of the tenant & it was held that the landlord can recover against the tenant as damages the value of the whole premises for the time he was kept out of possession, and the costs of ejecting the under-tenant. The facts in the present case are completely at variance with the facts in the reported decision, and I do not think that this renders any assistance to the respondent in this case.

The second authority that has been relied upon by the learned counsel is the one reported in — 'Ethirajulu Naidu v. Ranganatham Chetti', AIR 1945 PC 77 (B). There also the facts are completely different from the facts of the present case. In that case a lease provided, 'inter alia', that

> "the lessee shall always and in any event be entitled to be paid the price of the superstructure built (by the lessee) on the said plot of land before he surrenders possession of the land either on the expiry of the lease granted or any other future lease or at any time and that the price shall be fixed according to the market value of the buildings as at the time of ascertainment and payment."

In such circumstances, it was held by the Judicial Committee of the Privy Council that the lessee was entitled to hold over as tenant by virtue of the above clause at the rent reserved by the lease until he was paid the then market price. I do not think that this case has any relevancy to the facts in the present case. The next authority relied upon by the learned counsel for the respondent is the decision in —'Judoonath Ghose v. Schoene Kilburn & Co.', 9 Cal 671 (C). Again in this case, the facts are of a quite different nature from those of the present case and it is difficult to see how the decision in that case could be made applicable to the present case.

A passage found at page 339 of Woodfall's Law of Landlord and Tenant has been relied upon by the learned counsel for the respondent for sustaining the obviously incompetent judgment of the learned District Munsif. The sentence relied upon in the passage at page 339 is to the following effect:

> "A tenant remains liable for rent, unless he delivers up complete possession of the premises, or the landlord accept of another in his room."

In the present case it is not a case of any failure on the part of the defendant to deliver up vacant possession of the premises. On the other hand, it is quite patent that after terminating the tenancy the defendant went to the extent of offering the key of the premises and it was refused. And the refusal is on the ground that the building should be in complete repair and then only the landlord would take possession. Such a position taken up by the landlord is wholly untenable.

If the premises have been damaged and damaged to a considerable extent as it transpires from the evidence and the judgment of the learned District Munsif, the plaintiff has got his remedies by proceeding against the defendant society for damages, and he will be entitled to get every pie of damage which he will prove against the society. But that would entitle the plaintiff to refuse to take possession of the premises and then act as if the defendant is continuing as a tenant under him or that the tenant is in occupation and use of the premises and therefore liable to pay damages for such use and occupation. The issues have been confused and the remedy has been misconceived.

The learned counsel for the respondent would urge that under S. 108, Transfer of Property Act, cl. (m) he entered upon the premises immedia-

tely after the first notice, the ineffective notice given by the tenant, and when he found that the premises had been damaged, he gave notice of the defects and according to the latter part of that clause when such notice has been given by the landlord, the tenant is bound to make it good within three months after such notice has been given. The learned counsel for the respondent would say that such a notice having been given by the plaintiff and the defendant having failed to comply with that notice, the plaintiff would be entitled to recover rents for the subsequent period or damages for use and occupation.

There is nothing in this section to compel the defendant, who has terminated the tenancy and who has offered to deliver vacant possession and whose offer has been refused more than once, to remain in the premises until the premises, which a recalcitrant tenant might have purposely or otherwise damaged, is put in a state of proper repair. If he fails to comply with any demand, however legitimate it might be, from the plaintiff, the remedy of the plaintiff would be to sue for damages for the neglect or default or other deliberate acts of the defendant. The remedy that the plaintiff has chosen in this case seems to be absolutely without any basis.

The correct law, as pointed out by the learned counsel for the petitioner, has been laid down in — 'Baliramgiri v. Vasudev', 22 Bom 348 (D) and also in — 'Abdul Qayum v. Mohammad Fazal Azim', AIR 1937 Lah 121 (E). When once a proper notice has been given and the tenancy has been properly terminated the plaintiff's right would be not to question the notice or the termination of the tenancy, but to claim damages for any loss caused to the plaintiff by reason of any wilful negligence or default on the part of the tenant. The learned Judges in the decision in 22 Bom 348 (D) have considered the question as to what is to happen if possession is not given after a valid notice.

> "Does it continue the tenancy indefinitely, or does it give rise to a claim for damages on the part of the landlord? The latter appears to us to be its legal result."

This is what the learned Judges have observed and they relied upon the decision in (1869) 4 QB 170 (A) and they have observed that the measure of damages would be the extent of the loss of rent, which the landlord sustains during the actual period for which he was kept out of possession and the expenses he was put to in recovering possession of the land. The learned Judges have further observed at page 354 that

> "It would be unreasonable to hold cultivators, like the defendants, liable for rent perpetually because the 'inamdar' does not choose to demand or recover possession from the tenants, if he does not desire to treat them as his tenants."

Even so in 'AIR 1937 Lah 121 (E)' it has been held that the remedy of the landlord is to sue the tenant for damages, the measure of which is the rental value of the premises for the time he is kept out of possession, and the costs of the legal proceedings to oust the under-tenant from wrongful possession if the tenant fails to deliver vacant possession after termination of notice. But in the present case the facts are on a much stronger footing. Here the tenant has not merely terminated the tenancy but also offered to deliver vacant possession by giving the key. The plaintiff wilfully would not take possession on the ground that the premises remained damaged and it should be repaired and put in a tenantable condition before the plaintiff could take up possession. The passage quoted by the learned counsel for the petitioner which appears at page 724 of Woodfall's Law of Landlord and Tenant, is more apposite than the passage quoted by the learned counsel for the respondent with regard to the liability of the tenants and the rights of the landlords to recover damages in case the property is not kept in a state of repair and tenantable condition.

I do not think it is necessary for me in the view I have taken to multiply the authorities or to refer to those that have been further cited by the learned counsel for the petitioner. I am of opinion that the decision of the learned District Munsif is wholly wrong and untenable and he ought to have held that the plaintiff was not entitled to recover any rent or any damages for the period for which he laid this suit. On the other hand, the plaintiff should have been directed to seek the proper remedy by taking possession of the property and then to sue the defendant for the recovery of damages that have been caused to the property of the plaintiff. Instead of doing so, the plaintiff has misconceived his remedy and the learned District Munsif has fallen into the error of accepting that that was the proper remedy for the plaintiff.

(6) In the result, this petition is allowed with costs. The decree of the lower court is set aside.

B/V.R.B. Petition allowed.

A.I.R. 1953 MADRAS 998 (Vol. 40, C. N. 392)

SOMASUNDARAM J.

Kathan Maistry, Petitioner v. Muthuveera Maistry, Respondent.

Criminal Revn. Case No. 478, Crl. M. P. No. 1165 of 1952 and Cri. Revn. Petn. No. 453 of 1952, D/- 14-7-1952, to revise order of Stationary Sub-Magistrate, Tiruchirapalli Town, D/- 21-4-1952.

Criminal P. C. (1898), S. 347 — Applicability.

Section 347 permits the Magistrate to convert a calendar case into a P. R. case even in cases where in the course of enquiry the evidence discloses an offence exclusively triable by a Sessions Court. (Para 1)

Anno: Cr. P. C., S. 347 N. 4.

G. Gopalaswami, for Petitioner; C. K. Venkatanarasimham, for Respondent; Asst. Public Prosecutor, for the State.

ORDER: The proceedings in this case were started on a private complaint. The case was taken on file only for an offence under S. 415, I. P. C. After hearing the witnesses the Court converted the calendar case into a P. R. case on the ground that the evidence disclosed an offence under S. 477, I. P. C. Under S. 347, Cr. P. C., in my opinion, the Court is entitled to do so, if the Magistrate is of opinion that the case ought to be tried by the Sessions Court. The contention of Mr. Gopalaswami is that S. 347, Cr. P. C., applies only to cases which are triable both by the Sessions Court as well as by the Magistrate and not to cases which are exclusively triable by the Sessions Court. Cases which are exclusively triable by the Sessions Court are cases which ought to be

tried by the Sessions Court. In short, Mr. Gopalaswami wants to read into the section words not exclusively triable by the Sessions Court. There is no warrant for it. The section as it stands permits the Magistrate to convert a calendar case into a P. R. case even in cases where in the course of enquiry the evidence discloses an offence exclusively triable by a Sessions Court. The procedure adopted by the Magistrate in converting the case into a P. R. case cannot be said to be irregular or illegal.

(2) But what has happened is that subsequent to the filing of the revision the complainant and the accused have compounded the offence under S. 417 for which the case was taken on file and summonses were issued and have filed here a petition for permission. I hereby grant permission and the accused are acquitted of the offence of cheating.

(3) The question now is that after acquitting the petitioner of the offence of cheating for which the case was taken on file the accused should be put on trial for the offence under S. 477. I looked into the complaint. I am not satisfied that the offence under S. 477 has been clearly made out. I am not suggesting that there is no case for committal. But in view of the fact that the accused have been acquitted of the offence of cheating for which alone the case was taken on file on a private complaint, I think the ends of justice do not require that further proceedings should continue. It is in this view that I quash the further proceedings in the case.

C/V.S.B. Proceedings quashed.

A.I.R. 1953 MADRAS 999 (Vol. 40, C. N. 393)

SOMASUNDARAM J.

Seeni Naicker and others, Petitioners v. The State and another, Respondents.

Criminal Revn. Case No. 600 and Cri. Revn. Petn. No. 595 of 1951, D/- 8-4-1952, to revise order of Sub-divisional Magistrate, Koilpatti, D/- 22-6-1951.

Madras Preservation of Private Forests Act (27 of 1949), S. 5 — Scope — Offences not falling within Chap. XVII of Penal Code require no stay of proceedings — (Cattle Trespass Act (1871), S. 24).

No other offence although it may arise out of any act done in exercise or assertion of customary rights, falls within the scope of the section.

But an offence under S. 24, Cattle Trespass Act, falls within Chap. XVII and hence proceedings in respect of that offence can be stayed under S. 5. (Para 3)

K. Veeraswami, for Petitioners; R. Santanam, for Complainant; Asst. Public Prosecutor, for Respondents.

ORDER: This criminal revision case is filed by the ten accused against whom a charge-sheet has been laid for offences under Ss. 147, 148 and 323, Penal Code and under S. 24, Cattle Trespass Act. The petitioners belong to the village of Devarkulam and they are ryots claiming some customary and prescriptive rights with regard to pasture of the cattle in the communal pasture land in the village. On 23-11-1950 when their cattle were grazing in the pasture land, they were seized by the men of the landlord and in their attempt to rescue these cattle the petitioners are said to have committed the above offences. The police have filed a charge sheet against the petitioners for the said offences.

(2) These proceedings are sought to be stayed under S. 5 of the Madras Act 27 of 1949. This Act was passed for the purpose of preventing the indiscriminate destruction of private forest and interference with the customary and prescriptive rights therein and for certain other purposes. The definition of "forest" includes communal land containing trees and shrubs and pasture land. Under S. 5 of the Act

> "All suits, proceedings in execution of decrees or orders and other proceedings including proceedings by way of appeal or revision, in which a claim to customary or prescriptive rights in a forest is involved and all criminal proceedings in respect of offences which are of the nature described in Chap. XVII, Penal Code and arise out of any act done in exercise or assertion of such customary or prescriptive rights, and which stood stayed upto the commencement of this Act or which may be instituted after such commencement shall continue to stand stayed, or shall stand stayed, as the case may be, and shall not be proceeded with until after the expiration of this Act."

The section undoubtedly contemplates stay of criminal proceedings also. But only such of the proceedings which are in respect of offences which are of the nature described in Chap. XVII, Penal Code and arise out of any act done in exercise of assertion of such customary or prescriptive rights are stayed.

(3) It is contended by Mr. Viraswami for the petitioners that though the offences for which the petitioners are prosecuted are those which do not fall exactly within the scope of Chap. XVII, Penal Code, but still the common object of the said assembly being one which is in the exercise of the customary right, the proceedings in respect of these offences also must be considered as included within the meaning of S. 5 of the said Act. As pointed out already, it is only the proceedings which are in respect of offences which are of the nature described in Chap. XVII, Penal Code and arise out of any act done in the exercise of any customary right that are stayed. The section contemplates stay of proceedings in respect of only certain offences. These offences must be of the nature described in Chap. XVII, Penal Code. It is not enough that the offence described in Chap. XVII, Penal Code or in the nature mentioned in that Chapter must be committed. It must arise out of any act done in exercise or assertion of customary or prescriptive rights. Supposing an offence which does not fall within the scope of Chap. XVII, Penal Code but which arises out of any act done in exercise of assertion of a customary right, the question is whether the proceedings in respect of such an offence can also be stayed. Sections 147 and 323, Penal Code are not offences relating to property. They fall entirely outside the scope of Chap. XVII, Penal Code. If it is the intention of S. 5 of the Act to stay all proceedings in respect of offences which are committed by any act done in exercise or assertion or a customary right, the section would then be differently worded. But what is contemplated under the section is only stay of those proceedings which relate to the property. They are of the offences mentioned in Chap. XVII, Penal Code or which must be of the nature described in Chap. XVII. No other offence, although it may arise out of any act

done in exercise or assertion of customary rights, falls within the scope of S. 5 of the Act. The proceedings therefore in respect of offences which are not of the nature or which do not fall within the scope of Chap. XVII, Penal Code although they may arise out of any act done in exercise or assertion of customary rights, are, in my opinion not protected by S. 5 of the Madras Act, 27 of 1949.

(4) So far as S. 24, Cattle Trespass Act is concerned, that is an offence which is in the nature described in Chap. XVII, Penal Code. The proceedings therefore in respect of the offence under S. 24, Cattle Trespass Act are stayed. The prosecution in the present case will confine itself to the offences under Ss. 147, 148 and 323, Penal Code.

C/D.R.R. Order accordingly.

A.I.R. 1953 MADRAS 1000 (Vol. 40, C. N. 394)

CHANDRA REDDI J.

Thanubuddi Venkatappa Reddi and another, Appellants v. Gopavarapu Brahmayya and others, Respondents.

Second Appeal No. 2113 of 1948, D/- 7-7-1952, against decree of Sub-Judge, Guntur, in A. S. No. 61 of 1946.

(a) T. P. Act (1882), S. 78 — Suit by subsequent mortgagee for declaration that prior mortgage on same property was sham and not supported by consideration — Question can be gone into. (Para 6)

Anno: T. P. Act, S. 78 N. 1.

(b) Evidence Act (1872), S. 101 — Existence of prior mortgage not disputed but genuineness attacked by subsequent mortgagee — Burden is on subsequent mortgagee to show that prior mortgage is a sham and bogus one created with intent to defraud him — (T. P. Act (1882), S. 78). (Para 7)

Anno: T. P. Act, S. 78 N. 11; Evi. Act, Ss. 101-103 N. 6.

(c) Evidence Act (1872), Ss. 145 and 33 — Deposition of plaintiff in prior criminal case between same parties — Deposition is not admissible under S. 33 but under S. 145 attention of plaintiff should be drawn to the deposition made by him as required by S. 145. (Para 9)

Anno: Evidence Act, S. 33 N. 1; S. 145 N. 4, 8.

M. S. Ramachandra Rao, for Appellants; N. Ramamohan Rao, for Respondents.

JUDGMENT: Defendants 4 and 5 are the appellants. The suit which has given rise to this second appeal was instituted by the first respondent in the court of the District Munsif of Guntur for recovering a sum of Rs. 800 with interest that has accrued thereon, on a mortgage executed in his favour by the first defendant and his two minor sons, the second and third defendants, on 10-5-1943, after declaring that the mortgage in favour of the fourth defendant is a sham and nominal transaction and that the plaintiff is entitled to be treated as the first mortgagee.

(2) Defendants 1 to 3 executed a mortgage on 1-5-1943 in favour of the fourth defendant which mortgage was assigned to the 5th defendant by the fourth defendant for consideration. As soon as the plaintiff came to know of the existence of the mortgage in favour of the fourth defendant, he instituted criminal proceedings against the first defendant under S. 420, I. P. C. alleging that the first defendant cheated him by not disclosing to him the existence of the first mortgage and thereby inducing him to part with a sum of Rs. 800. The criminal proceedings were thrown out on the ground that the complainant, i.e., the plaintiff, had not established that the first defendant was guilty of the offence under S. 420, I. P. C. This led the plaintiff to file the present suit with the averments that there was really no consideration for the mortgage in favour of the 4th defendant and that it was a sham and nominal transaction intended to defraud the plaintiff and that for all intents and purposes he is the first mortgagee.

(3) The defences to the suit were that the question of the sham and nominal nature of the first mortgage could not be gone into in a suit by the subsequent mortgagee, that even if it could be agitated in such a suit, court-fee must be paid thereon and lastly that the case of the plaintiff that the first mortgage is a sham and nominal transaction is not true.

(4) The trial court dismissed the suit as against the fourth and fifth defendants agreeing with their defence. On appeal the Subordinate Judge reversed the judgment of the trial court and gave a decree in favour of the plaintiff. The learned Judge held that it was for the prior mortgagee to prove that there was consideration for his mortgage, and not for the plaintiff to establish that the first mortgage was devoid of consideration and that the former had not established the payment of consideration for the mortgage, that the question of the sham and nominal nature of the transaction could be gone into in this suit and no court-fee need be paid as it is a mere piece of paper.

(5) Against this judgment defendants 4 and 5 have preferred this second appeal.

(6) The same contentions that were raised in the courts below were raised before me in this second appeal. The contention that in a suit by the subsequent mortgagee the question whether the prior mortgage was supported by consideration cannot be gone into, has no substance and is therefore rejected. The point whether separate court-fee has to be paid or not on the declaration prayed for about the nominal and sham nature of the document need not be gone into in view of my finding on the question about the nature of the document in favour of the fourth defendant executed on 1-5-1943.

(7) The main question that arises for consideration in this second appeal is whether the mortgage in favour of the 4th defendant should take precedence over that of the plaintiff or whether it should be treated as a bogus one. As already pointed out, the lower appellate court decreed the suit, as in its opinion the onus of proving consideration for the earlier mortgage is on the first mortgagee and he had not discharged it. Now, is that view of the lower appellate court sound? No decided case has been placed before me on this question of onus by either side and both of them stated that it is bereft of direct authority. However, there is not much difficulty as regards the principles governing such cases. It appears to me that when the existence of the prior mortgage is not disputed but its genuineness is attacked by the subsequent mortgagee who alleges that

the prior mortgage is a sham and bogus one created with intent to defraud him, it is for the latter to prove it and not for the former to establish that the mortgage in his favour is supported by consideration and not a colourable one.

(8) That being so, has that burden been discharged in this case? When asked by the trial court whether he has got any witnesses to prove his case, the plaintiff stated that he has not summoned any witnesses for that purpose. So, he has not placed any material on record which supports his case. If there is nothing to show that the prior mortgage was a sham one, then the plaintiff will not be entitled to the declaration sought by him.

(9) That apart, there are some circumstances which throw light on the nature of transaction in favour of the 4th defendant. When the plaintiff filed a complaint against the first defendant under S. 420, I. P. C. he stated therein categorically that the first defendant not only did not bring to his notice the existence of the mortgage in favour of the fourth defendant but even represented to him that there was no other mortgage and thereby induced him to part with the money and that had he known about the prior mortgage, he would not have advanced money to the first defendant on the security of the same property. There was not even a suggestion then that the first mortgage was a collusive one with intent to defeat the subsequent mortgagees. His deposition in the criminal court was marked as Ex. P-3. The trial court thought that this was sufficient to prove that there was no basis for the present case of the plaintiff that the earlier mortgage was not supported by consideration. The lower appellate court thought that the trial court acted illegally in relying on Ex. P-3 as it was not evidence under S. 33, Evidence Act. But the appellate Judge overlooked the fact that Ex. P. 3 was admissible under S. 145, Evidence Act. The attention of the witness was drawn to the statements made by him as required by that section and therefore the statement is admissible under S. 145, though it does not come under S. 33, Evidence Act. In these circumstances, the lower appellate court erred in rejecting Ex. P. 3 as inadmissible in evidence. In my judgment, this document shows that the prior mortgage was believed to be a genuine and a bona fide transaction and that the present version of the plaintiff is an after-thought and rests on a very slender foundation. I must therefore hold that the mortgage in favour of the fourth defendant is not a sham or collusive one and the declaration sought by the plaintiff against defendants 4 and 5 cannot be granted. It follows that the conclusion of the lower appellate court is not correct.

(10) In the result, the decree of the lower appellate court is set aside and that of the trial court is restored. The plaintiff will have a decree against defendants 1 to 3. So far as defendants 4 and 5 are concerned, each party will bear his costs throughout. Time for redemption one month. (Leave to appeal is refused).

C/R.G.D. Appeal allowed.

A.I.R. 1953 MADRAS 1001 (Vol. 40, C. N. 395)

SUBBA RAO J.

Kumaraswami Padayachi, Appellant v. Govindaswami Padayachi, Respondent.

A. A. A. O. No. 18 of 1950, D/- 9-1-1952, against order of Sub-J., Mayuram, D/- 7-10-49.

Debt Laws — Madras Agriculturists' Relief Act (4 of 1938), S. 9-A — Usufructuary mortgage executed prior to 1947 — Deed containing condition that in case mortgage debt was not redeemed within 5 years, mortgagee would become owner — Application for redemption under S. 9-A after expiry of 5 years — Mortgagee contending that he was in possession only as vendee — Condition found to be clog on redemption — Held that creditor continued to be in possession only as mortgagee — S. 9-A directly applied — Animus of mortgagee was not the decisive factor for application of S. 9A. (Para 1)

T. S. Krishnamurthy Iyer, for Appellant; T. S. Kuppuswami Iyer, for Respondent.

JUDGMENT: The only question in this second appeal is whether S. 9-A, Madras Agriculturists Relief Act, (4 of 1938) applies to the transaction in question. The scheduled properties were usufructuarily mortgaged on 5-6-1927 in favour of the respondent's father for a sum of Rs. 500. There was a condition in the document that in case the mortgage debt was not redeemed within five years, the mortgagee would become the owner. The mortgagor treating that condition as a clog on the equity of redemption applied for redemption after depositing the proportionate amount under S. 9A of the Act. Both the Courts found that the condition was a clog on the equity of redemption and therefore the creditor continued to be in possession only as mortgagee. On that finding the provision of S. 9-A of the Act directly applies. Section 9-A reads:

> Where a usufructuary mortgage was executed at any time before 30th September 1947 and the mortgagee is in possession of the property mortgaged to him, the mortgagor shall be entitled to redeem the property notwithstanding that the time, if any, fixed in the mortgage for redeeming the mortgage has not arrived."

The learned counsel for the mortgagee contended that whatever might be the legal effect of the document he was in possession only after the expiry of five years not in his capacity as mortgagee but only in his capacity as vendee. His animus is not the decisive factor for the application of the provisions of S. 9-A. If he was a usufructuary mortgagee and was in possession of the property mortgaged to him the provisions of S. 9-A are attracted. The Courts found — and it cannot be disputed — that notwithstanding the aforesaid conditions he continued to be a mortgagee and he was in possession in his capacity only as mortgagee. Section 9-A therefore applies and the decision of the Courts below is correct. There is no dispute with regard to the correctness of the amount.

(2) In the result, the second appeal fails and is dismissed with costs. No leave.

C/V.B.B. Appeal dismissed.

A.I.R. 1953 MADRAS 1002 (Vol. 40, C. N. 396)

SOMASUNDARAM J.

In re S. A. A. Beyabani, Petitioner.

Criminal Misc. Petns. Nos. 447 and 448 of 1952, D/- 27-3-1952, for leave to appeal to Supreme Court, against order of High Court in Cri. Appeal No. 682 of 1950, D/- 14-3-1952.

(a) **Madras District Police Act (24 of 1859), Secs. 53 and 44 — Complaint in respect of offence under S. 44 — Bar of limitation under S. 53 does not apply.**

What is contemplated under S. 53 as a bar of limitation for the prosecution is the act done or intended to be done under the provisions of this Act or under the provisions of any other law. Where the act complained of is one of desertion, an offence specially created under the provisions of S. 44 of the Act, it cannot be said to be an act done in pursuance of any power conferred on him by this Act or by the provisions of any other Act. Section 53, therefore, cannot apply to such complaint. (Para 2)

(b) Madras District Police Act (24 of 1859), S. 51 — Section does not apply to cases of dismissals made departmentally by the police — Dismissed person can be tried and convicted for an offence under the Act. (Para 3)

(c) Madras District Police Act (24 of 1859), S. 44 — Offence under — Prosecution for — There is no provision in Act requiring sanction of District Superintendent of Police for such prosecution — Prosecution is not invalid for want of such sanction. (Para 4)

(d) Madras District Police Act (24 of 1859), S. 50 — Section applies only to a case of departmental enquiry and not to an offence before a Court. (Para 5)

Neti Subramaniam, for Petitioner; Public Prosecutor, for the State.

CASES REFERRED TO:

(A) ('16) AIR 1916 Mad 142: 2 Mad LW 348: 16 Cri LJ 334

(B) 1 Weir 846

ORDER: Cri. M. P. No. 447 of 1952: This is an application for leave to appeal to the Supreme Court against the judgment in Cri. Ap. No. 682 of 1950. That was an appeal preferred by the State against the acquittal of the accused by the Stationary Sub-Magistrate of Nellore in respect of a charge for an offence under S. 44, Madras District Police Act. One of the grounds on which leave is sought is that this prosecution is barred under S. 53, Madras District Police Act. I must state at once that this point was neither raised before the trial Court nor was that raised before me when the appeal was heard. I think at the time when the appeal was heard, the advocate must have bestowed some attention on this point and very probably he rightly felt that there was no force in this contention, and that is why he did not raise it before me. However, as the point has been raised in this application for leave to appeal to the Supreme Court, I must deal with it.

(2) S. 53 says that all actions and prosecutions against any person, which may be lawfully brought for 'anything done or intended to be done under the provisions of this Act' or under the provisions of any other law for the time being in force conferring powers on the police shall be commenced within three months after the act complained of. "Anything done or intended to be done under the provisions of this Act or under the provisions of any other law for the time being in force conferring powers on the police" have been introduced by an amendment by Act 8 of 1947. Before that this section was as follows:

> "Anything done or intended to be done either under the provisions of this Act or under the provisions of any other law for the time being in force conferring powers on the Police".

Even before that, according to the decision in — 'Murugesa Naidu, In re', AIR 1916 Mad 142 (A), the words were "for anything done under the provisions of this Act under the General Police powers". This section has been the subject of interpretation in 'Chendrial, In re', The Law of Offences and Criminal Procedure — '1 Weir 846 (B)'. There a Bench of the Court consisting of Muttuswamy Aiyar and Best JJ. have held that this section has reference only to acts done or intended to be done under colour of the Act whereas the act complained of was not professedly done in the exercise of any power conferred by the Act. In that case, the act that was complained of was one of having bought and sold goats, an offence falling under S. 44 as it then stood.

This again came up for consideration in — 'AIR 1916 Mad 142 (A)'. In this case, the offence complained of was one under S. 45, Madras District Police Act for receiving unauthorised fee or recompense. In construing the words "anything done or intended to be done", Ayling J. has held that the intention of the Legislature is obvious, viz., to impose a bar of limitation against actions and prosecutions against officers for acts done or purporting to be done in pursuance of their official powers. It is, therefore, clear from these two decisions that what is contemplated under S. 53 as a bar of limitation for the prosecution is the act done or intended to be done under the provisions of this Act or under the provisions of any other law. But the complaint in this case is not for anything done under the provisions of this Act or by virtue of any power conferred on him as a Police Officer. The act that is complained of is one of desertion, an offence specially created under the provisions of this Act. It cannot be said to be an act done in pursuance of any power conferred on him by this Act or by the provisions of any other Act. S. 53, therefore, cannot apply to the facts of this case. The question of limitation must, therefore, be considered to be not applicable to this case. In my opinion, the learned Advocate, who appeared for the accused at the time of the hearing of the appeal, was therefore, perfectly justified in not raising that point at the time of the hearing.

(3) The second point that is raised is that he having been already dismissed, he should not be tried again for an offence and be convicted. For this, the learned Advocate Mr. N. Subramaniam relies on S. 51, District Police Act. S. 51 is as follows:

> "Nothing contained in this Act shall be construed to prevent any person from being prosecuted for any offence made punishable on conviction by this Act or to prevent any person from being liable under any other law, regulation or Act to any other or higher penalty or punishment than is provided for such offence by this Act: provided always that no person shall be punished twice for the same offence."

It deals only with punishment under the Act or for offences falling under the Act. When a person is convicted for an offence either under the provisions of this Act or under any of the several Acts, he should not again be convicted for the

same offence in respect of the same facts. The punishment here is not the punishment of dismissal which is made after departmental enquiry but a punishment imposed by the Court. This sentence has been passed by the Court after he has been found guilty. Section 51, therefore, will not apply to cases of dismissals made departmentally by the Police.

(4) The third contention is that there was no sanction given by the District Superintendent of Police to prosecute this person. So far as the Act is concerned, there is no provision of law under which sanction is necessary. He relies upon a G. O. according to which it is stated that it is the District Superintendent of Police that must sanction the prosecution against the Police officer. It is not a provision in the Act. In the absence of any provision providing for sanction in the Act itself, I do not think that any sanction is necessary under the Act for prosecuting the accused. So long as the provisions of this Act do not require that sanction by the District Superintendent of Police is necessary, the prosecution does not become invalid without such sanction. That contention also fails.

(5) Another contention that is raised is that any charge against a Police officer above the rank of a constable under this Act shall be enquired into and determined only by an officer exercising the powers of a Magistrate. It is contended that there is no evidence to show that this Court is a Police officer within the meaning of the term "exercising the powers of a Magistrate". Section 50 on which the learned Advocate relies applies only to a case of departmental enquiry and not to an offence before a Court. There is no substance in this contention either.

(6) In the result, in my opinion, there is no substantial point in this case, so as to compel me to give leave to appeal to the Supreme Court. The petition is, therefore, dismissed.

(7) Crl. M. P. No. 448 of 1952: As regards the petition for stay of the sentence of imprisonment, in consequence of the dismissal of Crl. M. P. No. 447 of 1952, I think this petition also must be dismissed. I do not think there is any need to stay the operation of the order of the High Court. This petition is accordingly dismissed.

C/K.S. Petition dismissed.

A.I.R. 1953 MADRAS 1003 (Vol. 40, C. N. 397)

RAMASWAMI J.

In re Veerappa Goundan, Appellant.

S. R. No. 30122 of 1952, D/- 19-8-1952, against order of Sub-Judge, Coimbatore, D/- 24-3-1952.

Madras Hindu (Bigamy Prevention and Divorce) Act (6 of 1949), S. 5 — Appeal — "Any such petition" in sub-s. (5) — Interpretation of — Ex parte order passed on interlocutory application under cl. 7(a) of S. 5, not appealable — Application to set aside that ex parte order under O. 9, R. 13, C. P. C. — Rejection of — No appealability — (Civil P. C., O. 43 R. 1; O. 9 R. 13). (Para 6)

Anno: Civil P. C., O. 43, R. 1 N. 4 Pts. 2 and 3.

P. S. Ramachandran, for Appellant; D. L. Narasimharaju, for Govt. Pleader, for the State.

ORDER: This matter comes up for orders on an office note in the following circumstances.

(2) The facts are: S. R. No. 30122 is sought to be filed as a C. M. A. under O. 43, R. 1(d), C. P. C. against the order of the Subordinate Judge's Court of Coimbatore passed in I. A. No. 1313 of 1951 in O. P. No. 112 of 1950 refusing to set aside the ex parte order passed earlier in I. A. No. 414 of 1950 in the same O. P. This O. P. No. 112 of 1950 was filed under S. 5(1) of Madras Act 6 of 1949 for the dissolution of the marriage of the petitioner with the respondent therein. The learned Judge passed an ex parte order in I. A. No. 414 of 1950 under S. 5, cl. 7(a) of the Act making interim provision for the expenses of prosecuting the O. P. and maintenance of the petitioner. The respondent subsequently filed I. A. No. 1313 of 1951 under S. 151 and O. 9, R. 13, C. P. C. for setting aside that order. This petition was dismissed. Therefore this S. R. has been filed seeking to have it numbered as C. M. A.

(3) The point for consideration is whether this C. M. A. lies to the High Court either under O. 43, R. 1(d), C. P. C. or under S. 5, subss. (4) and (5) of Act 6 of 1949?

(4) Section 5(4) of the Act makes the provisions of the Civil Procedure Code applicable to all proceedings under sub-ss. (1) and (2) and sub-s. (5) provides for appeals to the High Court against any order passed on any such petition. It is obvious that the words "any such petition" referred to in sub-s. (5) can be taken to refer only to the petitions presented under sub-ss. (1) and (2) mentioned in the preceding sub-section and these words cannot be pressed into service in order to make out that appeals have been provided for against orders passed on interlocutory applications in such petitions.

(5) Then turning to O. 43, R. 1(d), C. P. C. it provides for an appeal against an order rejecting an application under O. 9, R. 13 only if the order sought to be set aside is open to appeal. But inasmuch as no right of appeal against an ex parte order passed in I. A. No. 414 of 1950 has been provided for as mentioned in the previous paragraph, the order passed subsequently refusing to set aside that ex parte order cannot become the subject-matter of an appeal.

(6) Thus, no appeal lies to the High Court either under Act 6 of 1949 or under O. 43, C. P. C., and only a civil revision petition has got to be filed as has been the practice till now in regard to orders passed on interlocutory applications in petitions filed under Act 6 of 1949. In case an appeal is held to lie to the High Court, in these circumstances, the court-fee payable will be Rs. 10 under S. 5(6) of the Act and cannot in any event be the court-fee of Rs. 2 for a C. M. A. This does not however arise in view of my holding that only a civil revision petition can be filed. The office note is answered accordingly and it is left open to the party to take such steps as he may be advised to do in view of this answer to the office note. Petitioner to pay costs of Government Pleader Rs. 25.

C/H.G.P. Answered accordingly.

A.I.R. 1953 MADRAS 1004 (Vol. 40, C. N. 398)

RAMASWAMI J.

In re Vasam Setti Appa Rao and others, Petitioners.

Criminal Revn. Cases Nos. 537, 543 .to 568, 799 to 816 and 982 of 1951 and Cri. Revn. Petns. Nos. 532, 538 to 563, 786 to 803 and 965 of 1951, D/- 22-2-1952, to revise judgment of Sub-Divisional Magistrate, Peddapuram, in C. A. Nos. 180 of 1951 etc.

(a) Evidence Act (1872), Ss. 25, 114 — Police officer — Prohibition Sub-Inspector is not — Statement to him need not be corroborated.

A Prohibition Sub-Inspector under the Madras Prohibition Act is not a police officer. An incriminating statement made to him is not, therefore, a confession made to a police officer within S. 25, Evidence Act, and the ruling relating to the corroboration of a resiled confessional statement does not apply to the case. AIR 1948 Mad 116 and AIR 1952 Mad 299, Relied on. (Paras 2, 3)

Anno: Evi. Act, S. 25 N. 4; S. 114 N. 5.

(b) Evidence Act (1872), S. 114 — Corroboration — (Madras Prohibition Act (10 of 1937), S. 4(e)).

The extent and the nature of the corroboration required before a Court can act upon and accept confessional statements will depend upon the circumstances of each case. (1916) 2 KB 658, Relied on. (Paras 4 and 5)

(c) Madras Prohibition Act (10 of 1937), S. 4(e) — Sentence.

Offence by toddy tappers thrown out of employment by prohibition — Long sentence of imprisonment held undesirable and reduced to that of 3 weeks and fine of Rs. 30. (Para 7)

D. Narasaraju and K. B. Krishnamurthi, for Petitioners; Public Prosecutor, for the State.

CASES REFERRED TO :

(A) ('48) AIR 1948 Mad 116: ILR (1948) Mad 574: 49 Cri LJ 100

(B) ('52) AIR 1952 Mad 299: 1952 Mad WN Cr 5: 1952 Cri LJ 640

(C) (1916) 86 LJ KB 28: (1916) 2 KB 658

(D) (1823-41) 173 ER 694: 8 Car & P 732

ORDER: In this batch of revision petitions two points of law are taken viz., that an incriminating statement made by the person later on charged as an accused to a Prohibition Officer would be a confession made to a police officer within the meaning of S. 25, Evidence Act; and secondly, that such a confessional statement must be corroborated, and that failing which there would be no validly acceptable evidence for convicting the accused.

(2) Both these points taken must fail because it has been held that a Prohibition Sub-Inspector under the Madras Prohibition Act is not a police officer in the decisions in — 'Venkatareddi In re', AIR 1948 Mad 116 (A) and it has been followed by Panchapakesa Aiyar J. in — 'Vadivel Goundar In re', AIR 1952 Mad 299 (B).

(3) In regard to the second point inasmuch as the statement to a Prohibition Officer is not a confessional statement, the ruling relating to the corroboration of a resiled confessional statement does not apply to this case. But apart from that, there is material corroboration as a matter of fact in all these cases.

(4) The extent and the nature of the corroboration required before a Court can act upon and accept such statements will depend upon the circumstances ot each case. In — 'King v. Baskerville', (1916) 2 KB 658 (C) Lord Reading the Lord Chief Justice laid down that:

> ".....evidence in corroboration must be independent testimony which affects the accused by connecting or tending to connect him with the crime. In other words, it must be evidence which implicates him, that is, which confirms in some material particular not only the evidence that the crime has been committed, but also that the prisoner committed it ...The nature of the corroboration will necessarily vary according to the particular circumstances of the offence charged. It would be in high degree dangerous to attempt to formulate the kind of evidence which would be regarded as corroboration, except to say that corroborative evidence is evidence which shows or tends to show that the story of accomplice that the accused committed the crime is true, not merely that the crime has been committed, but it was committed by the accused.
>
> The corroboration need not be direct evidence that the accused committed the crime; it is sufficient if it is merely circumstantial evidence of his connection with the crime. A good instance of this indirect evidence is to be found in — 'Reg. v. Birkett', (1823-41) 8 Car & P 732 (D). Were the law otherwise, many crimes which are usually committed between accomplices in secret, such as incest, offences with females, or the present case, could never be brought to justice."

In — '(1823-41) 8 Car & P 732 (D)', the prisoner was tried and convicted for stealing a sheep. In order to corroborate the evidence of the approver, reliance was placed on the circumstance that a quantity of mutton which might have been part of the carcass of the stolen sheep was found in the house.

(5) The circumstantial detail in this case relied upon by the prosecution is that the accused himself climbed the tree and brought down the toddy pots which were found to contain toddy, showing thereby that it was he who had put the pots there and who drew the toddy within meaning of S. 4 of the Act. Therefore. the second point taken also must fail.

(6) The learned Advocate pressed finally for a reduction of the sentence, putting forward several mitigating circumstances like the fact that these persons were originally toddy tappers; they have now become unemployed; that they have learnt a lesson and that sending them to jail would only convert them into gaol birds making them lose their self-respect and harden them into defying law and order more impudently in future than before. I agree.

(7) Therefore, I reduce the period of imprisonment to the period already undergone, namely, about 3 weeks and in addition impose a fine of Rs. 30 on each of the accused or in default to undergo one month's imprisonment. Time for payment of the fine, two months.

(8) These revision petitions are disposed of accordingly.

C/D.R.R. **Sentence reduced.**

A.I.R. 1953 MADRAS 1005 (Vol. 40, C. N. 399)

RAJAMANNAR C. J. AND
VENKATARAMA AIYAR J.

Bendalam Seshagiri Sarma, Petitioner v. The State of Madras, represented by the Collector of Srikakulam and others, Respondents.

Civil Misc. Petn. No. 4360 of 1951, D/- 19-2-52.

Madras Subordinate Collectors and Revenue Malversation (Amendment) Regulation (7 of 1828), Cl. 3 (3) — Order dismissing village officer — Order revised by District Collector — No power of Board of Revenue or Government to interfere with District Collector's order — (Madras Hereditary Village Offices Act (3 of 1895), S. 7 (1)). **(Para 3)**

C. Rama Rao and D. V. Reddipantulu, for Petitioner; T. Venkatadri, (for No. 3) and Advocate General, for the Govt. Pleader (for Nos. 1 and 2), for Respondents.

CASE REFERRED TO:

(A) ('50) C. M. P. No. 9034 of 1950 (Mad)

RAJAMANNAR C. J.: In 1935 one Krishnamurthi who was then a minor was registered as the village headman of the village of Bijjiputti, Itchapuram taluk, Srikakulam district and the petitioner was appointed under S. 10(5), Madras Hereditary Village Offices Act (3 of 1895) to discharge the duties of the office until the person registered as heir attained majority and qualified himself to discharge the duties of the office. In 1948, as the said Krishnamurthi did not qualify himself, he was removed from the office for which he had been registered and in the vacancy thus arising, the third respondent to this application, one Barla Surayya, was registered as the office holder. As he was a minor at the time, the petitioner himself was again appointed as the deputy of this Surayya by the Assistant Collector, Srikakulam.

Subsequently, the mother and guardian of the minor, filed a petition before the Revenue Divisional Officer on 9-3-1949 making adverse allegations against the petitioner and praying that he may be removed and another person may be appointed to do the duties of the office. The Revenue Divisional Officer by his order dated 9-11-1949 removed the petitioner and appointed one Barla Appadu in his stead. It is said that this order was passed without any enquiry and without any notice to the petitioner.

Against this order of the Revenue Divisional Officer, the petitioner filed what he calls an appeal to the District Collector, Vizagapatam, who by his order dated 9-6-1950, set aside the order of the Revenue Divisional Officer and restored the petitioner to the position which he was occupying. Barla Appadu carried the matter to the Board of Revenue but the Board refused to interfere with the order of the District Collector. Appadu thereupon filed a petition before the Government of Madras and the Government passed the following order on 17-1-1951:

"The Government have perused the connected records. They consider that in the best interests of the minor, the petitioner's nominee should be appointed as the Deputy. They accordingly direct that Sri Barla Appadu be restored as Deputy Headman of Biggiputtuga village, ousting the present incumbent, Sri Bendlam Seshagiri Sarma. The petitioner is referred to the Board of Revenue for orders on her petition."

(2) Though this order was communicated to the mother and guardian of the minor, it does not appear to have been communicated to the petitioner himself. It is also clear that the petitioner was not given any notice before the said order was passed. Apprehending that in pursuance of this order of the Government, he may be removed from office, he rushed to this Court with an application for a writ of 'certiorari' to call for the records of the case and to quash the order of the Government.

(3) We have no hesitation in holding that the Government had no power whatever to pass any order in this matter. Appointments, dismissals and other matters of and pertaining to the hereditary village officers mentioned in the Madras Hereditary Village Offices Act are governed entirely by the provisions of that statute. There is no provision in that Act conferring any power on the Government to interfere with the orders of any of the Subordinate revenue authorities entrusted with specified powers by the provisions of that Act. The learned Advocate General referred us to the Board of Revenue Regulation under which it was said the Government have the power to interfere with certain orders of the Board of Revenue because the proceedings of the Board of Revenue are subject to the control and supervision of the Government.

We do not desire to say anything about the powers of the Government to interfere with the orders of the Board of Revenue generally because we are convinced that the Board of Revenue itself had no power to interfere with the order passed by the District Collector in a case like the present. Under S. 10(5) of the Act, it is the Collector who has got the power to appoint a qualified person to discharge the duties of the office when a minor is registered as heir. Ordinarily, this power is exercised by the Revenue Divisional Officer.

This is because of the provisions of Regulation 7 of 1828, viz., the Madras Subordinate Collectors Regulation. Under sub-cl. (3) of cl. 3 of that Regulation the proceedings of subordinate and Assistant Collectors are made subject in all cases and in the fullest manner, to the superintendence, control and revision of the Collector, who shall have power either to direct, generally, that the proceedings of any of his subordinates or Assistants shall be regularly submitted to himself before the decision, order or sentence is carried into execution, and to confirm, modify or annul them, or issue any further orders in the case, as he may see fit; or in any particular case to direct that the decision, order or sentence of any of his subordinates or Assistants shall not be carried into execution, and to pass such further orders as he may see fit.

It is evidently under the provisions of this Regulation that the orders passed by the Sub-Collectors and Revenue Divisional Officers are revisable by the District Collector. In this case the order of the Revenue Divisional Officer removing the petitioner and appointing another as the person to discharge the duties of the office during the minority of the registered heir was liable to be revised by the District Collector. The District Collector in the exercise of this power set aside the order of the Revenue Divisional Officer and restored the petitioner to his original position. This order of the District Collector was not subject to any appeal or revision and we are unable to discover any statutory power under which either the Board of Revenue or the Government could interfere with his order. A similar view appears to have been taken by Subba Rao J. in an application recently disposed of — 'C. M. P. No. 9034 of 1950 (Mad) (A)' and we agree with his reasoning and conclusion. The order of the Government in this case must, therefore, be quashed with the result that the order of the District Collector will be restored.

(4) There will be no order as to costs.

C/V.R.B. Order quashed.

A.I.R. 1953 MADRAS 1006 (Vol. 40, C. N. 400)

GOVINDA MENON AND MACK JJ.

In re Samatham Veerabhadrudu, Appellant.

Criminal Appeal No. 18 of 1951, D/- 22-4-52, against order of Court of Session, West Godavari division at Eluru, in C. C. No. 49 of 1950.

(a) Penal Code (1860), Ss. 300, 379, 411 and 201 — Murder for gain — Separate charge under each section is not necessary — (Criminal P. C. (1898), S. 236). (Para 4)

Anno: I. P. C., S. 300 N. 36, 53; Cr. P. C., S. 236 N. 1.

(b) Penal Code (1860), Ss. 302, 379, 411 and 201 — Murder for gain — Accused found with jewels of the deceased — Conviction for murder under S. 302 and under S. 379 or 411 in the alternative — Accused acquitted of charge under S. 201 — Appellate Court finding no evidence for his participation in murder — Conviction under S. 302 set aside but that under S. 379 maintained — Acquittal under S. 201 held irregular but could not be disturbed as there was no appeal by Government. (Para 5)

Anno: I. P. C., S. 302 N. 22, 26; S. 379 N. 20; S. 201 N. 1.

R. V. Raghavan Amicus curiae, for Appellant; Public Prosecutor, for the State.

MACK J.: The appellant aged about 28 has been found guilty of the murder of one Koti Veeramma a well-to-do elderly woman aged sixty who lived by herself at Narasapur and disappeared from her house on the night of 17-11-49. According to the prosecution case she was throttled to death by four persons including A. 1 and A. 2 who were actually tried for this murder, one Basavayya, a relation of Veeramma and one Ankisetti who has been absconding.

(2) The motive centred round Basavayya who is said to have died in jail while on remand and who was the deceased's sister's grand-daughter's husband. The deceased Veeramma is said to have made a settlement deed of her property in favour of Basavayya and to have sought to revoke it by a lawyer's notice, Ex. P. 3 dated 9-6-1949 issued by an advocate, P. W. 6. The prosecution case briefly is that Basavayya in conspiracy with the other accused persons encompassed her death before she could revoke the settlement which had been made in his favour. While he retained the property he is said to have distributed the deceased Veeramma's jewels to the other associates in this crime.

(3) The disappearance of Veeramma who was living by herself was noticed and reported by her neighbour, P. W. 1 at the police station seven days later. On the 24th of November, the Sub-Inspector after investigation found Veeramma's body in a salt creek on the evening of 27th in a highly decomposed condition in a gunny bag. The lady doctor, P. W. 5 who held the post mortem could not diagnose the exact cause of death. Veeramma's body was, however, identified by three neighbours of her's P. Ws. 1 to 3 and also by a sari M. O. No. 6 which was identified by a washerman, P. W. 20 who used to wash clothes for the deceased Veeramma. It was not till 3-12-1949 that the appellant was arrested. A. 2 has been acquitted on what the appellant's advocate urges is rather similar evidence. On information given by the appellant the police recovered a number of jewels and ornaments which have been satisfactorily proved to belong to the deceased Veeramma. (His Lordship then referred to the evidence relating to the recovery of the jewels and ornaments and continued as under:) We see no reason to disbelieve the evidence of the recovery of these jewels on this appellant's information. What these recoveries prove in the circumstances is that the appellant was found in possession of articles belonging to the murdered Veeramma.

(4) There were two witnesses, P. Ws. 8 and 9 who were prepared to swear that they saw A. 1 and A. 2 Basaviah and Anki Chetti near the Sub-Collector's office after a cinema show on 17-11-1949 carrying a gunny bag. Their evidence has raised wholly unnecessary complications in the trial. The learned Sessions Judge quite unnecessarily in our opinion, framed three charges against these two accused one of murder under S. 302 another of robbery under S. 392 and yet a third charge under S. 201, I. P. C. He very strangely acquitted this appellant of the charge under S. 201, I. P. C., and at the same time on the strength of the recovery of the jewels which he believed belonged to Veeramma he convicted the appellant under S. 302 for the offence of murder and sentenced him to transportation for life and in addition found him guilty under S. 379 or S. 411, I. P. C., in the alternative and sentenced him to undergo rigorous imprisonment for two years. It is quite unnecessary in a case of murder for gain to frame separate charges under S. 392 or S. 411 or S. 379 or S. 201, I. P. C. We are embarrassed at the unsatisfactory manner in which this case has been dealt with and at the acquittal of this appellant in the circumstances of the charge under S. 201, I. P. C. Normally if an accused person is convicted under S. 302, I. P. C., of murder it would be quite open to the appellate Bench, if the evidence warrants it to modify the conviction to one under S. 201, I. P. C., if the facts show that the appellant had no hand in the murder itself but only assisted in the disposal of the body after the murder.

(5) On the facts of the present case we think the evidence will not warrant the conviction of the appellant directly on the charge of murder. There is no material to show that he had any enmity against Veeramma and even according to the prosecution case it was the deceased Basavayya who was the main spring of the murder and who employed the services of the other three accused persons and the services of this appellant were utilised for the murder itself. At the same time Veeramma's body after she was murdered was put into a gunny bag and carried to some considerable distance and deposited in a salt creek. This was obviously the work of several persons and it may well have been that the appellant participated. On the evidence however in fairness to the appellant we think what the prosecution has conclusively established in this case is that he was in possession of these articles of Veeramma which he undoubtedly received for the services he rendered in connection with the murder. His actual participation in the murder has not been established. In view of the specific acquittal by the learned Sessions Judge of the appellant under S. 201, I. P. C., which is of course quite inconsistent with his finding the appellant guilty of murder under S. 302, I. P. C., we feel it would not be strictly correct for us to modify the conviction to one under S. 201, I. P. C., without the State filing an appeal against the acquittal. With the principal culprit Basavayya now dead the ends of justice would, we think, be served by our merely confirming the conviction of the appellant under S. 379 or S. 411, I. P. C., and the sentence of two years' rigorous imprisonment passed upon him. The conviction and sentence for murder are set aside.

C/D.R.R. Order accordingly.

A.I.R. 1953 MADRAS 1007 (Vol. 40, C. N. 401)

BASHEER AHMED SAYEED J.

Kollepara Venkata Reddayya and others, Appellants v. Muthangi Kondala Rao, Respondent.

A. A. A. O. No. 121 of 1951, D/- 10-7-1952, against order of Sub-J., Rajahmundry, D/- 19-12-1950.

Civil P. C. (1908), S. 38 — Executing Court's power to go behind decree.

The executing court is not entitled to go behind the decree, which stands amended rightly or wrongly, and the executing court will not also be entitled to hear the judgment-debtors when they claim that the amendment had been ordered without notice to them, or that the decree had been amended, when it had become time-barred. These two points, should be agitated before the court which passed the decree and which ordered the amendment. (Para 3)

Anno: C. P. C., S. 38 N. 8.

G. Chandrasekhara Sastri, for Appellants; V. V. Sastri, for Respondent.

CASES REFERRED TO:

(A) ('38) AIR 1938 Pat 57: 16 Pat 453
(B) ('35) AIR 1935 Mad 97: 58 Mad 743
(C) ('41) AIR 1941 Lah 131: ILR (1941) Lah 659
(D) ('50) AIR 1950 All 655: 1950 All LJ 676
(E) ('32) AIR 1932 PC 165: 60 Cal 1 (PC)

JUDGMENT: This appeal is against the order of the learned Subordinate Judge of Rajahmundry upholding the decision of the learned District Munsif that the execution application taken out by the decree-holder in O. S. No. 110 of 1941 was not barred by limitation.

(2) The main point that has been urged by the learned counsel for the appellants is that the final decree which had been passed on 9-2-1946 had become barred by time on 16-3-1949, when the execution application was re-presented with a petition to excuse delay in re-presenting the same petition, which had been returned for complying with certain requirements on two previous occasions. In this case, after the final decree was passed on 9-2-1946, an execution application was presented on 13-2-1947. It was returned on 17-3-47 for complying with certain defects. It was re-presented again on 24-2-1947 without complying with the defects pointed out and again it was returned on 27-2-1947, with a direction that it should be re-presented within 7 days. Even this was not done and finally on 16-3-1949, the application was re-presented with a petition to excuse delay. That application to excuse delay was, however, dismissed.

An interlocutory application was filed on 16-3-1949 for bringing the guardian on record and to amend the decree so as to make it possible for the judgment-debtors to be represented by the guardian. This interlocutory application for amendment of the decree and for bringing the guardian on record was ordered on 30-4-49. But this was done without notice to the judgment-debtors. The contention raised by the learned counsel for the appellants before me and which was also the contention raised before the lower court was that the amendment of the decree, which was ordered on 30-4-1949 ought not to have been ordered, as, on that date, the decree had already become barred and the further contention is that the amendment was ordered without notice to the judgment-debtors and therefore the order would not be binding against the judgment-debtors.

(3) No doubt, the fact is that the amendment was ordered after the decree had 'prima facie' become time barred and for the reason that no notice was issued to the judgment-debtors, there was no opportunity given to them to point out that the decree had already been barred and no amendment was called for. These are no doubt legitimate grievances, which the judgment-debtors are entitled to agitate, but the question is as to the stage and the court before which these grievances should have been agitated by the judgment-debtors, who are aggrieved by the amendment ordered by the court which passed the decree and by the omission, which was caused by that court in not issuing notices to the judgment-debtors. It is doubtful whether the judgment-debtors could raise this point in an application to execute the amended decree before the executing court.

The executing court is not entitled to go behind the decree, which stands amended rightly or wrongly, and the executing court will not also be entitled to hear the judgment-debtors when they claim that the amendment had been ordered without notice to them, or that the decree had been amended, when it had become time-barred. These two points, which the learned counsel has taken, have been rightly negatived by both the courts as the same should have been agitated before the court which passed the decree and which ordered the amendment. Under Art. 182, sub-cl (4), Limitation Act, it is made clear that the starting point for an amended decree is the date of the amendment and the decree-holder appears to be well within his rights, when he proceeds to execute the decree before the time prescribed had lapsed, though the decree might have been passed on 9-2-1946. The date of the amendment gives him a fresh starting point and if the benefit of that starting point has to be denied, steps should have been taken by the judgment-debtors earlier before the court, which passed the decree and which ordered the amendment.

(4) Learned counsel for the appellants has invited my attention to the decision in — 'Rameshwar Narain Misra v. Raghunandan Purbey', AIR 1938 Pat 57 at p. 59 (A), I do not think that that decision would apply to the facts of this case. On the other hand, the decisions relied on by the learned counsel for the respondent, — 'Viz Lakshmikantarao v. Ramayya', AIR 1935 Mad 97(B), —'Imamdin v. Peoples I. and S. Bank Ltd.', AIR 1941 Lah 131 (C), — 'Ghafoor Darzi v. Ramnath', AIR 1950 All. 655 (D), which in turn follow the Privy Council decision in — 'Nagendranath De v. Sureschandra De', AIR 1932 PC 165 (E), seem to apply to the facts of this case and I am therefore inclined to hold that the decision of the lower appellate court is correct, and though there might be some grievances so far as the judgment-debtors are concerned in that they were not given notice, still these grievances cannot be remedied by the executing court from out of whose order this appeal has arisen.

If there had been an appeal against the order of the court which originally passed the decree and ordered the amendment, it would be possible to say that notice should have been given and the appellants should have been heard as to whether the amendment was called for or not and whether the decree-holders were in time in asking for the amendment. But, I do not think that in the present case I am called upon to give any such directions for the reason that this is an application, which has arisen out of the order made by the executing court.

(5) Therefore this appeal has to fail and is accordingly dismissed. In the circumstances of the case, I think there need be no order as to costs.

in this appeal. I make no order as to what the judgment-debtors might be advised to do in order to get such redress as is possible and available to them in the matter of their grievances referred to in this judgment before the court which passed the decree and also ordered the amendment. (Leave to appeal is refused)

C/VRB Appeal dismissed.

A.I.R. 1953 MADRAS 1008 (Vol. 40, C. N. 402)

RAMASWAMI J.

A. Innasia Pillai and others, Petitioners v. Perumal Chettiar (Complainant) and another, Respondents.

Criminal Revn. Case No. 531 and Cri. Revn. Petn. No. 428 of 1952, D/- 30-7-1952, to revise order of Stationary Second Class Magistrate, Tiruchirapalli Town, D/- 2-6-1952.

Criminal P. C. (1898), S. 256 — Anticipating of defence.

An accused person has no right to raise a preliminary point before he is charged. He must wait to defend himself till he is charged and if he is convicted, his first remedy is in most cases by way of appeal. (Procedure laid down by the High Court in the Circular order dated 10-1-1931 held should be followed). (Para 1)

Anno: Cr. P. C., S. 256 N. 2, 10.

A. V. Narayanaswami Aiyar, for Petitioners; S. K. Ahmed Meeran, for Respondents; Public Prosecutor, for the State.

ORDER: This is a criminal revision case illustrating the very abuse pointed out by the High Court in their Circular Order dated 10-1-1931. It was pointed out by this Court:

"Instances have come up to the High Court which disclose that a system of procedure not contemplated by the Code is developing in the subordinate criminal courts. In warrant cases, the accused persons, before they are charged and put upon their defence anticipate their defence by petitions raising preliminary points upon which the court passes judgment and these are then brought up on revision to the High Court pending which the trial of the case is adjourned. The High Court desires to impress upon the lower courts that this procedure is unwarranted and makes for delay and extra work. An accused person has no right to raise a preliminary point before he is charged. He must wait to defend himself till he is charged and if he is convicted, his first remedy is in most cases by way of appeal."

(2) The facts of this case are as follows: In Trichinopoly, there was a firm run under the style and name of the Tiruchirapalli Merchants Chit and Investment Co., Ltd. It seems to have been established in 1946. The Memorandum and Articles of Association of the above company started with 19 shareholders with 255 shares of Rs. 100 each, fully paid. Of these 19 shareholders two have been declared insolvents subsequently and one has gone to Malaya. The remaining 16 are accused Nos. 1 to 4, the complainant and witnesses 1 to 11 in the complaint petition. The complainant, namely the respondent before me, and two others, are stated to have filed a petition before the High Court, Madras, O. P. No. 357 of 1949 for the winding up of the company abovenamed and as per orders of the High Court in the above petition dated 2-1-1951 accused 1 to 4 and witness No. 1 in the complaint petition who were said to be the five directors elected on 23-9-1950 took possession of the articles of the company together with books and accounts from the Official Receiver, Tiruchirapalli and were said to have been managing the affairs of the company from 13-1-1951 uptodate.

(3) It is in those circumstances that this complaint has been filed and this complaint sets out the various acts of misfeasance and malfeasance of the accused and proceeds to set out the gravamen of the charge. The gravamen of the charge against these accused is that accused 1 to 4 had a debt of nearly Rs. 16000 and that these accused have assigned their debt to the son of the first accused for a low value of Rs. 9000 and defrauded the company to the extent of Rs. 7000. It is stated that the modus of this swindling was the preparation of false records, making false signatures and faked up resolutions as if ratified by the general body of this company.

(4) In this connection I am bound to point out that two suits are stated to have some connection. O. S. No. 66 of 1948 has been filed in the Sub-Court, Tiruchirapalli, by this company against third parties who were owing monies to this company. They seem to have obtained decrees. The fifth accused claims to be an assignee-decree-holder of a debt decreed in O. S. No. 66 of 1948 and this fifth accused is stated to be taking out execution in regard to that matter. It is unfortunate that we have neither the plaint nor the connected records of this O. S. No. 66 of 1948 and all that we know is that the fifth accused has come into the picture as an assignee decree-holder in regard to a debt due to the company and is levying execution.

(5) Then turning to O. S. No. 497 of 1951 this was a suit instituted by Ratnam Pillai, A. 5, the son of the first accused against one P. Narayanaswami Konar. The relief asked for in this suit is for a decree on a promissory note, Ex. A. 2, which is said to have been assigned in favour of the plaintiff for valuable consideration on 20-4-1951. I need not point out that this second suit is pending and the present complaint also mentions the filing of this second suit mentioned above.

(6) It is in these circumstances that the present application was made in the court of the Magistrate just before the commencement of the examination of the prosecution witnesses that this complaint falls within the mischief of S. 195(1)(c) and that the complaint should be filed by the concerned Civil Court.

(7) I am unable to see any connection between the suits and this criminal case which in substance and effect is nothing more than that these five accused in collusion have swindled the company of a sum of Rs. 7000 by assigning a debt of Rs. 16000 for a sum of Rs. 9000 and that this was achieved by means of falsification of the records, forgery of signatures and preparation of false resolutions of the company.

(8) Therefore, the learned Magistrate rightly pointed out that S. 476 is nowhere in the picture and that the civil courts cannot prefer complaint at this stage in regard to the subject-matter of the complaint before the Magistrate. Therefore, there is no overlapping and it cannot be said that the subject-matter of this complaint should be a subject matter of complaint by the civil court.

(9) There is no substance in the application and it is hereby dismissed and it is enjoined upon the Magistrate to expeditiously dispose of the criminal case which has been held up for such wholly unnecessary length of time owing to his not following [illegible] by the High Court in the Circular Order set out at the beginning of this order.

C/RH Application dismissed.

END

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